

**ACCESS TO JUSTICE AND RULE-OF- [Good]
LAW:
THE CUNNING OF JUDICIAL REFORM
IN INDIA**

Working Paper

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Introduction

The *UN Commission on the Legal Empowerment of the Poor*, as “the first global initiative to focus specifically on the link between exclusion, poverty and law” believes that “poverty can only be reduced if governments give all citizens, especially the poor, a legitimate stake in the protections provided by the legal system, which should be not the privilege of the few but the right of all persons. Thus the Commission sets out to explore how nations can reduce poverty through reforms that expand access to legal protection and opportunities for all”. Yet, “the Commission acknowledges that there are inherent risks in undertaking reform programs that attempt to create an enabling environment for the poor, and it takes those risks into full consideration, not least for women and other vulnerable groups, such as indigenous peoples. The Commission will also work to generate political commitment and social consensus to ensure that well intentioned reforms do not fall short of their intended outcomes, and in the worst cases, exacerbate poverty”.

Merely mapping the cartography of *access* to justice in India would not necessarily reveal how empowerment of the poor is used as a resource by the discourses of judicial reform. Hence, it becomes important to address the politics of judicial reform that ends up exacerbating impoverishment. Keeping in mind the fact that the Commission is sensitive to the risks in instituting reform programs, this working paper looks at how the rule-of-law and access to justice framework has been mobilized in specific judicial reform discourses in India.

Judicial reform which includes the reform of substantive law as well as the institutional forms or processes of state law may be mobilized to improve the picture of judicial efficiency and “good governance”, or it may be used to augment political movements that

¹ The term *rule-of-[good] law* has been borrowed from Baxi [2004]

promise horizons of human rights. While the Commission points out that “the vast majority of the world’s economy lives their daily lives in what is often referred to as the *informal* or *extralegal* sector”, equally regimes of impoverishment that are created in the zones of legality and illegality inhabit and indeed is produced by state law. Therefore, the corpus of work on access to “justice” that animates the intersection of social movements and the law often remains outside mainstream discourses of judicial reform. Illustrating the latter argument on law reform in relation to queer activism, Arvind Narrain has argued that “any attempt at law reform should be a public movement process, as a mere removal of a statutory provision without a wider recognition of queer lives would not be productive” [2007:67]. Such voices disrupt the official discourses of “access” to justice reform discourses which marginalize social movement critiques such as the critique of the criminalization and medicalization of queer subjects before the law to create cartographies of difference, deviance and marginality.

This working paper however is not an exhaustive review of judicial reform in India, nor does it contrast the different programs for judicial reform over time. Rather, it focuses on the reform based research on judicial delay and “alternate dispute resolution” as an illustration of how the problems in the administration of state law comes to be equated with *access* to justice. This paper explores how the politics of judicial reform when aligned to *access* to justice expands state power. This exploration might flag for the agenda of the legal empowerment of the poor what *risks* inhere in replicating the official discourses of reform that concentrate on a specific assemblage between “access” to justice and rule-of-law.

“Access” to Justice and Rule-of-[Good] Law

In recent years, the meta-narrative of judicial reform in India has creatively appealed to the problem of alleviating poverty as a resource to strengthen rule-of-law frameworks that focus on “access” to justice in the contexts of economic growth and *good* governance rather than interrogate what it means to access “justice” [see Hughes and Mossman 2001]. This paper retains the distinction between “access” to justice and access to

“justice” as an important framework to understand how reform discourses represent, sustain and constitute specific regimes of impoverishment.

By treating the poor as a homogenous category, reform discourses often overlook the “different histories and ecologies of suffering” of body populations that are dispossessed of everyday means of survival [Baxi 1988: xii]. Reform discourses by adopting a paternalistic framework of *rescue* continually constitute the poor as passive or signify states of poverty as characterized by “powerlessness, apathy, disorganization, alienation and anomie” [Baxi 1988: vii]. However, “people are not naturally poor but are made poor”, such that “impoverishment is dynamic process of public decision-making in which it is considered just, right and fair that some people may become or stay impoverished” [Baxi 1988: vi]. Hence, this perspective invites serious research on the socio-legal processes that regulate, sustain or produce regimes of impoverishment.

The onerous task of legal empowerment of the poor must begin by looking at the claims of judicial reform that use poverty as a resource to strengthen rule-of-law notions which do not sufficiently interrogate the processes by which those who are dispossessed can access substantive justice. This paper engages with those perspectives that do not sufficiently interrogate judicial reform in relation to how substantive law excludes the poor by relating access of justice with, what Baxi [2004] calls, the rule-of-[*good*] law. Hence, judicial reform must be in critical engagement with how substantive and procedural law translates into the everyday practices of state law, rather than expand the legitimacy of the notion of the rule-of-[*good*] law.

The term access to justice has been most commonly used to reform the lacunae in state legal systems “to ensure that every person is able to invoke the legal processes for legal redress irrespective of social or economic capacity” and “that every person should receive a just and fair treatment within the legal system” [Murlidhar 2004:1]. Capelliti and Garth [1978] for instance, point out that the right to access to justice as a basic human right emerges with the rise of the welfare state when it was held that rights could not be actualized without equal and just access to the legal system [cited in Murlidhar 2004].

Lack of *access* to the legal system then is mapped out in a number of ways in which such an access is denied either through spatial, temporal, linguistic, social or symbolic barriers. However, the discourse on access to justice needs to be unpacked to examine the nature of correlations it sets up with the notion of rule of law. This is important since access to justice as a discursive category itself means different things to different people. Unless we unpack which notion of rule of law constitutes the cartography of access to justice, we cannot understand the relationship between law, justice and social suffering.

The cartographies of the discourses on *access* to justice rest on the everyday context as the condition of legal redress. Yet, the everyday remains a given category wherein the contingency and instability that marks poverty and violence is not adequately theorized. *Access* to justice discourses assumes a certain stability of politico-jural regimes where displacement, violence and refuge do not become central issues in the crafting of judicial reform². As we map the cartographies of the access to justice discourses in India, we must also bear in mind that the access to justice cartography translates in different ways in the judicial hierarchy. While Anderson [1996] is entirely right in making the argument that it is imperative to locate the access to justice discourses at the level of the lower courts, however we must also bear in mind the circulation of social and legal categories between different judicial and administrative hierarchies that *constitute* the legal present for a legal subject seeking access to justice. Moreover, it is important to bear in mind that this legal present may be constituted by seeking simultaneous legal redress at the different levels of courts.

The *access* to justice reform discourse congeals at specific institutional sites that are worth mentioning at the onset. First, the narrative of judicial reform identifies courts of law, especially lower courts, as a space where reform is urgent in order to empower the poor. Second, adjudication through regular courts has met demands for innovation through the formation of state instituted *lok adalats* [literally, peoples courts]. Third, the

² The constitution of the very category of public interest has been challenged by different classes of citizens such as displaced people, who do not always perceive state law as a route to just legal orders rather they often perceive state law as a mechanisms of divesting them of their property rights and right to life and livelihood [see Lobo 2003].

institution of legal aid to those who cannot bear the costs of litigation has been the focus of “access” to justice frameworks. Fourth, the substantive aspects of legislation that dispossess the poor have been at the centre of legal reform. Fifth, the lack of implementation of state law in order to maintain public tranquility or order has been identified as a barrier to access to justice. Sixth, the crafting of judicial activism through public interest litigation or social action litigation has been seen as an important chapter in the access to justice narrative. This working paper does not intend to be ambitious in charting all these diverse forms of reform discourses except to indicate that these complex and shifting discourses need to be critically interrogated in order to demystify how judicial reform regulates, or enforces specific regimes of impoverishment.

The Numerical Narratives of Judicial Delay

The story of *judicial delay* must be located in the context of two contradictory meta-narratives that script the story of the legal system in relation to the projects of development in India [see Mendelsohn 2005]. While the colonial *gift*³ of the rule-of-law is often seen as an important legacy of the colonial regime and a primary route to national progress, equally the contemporary legal system is most commonly seen as archaic, corrupt and inept at meeting “the demands of either the common people or modern, increasingly global commerce” [Mendelsohn 2005:301]. The claim that rule-of-law was a *gift* was supplemented by the colonial claim that Indians were not worthy of this *gift* since the nature of their litigiousness was *frivolous*. This was then related to the large numbers of cases in colonial courts, in the realm of civil law. We find that this assertion of “frivolous” or “vexatious” litigation animates judicial discourse today as well, linking thereby judicial delay with how people [*mis*]use state law. However, it is important to examine this claim of high litigation rates critically. Mendelsohn argues that “British policies in relation to land, above all the severity of taxation demands, were the single greatest factor producing litigation in courts the British themselves established. This became dramatically clear in retrospect, when the effective abolition of taxation on agricultural land after Independence caused the immediate disappearance of hundreds and thousands of cases annually in Bengal and other parts of eastern India. These cases were

³ See Merry 2004

an aspect of the intermediary (*zamindari*) system, whereby the *zamindars* used the court as a tactic to extract rent from their tenants; much of this rent had then to be passed on as a tax to the state” [2005: 302].

Yet, the colonial discourse in the 1870s argues Mendelsohn, was the most strident in declaring that Indians litigated frivolously, and the courts were overwhelming clogged with cases. The link that was drawn between litigating body populations and what came to be known as *court arrears* in official discourses continues to hold immense power. Hence, law reformers continue to believe that Indians are litigious. Mendelsohn argues that while it is clear that many more spheres of litigation emerged, apart from land, since independence, however it is not so clear “whether the number of cases coming forward every years is genuinely beyond the capacity of a properly functioning system to handle” [2005: 304]. Galanter and Krishnan [2002], for example, have argued that the rate of litigation in India might actually be lesser than the rates of litigation in other similarly placed jurisdictions. In fact “in post-independence India there continues to be a huge volume of litigation that is peculiarly the creation of particular and dubiously progressive schemes of public administration” [Mendelsohn 2005: 304]. Taking the example of rent control litigation, especially in Bombay, Mendelsohn argues that even though the rent control cases are not equivalent in volume to the land cases during the colonial regimes nor similar in terms of social impact, the volume of litigation is produced by the policies of public administration [also see Moog 2003].

Apart from the fact that there are no reliable statistics on judicial delay, there has been a tendency to characterize the litigant as someone who uses delay in order to harass the opponent rather than desire a successful outcome in reduced periods of time. Cohn [1965] argued that litigants often used the courts to meet their own ends such as those of enhancing honour in the local community or harassing an opponent by taking her to court unmindful of the outcome. Hence, law may be understood as a form of social control

[Baxi 1986]. Whereas Kidder [1973] argued that litigants did not reject legal values preferring successful outcomes to out of court settlements or compromise⁴.

Mendelsohn has argued that while litigants do seem to want successful outcomes, and therefore adopt legal values, judicial delay has been used as a resource both by litigants and lawyers in the realm of rent control litigation to script a successful outcome to a dispute that holds high stakes for the litigant⁵. Mendelsohn's work points towards how the stabilization of certain legal techniques during the colonial legal regime are captured by litigants and legal professionals now since the existing regimes of rent control are not substantively challenged since "the rent control laws in independent India have helped to compound the worst aspects of that system" [2005: 312]⁶.

This point has immense valence in the realm of criminal law that imposes harsh regimes of impoverishment on the poor the most [see Muralidhar 2004]. We cannot meaningfully talk of reducing court arrears without realizing that the problem of court arrears or judicial delay must be contextualized in terms of the regimes of criminal law and patterns of prosecutions brought against the poor. Muralidhar's [2004] research shows how criminal law imposes regimes of impoverishment on the poor through unjust laws, false charges by the police and illegal mechanisms of detention, violence and torture. Moreover, the lack of legal aid to the indigent prisoner, the overcrowding of prisons, the appalling toll judicial delay takes on an undertrial and the conditions of violence imposed on her remain grim descriptions of the criminalization of the lives of the poor. This

⁴ We may argue that these arguments do not take into account the fact that people's legal consciousness changes over time as a case unfolds. Thereby, it may be more useful to pose the question of why people litigate over a period of time to detail the shifts in the reasons as to why people litigate or how they constitute the law.

⁵ However, this form of litigiousness is produced by the regimes of rent control that pits tenants against their landlords in contexts of scarcity of urban housing.

⁶ While the attempt to redress judicial delay in courts in Bombay has been taken up in all seriousness such that "certain categories of cases, including rent control matters" are being directed towards alternate dispute resolution bodies, given the existing rent control regime, it must be recognized that the defendant party will "have habitually a strong interest in delaying proceedings if the plaintiff is seen to have a strong case" [Mendelsohn 2005: 312]. Taking cognizance of this, the judiciary seems to believe that some of the disputes should be referred to alternate dispute resolution bodies without providing recourse to appeal or further referral to courts wherein substantive issues in law would be addressed in the first instance.

constitutes the reality of those who are vagrants, beggars, sex workers, street children or people marginalized on the basis of their tribal, caste, community, class, or gendered identities. The issue of court arrears then becomes exceedingly important in the realm of criminal law, and hence, many scholars choose to privilege criminal law rather than civil law without denying the importance of the latter.

The regimes of impoverishment that are instituted by judicial delay may be mapped according to the differential impact of judicial delay on victims, witnesses, under trials, respondents and accused. Judicial delay has led to suicides or deaths in custody; increased the possibilities of out of court settlements in criminal trials and resulted in loss of livelihood. Judicial temporality is equally a resource used by different legal experts and indeed by governments in order to repress social movements. For example, the arrest of pro-poor activists protesting against neo-liberal policies of the state often result in delayed release even after court orders are passed. We would also have to recognize that judicial temporality has also been a resource for strategic cause lawyering. For instance, in capital punishment cases, the anti-death penalty lawyer may be able to argue for remission on the grounds of delay, in the context of the Indian state's resistance to abolish capital punishment. The politics of the Bar signaled by the frequent strikes by lawyers is another illustration of how judicial calendar is constituted by regimes of judicial administration that cannot be merely computed by reducing judicial delay to the processes of managing case load.

The politics of the appointment of Judges including transfer cannot be captured by computing whether filling vacancies or improved judicial performance would reduce judicial delay. Rather, judicial strength must translate constitutional notions of substantive justice during the adjudication of pending cases that are heard after years of backlog. In other words, we need to pay attention to researching how pending cases are disposed and whether the jurisprudence of delay builds notions of substantive justice into the very act of judging pending cases. It is equally important to note that the use of state law is embedded in a field of strategies wherein legal experts themselves recognize and

deploy the threat of or the use of state law as a form of punishment for those who have been violated and seek redress.

For these reasons, the vexed issue of court arrears remains critical to any judicial reform debate in India, however it is quite apparent that the attention to court arrears or judicial delay has in recent years emerged in relation to the concerns of global capital and multinational corporate interests⁷. It is of interest that the project of redressing judicial delay uses the framework of the legal empowerment of the poor as a powerful framing device. Hazra and Debroy [2007] for instance argue that the neglect of judicial reform, i.e., specific problem of judicial delay, results in different kinds of social, political and economic costs. The failures of judicial reform amount to several costs such as the inability to check governmental excesses, the lack of enforcement of property rights, the inability to enable exchanges between private parties, and the curtailing of the development of markets especially in the sector of foreign investments. To this picture of the deprivation that derives from failed judicial reform is the exclusion of the poor from the legal system, the weakening of the rule-of-law, the slowing of economic growth and the failures of promoting human rights.

The correlation between the “rule of law” and economic growth has been influenced by the new institutional economics framework which “emphasizes the protection of private property rights and the facilitation and enforcement of long term contracts as essential ingredients to raising levels of investments and hence, economic growth” [Hazra and Debroy 2007:19]. Hazra and Debroy argue that high rates of pending cases result in inefficiency, and this inefficiency does not permit the wide range of legal reforms to be efficacious. This argument however does not converse with how court arrears are produced by specific regimes of administrative law. The attention to judicial delay as a central aspect of rule-of-law and *access* to justice is crafted thereby in the context of the

⁷ The emergence of the corporate law firm in India has been situated in the context of economic globalization wherein multinational corporations prefer to bind their Indian business partners in international arbitration agreements rather than have to go out to Indian courts [see Mendelsohn 2005].

demands of a liberalizing economy that promotes “market friendly models of human rights” [see Baxi 2007].

Hazra and Micevska [2007] point out that judicial delay afflicts the administrative of justice in both civil and criminal realms. They state that while there are no statistics for the number of cases that are pending in tribunals, “there are about 20 million cases pending in lower courts and around 3.2 million cases in the High Courts” [2007: 136]. The authors rightly argue that there is a lack of reliable data from lower courts on the rates of pending cases, clearance of cases and incoming cases. However, they base their analyses on a data set provided to the authors by the Department of Justice of the Government of India that covers 27 states and union territories over the period 1995-1999 in order to test the claim that the back log in courts is produced due to the fact that courts are under-staffed and under-funded.

Hazra and Micevska [2007] suggest that the argument that the failure to appoint judges leads to judicial delay has its antecedents in colonial legal discourse, which finds repetition in several reports in independent India⁸. Challenging this construct, the authors use econometrics methods to analyze court congestion to derive the following observations.

1. While increasing the number of judges might lead to a reduction in the congestion rates, this solution is not likely to contribute to an improvement of the situation in the court systems facing large caseloads.

⁸ The methods of computing delay in this study follow three trajectories. First, case load per capita has been correlated to case load per judge to reflect the perception of judicial delay by the population. Second, it has been assumed that cases which are older than one year constitute the backlog, thereby the number of cases older than a year per capita and per judge have been computed. Third, the ratio of the backlog of cases older than a year to cases disposed has been correlated to reflect the time “it would take a court to dispose of the cases older than a year given its current efficiency and clearance rates” The authors suggest that the methods of calculating delay need further research. Clearly the calculation of what is appropriate time to clear a case versus what constitutes delay in the case is dependent on the area of law that is addressed [see Baxi 1982]. It is unclear from the study cited herein how judicial temporality is mapped if all civil or criminal cases are treated as entailing similar temporalities. Baxi [1982] has argued that delay is also a function of legal normativity, since due process; presumption of innocence and substantive procedural law encodes a certain temporality that may not seem to be efficient but strives to serve just ends.

2. Elimination of vacancies seems particularly relevant for judiciaries with large caseloads per judge.
3. Improvements in court productivity are crucial for reducing the congestion in all state judiciaries
4. Reduction in litigation rate, coupled with an increased emphasis on resolving cases that are pending for a long time is also likely to assist lower courts in every state to address their backlogs [2007: 153]

While the study aims to establish that judicial reform has failed since it has not *disaggregated* the nature and extent of court congestion in different courts in the lower judiciary, the methods used herein address judicial quality across different judicial institutions insisting thereby that the variance between different lower courts [since each court is embedded in the local] is not relevant to the study. This allows them to suggest that rates of litigation need to be regulated, especially of those cases that are vexatious or frivolous. While earlier Law Commission reports, the authors argue, dealt exclusively with “augmenting the judge strength and appointing ad hoc judges to tackle the problem of arrears”, some recent reports such as the Report of the Justice Satish Chandra Committee [1986] and the Malimath Committee Report address court arrears reduction schemes as reforms “that can lead to a decline in the litigation rates” [2007:142]. In other words, the authors read contemporary law reform as a move towards looking at how to devise “methods to curtail frivolous litigation” [2007:142].

The very category of *frivolous* or *vexatious* litigation is by no means a transparent category over different domains of law and life since such litigation often actually *masks* the way state law is used to contest or entrench caste, class and gendered inequities that structure everyday life. Hence, unless what is termed as *frivolous* litigation is read alongside the regimes of law that produce the conditions for such litigation we really cannot make the claim that litigation rates should be reduced. Moreover, the semantic charge of *frivolous* or *vexatious* litigation is powerful precisely because it *individualizes* the manipulating and dishonest litigious citizen. At the same time, it disguises the cunning of the judicial reform discourse which does not use the term *frivolous* litigation to describe the dishonest litigations the state brings against the poor routinely. Galanter and Krishnan [2002], for instance, point out that 60% of the pending cases in courts are

brought by governmental agencies. They also note that while the agencies could well settle these cases reasonably, they use judicial delay as a resource and often end up in long litigations which they lose.

Other scholars have pointed towards how the police bring false criminal cases against the dispossessed be this to criminalize the everyday lives of the poor through anti-poor legislations [see Murlidhar 2004] or to criminalize the lives of already impoverished minority populations into the domain of extraordinary laws such as the anti-terror laws [see Singh 2006]. The fact that the state uses delay or the police uses forgery to file *vexatious* cases has been routine to practices of statecraft, yet this does not feature as an aspect of the impetus to reduce judicial delay. For those who are concerned with access to *justice* then it is important to note that this maneuver of judicial reform discourse is predicated on the premise that the rule of law should derive its strength from the legalization of everyday life rather than permit courts to be theatres where contestations of specific regimes of dispossession are enacted.

Judicial reform that looks towards *strengthening* rule-of-law by reducing judicial delay assumes that the rule-of-law means the implementation of legality and that the extant forms of legality equals *good* law. This reductionist picture of the law equates efficiency, speed and reduced costs to imply access to justice. Contesting this premise, it may be argued that the poor are excluded from just legal processes by the very claims of efficiency. The fast track courts held in Tihar Jail [Delhi] provide an illustration of this argument. Ramanathan [2007] observed the work of fast track courts in Tihar jail wherein undertrial prisoners who had been accused of crimes such as “lurking in the vicinity of the railway station with the intent to commit theft”, bootlegging, being found in the possession of a knife, were offered the option of “confessing” to the crime in return for an early release or to continue life in imprisonment to await a case being in routine courts. The trade off between admitting “guilt” and protesting innocence herein is determined by the time already spent in prison and an early release by the fast track courts and the potential delay that routine courts ensure. This form of informal system of *plea bargaining* that scripts confessions in return for release has found strong critique.

The criminal law has been since amended in 2005, and plea bargaining provided as a formal option since January 2006. However, the processes of fast track courts that end up in strengthening the numerical narratives of increased convictions and decreased judicial delay do not constitute the individual undertrial as a legal subject who deserves the safeguards assured by constitutional and procedural law, rather the undertrial bargains freedom at the cost of being labeled a criminal. Therefore, we need to interrogate how access to justice is annexed to the question of judicial delay or court arrears, in relation to notions of rule of *good* law that precludes notions of constitutional forms of judicial governance [Baxi 2004].

Informalism in State Law: Debating *Lok Adalats*

The *cunning* of judicial reform that claims to redress impoverishment of litigants through the legal process proceeds to the innovation of the forms of state law. Hence, we cannot meaningfully make distinctions between court arrears judicial reform agendas and the alternate dispute resolution discourses that are predicated on what Galanter and Krishnan [2003] call forms of *debased informalism* in order to clear court congestion or deal with claims of docket explosion. The phrase *Alternate Dispute Resolution* [ADR] covers a broad spectrum of judicial reform that ranges from creating new forms of courts which may be temporary or permanent; or may refer to procedures such as mediation, conciliation or arbitration. ADR often acts as a shortcut to refer to any form of judicial reform that is perceived to provide an alternative to the pathologies of the formal legal system. In contrast, the term *informalism* has been used to explore the effects of power exerted by different forms of judicial innovations in the realm of state law whether these function under the sign of alternate dispute resolution or through *alternate* state courts such as *lok adalats* (literally, peoples courts)⁹.

⁹However, the term *informalism* could also include “alternate” *processes* in routine court proceedings such as out of court settlements, which are justified on the grounds of the costs that litigants might incur due to judicial delay. In practice, these out of court settlements may be either legal or illegal. For example, the illegal out of court settlement [or compromise] in a rape trial is justified by evoking the social costs of judicial delay on a survivor of sexual violence.

The official picture of *Lok Adalats* as a form of *alternate dispute resolution* which marks a new phase in judicial reform constitutes most writings on lok adalats. For instance, Justice Madan B Lokur [2003] has argued that “for the last decade or so, the effort seems to have shifted from tribunalizing justice to reducing the adversarial role that litigants play. It is for this reason that greater interest has been shown in alternate dispute resolution systems including the Lok Adalats and now the Permanent Lok Adalat. There is no doubt that these Lok Adalats have done a considerable amount of good work. But they also confirm that the earlier system of setting up Tribunals has not really solved the problem”. Likewise, Chief Justice Y. K. Sabharwal [2006] has argued that

...litigation through Courts and Tribunals established by the state is one way of resolving the disputes. The Courts and Tribunals adjudicate and resolve the dispute through adversarial mode of dispute resolution. Litigation as a method of dispute resolution leads to a win-lose situation. Associated with this win-lose situation is the growth of animosity between the parties, which is not congenial to a peaceful society. One party wins and other party is a loser in litigation, whereas in Alternative Dispute Resolution, we try to achieve a win-win situation for both the parties. There is nobody who is a loser and both the parties feel satisfied at the end of the day.

We are further told that successful mediation and conciliation address the emotions underlying a dispute and the wisdom that informs such form of artful dispute resolution is actualized by drawing on techniques of skilled counseling. We must note here that that the American judiciary has acted as a significant resource in shaping judicial innovation in India. For instance, Chief Justice Y.K. Sabharwal’s paper on *delayed justice* ends with the words of the American Chief Justice Warren Burger who emphasizes the failures of the adversarial legal system and advocates the need for quick legal relief for litigants.

We know that Chief Justice Warren Burger, a strong advocate of ADR “warned that adversarial modes of resolving conflict was tearing the society apart and that alternative forums were more civilized. He insisted that Americans were *inherently* litigious. He argued that lawyers should serve as “healers of human conflict”. In such a model plaintiffs are patients needing treatment” [Nader 1995:442]. Nader argues that “in spite of evidence to the contrary, the chief justice proceeded relentlessly with his solution, the privatization of law, arguing that we must move towards taking a large volume of private

conflicts out of the courts and into the channels of arbitration, mediation and conciliation. Relationships, not root causes, interpersonal conflict resolution skills, not power, inequities or injustice, are the crux of the ADR movement” [1995: 442]. Hence in the US, it is possible to find the “Union Carbide, which has experimented with mini trials, presided over by a company executive. In product liability cases involving workers injured by accident exposure to toxic chemicals, the potential defendant becomes the judge. At Ford Motor Company, for over a decade it has been possible to complain to Ford about Ford in mediation hearings” [Nader 1995: 449]. State law characterized as adversarial, locked in a win or lose framework that created animosity found contrast to the participatory, conciliatory and informal.

It is really intriguing that the globalized discourse on alternate dispute resolution seems to be a conversation between judicial elites, wherein critical voices that have interrogated the “formulaic” language of ADR inaugurated in America do not find an audience. It is also ironic that judicial elites in postcolonial locations remain unaware of or are indifferent to the histories of ADR in American law since these histories are entangled with how the west constructed the non-west, and how notions of indigenous dispute resolution found translation in American legal discourse, only to return it to the post colony in the form of *alternate dispute resolution*. While the way global discourses on ADR translate in India is a complex narrative, it is sufficient to recount here the contestations around ADR in America. The work of legal anthropologists in “other cultures” on dispute resolution caught the imagination of the reform movement in America in the 1960s and 1970s. Those who advocated community mediation, in the 1970s, drew on the notion of community, which was “a mythic construction of harmonious society in which local groups settled their problems without the intrusion of state law...” [Merry and Milner 1995:11]. This picture of harmony was drawn from the work of legal anthropologists in postcolonial locations wherein custom, customary law or indigenous modes of dispute resolution were not historicized or placed within the changing forms of colonial statecraft. In America, “law, with its adversarial, coercive characteristics, was reinterpreted as a problem rather than a means of reform” [Merry and Milner 1995:11]. Hence, there was a move to replace “the state legal system with

community legal processes” and to build “the capacity of communities to manage conflicts” [Merry and Milner 1995:11].

Nader tells us that “the dispute resolution movement was inspired by an awareness of the increased need for access to justice for the poor, for “minorities”, for consumers – for those that don’t have general access to law’ [1995: 447]. It was also motivated by “corporations who wanted to reduce their legal fees, and others who wanted to unclog the courts. But what gave the movement moral push was the attempt to address the question of access to justice for the masses, for the many. Today, very little is said about the underlying issue – requiring that kind of class access – except in generalizations...” [1995: 447]. Hence, the ADR movement did not necessarily guarantee access to justice, yet it successfully deployed the language of access to justice to animate the movement with moral charisma.

Like in the US, most reform discourses in India, do not engage with the critics of the American ADR movement. The work of Galanter and Krishnan therefore remains pertinent to our interrogation of Lok Adalats as a privileged form of ADR. Galanter and Krishnan [2002] argue that the state instituted *lok adalats* derived their ideological appeal from the idea that such courts were closer to indigenous modes of dispute resolution by simplifying formal procedure, doing away with lawyers and emphasizing compromise or conciliation¹⁰. The institution of state *lok adalats* has been traced back to 1982. Galanter and Krishnan [2004] tell us that “as of March 1996, some 13,061 had been organized nationwide and some 5,738,000 cases were resolved here [about 440 per lok adalats]. Twenty-one months later the total had risen to 17, 633 Lok Adalats and 6,886,000 cases settled. That means that in the twenty-one-month period, 4572 lok adalats were held – some 218 per month or 2600 per year and that approximately 1.148 million cases were resolved [about 251 per lok adalats]. Unpublished data from the National Legal Services Authority shows that as of the end of 1999, 49,415 Lok Adalats were held with 9,

¹⁰ The very fact of the creation of Lok Adalats itself inaugurates a radically different notion of “people” to whom state law is now made “accessible” suggesting thereby that the appropriation of “people’s law” by the state always be debased.

720,289 cases being settled [about 197 per Lok Adalat]. By November 30, 2001 there were 110,600 Lok Adalats that had settled 13,141,938 cases (about 119 settled per Lok Adalat)” [2004:799].

This decreasing rate of cases settled in Lok Adalats, Galanter and Krishnan [2004] say could be attributed to a number of reasons which remain unclear such as the increase in the number of Lok Adalats, fewer resolutions that result in cases being settled, reduced numbers of cases, shortage of mediators or the routing of more complex cases to such fora¹¹. While there are not sufficient empirical narratives of the nature of cases heard in Lok Adalats, the cases are not only limited to those which involve motor accidents or family related cases. The cases that are routed to Lok Adalats are “considerably more varied, including vast numbers of ordinance violations and minor criminal cases” [Galanter and Krishnan 2004:800]. However, Rao notes that Lok Adalats are not able to “attract cases with heavy financial stakes or important civil litigation. Private litigation [has] remained totally outside the ambit of Lok Adalats” [cited in Galanter and Krishnan 2004:800].

The overriding framework for the constitution of the Lok Adalats, and their subsequent transition into permanent bodies, remains one which draws on making justice accessible to the poor, especially in the realm of uncontested adjudication. Gene Kassebaum¹² for instance points out that the Lok Adalats in Kerala researched from 1986 to 1988, which comprised 62% motor accident claims, were typically contestations between transport companies or government agencies and poor citizens injured in accidents as pedestrians or passengers [cited in Galanter and Krishnan 2004]. The unequal footing at which the claimants were positioned in relation to the defendants reflected in the organization of all

¹¹ The regional variation revealed disparate evidence for example Gujarat reported that ninety percent cases had been settled, whereas in Kerala only thirty nine percent of cases had been settled. Whether there is regional variation in the way cultures of compromise inhabit different judiciaries in these states needs further empirical studies, however this observation does confirm the need for factoring into analyses the way law is used as a resource in different social and regional contexts within India [see Galanter and Krishnan 2004].

¹² Kassebaum, Gene. *ADR in India: The Lok Adalats: An Alternative to Court Litigation of Personal Injury and Criminal Cases in South India*, Unpublished Manuscript.

claims against an insurance or transport company, which was represented by a lawyer, before a panel that settled the case after short and often cursory negotiations on the amount of damages. Moreover, “the amounts awarded in Lok Adalats are arguably quite small” [Galanter and Krishnan 2004: 803].

These cases are those that are diverted from the Motor Accident Claims Tribunals, which had been established “to provide expeditious proceedings with no court fees and some compensation available without showing a fault” [2004:804]. Critiquing the procedures followed in Lok Adalats, Galanter and Krishnan argue further that the assumption that Lok Adalats necessarily supplement access to justice is not empirically accurate in all cases since “while some of the Permanent Lok Adalats may address claims that have not been brought to a court or tribunal, overall the Lok Adalat docket is made up of cases that have already been brought to another forum. Lok Adalats do not provide new facilities for the vast portion of potential claims that are discouraged by court fees, the cost of lawyers, the prospects of delay, and paltry recoveries” [2004: 804].

We are also told that the routing of cases to Lok Adalats is embedded in the existing markets of legal services wherein if for lawyers Lok Adalats could potentially be a route for furthering their individual stakes in the profession, for the judiciary the Lok Adalat may also become a site to demonstrate judicial efficiency. Moog, for instance, details the links between the pressures put on court officials to reduce court arrears and the nature of cases that are routed to the lok adalats in Uttar Pradesh by observing that even those cases settled in courts were routed again to *lok adalats* so that the numbers of cases that find settlement through *lok adalats* goes up [cited in Galanter and Krishnan 2002:26]. We know that the enumerative techniques of the state are used in the legal realm such as policing wherein rates of crimes are linked to police performance. Such statistics are then used as evidence of good governance and rule-of-[*good*] law. The numerical narratives that Moog documents then testifies to the importance of serious research on the politics of enumeration as well as the trust placed in such numerically adduced targets wherein judicial reform serves as an index of judicial performance often used as a resource in the political discourse on [*good*] governance and rule-of-[*good*]law.

The impact of such *alternate forms of dispute resolution* on the criminalization of the lives of the urban poor may be illustrated through the example of electricity theft charges, and the regimes of extortion that surround the contestations around electricity may be illustrated through the functioning of Electricity Lok Adalats. Krishnan's fieldwork in Electricity Lok Adalats, founded in 2001 to settle disputes between consumers and the state electricity company reveals that complaints largely could be divided into those consumers who complained of excessive billing and cases of electricity theft brought against individuals. While in most cases, the delay was caused by the lack of preparation by the government or unwillingness to settle, theft charges against individuals were brought by the police along with the electricity company¹³. However, the police who reserve the right to pursue criminal charges against the defendant act as the "lead advocate for the company. This official would explain the case to the judicial panel, question the defendant on the specifics of his actions, and make penalty recommendations" [Galanter and Krishnan 2004: 813]. The police also argue cases of excessive billing against an individual to coerce her into settling the case. This account of the electricity Lok Adalat points to the expanding role of the police as "not only enforcers but also interpreters and arbitrators of law" [Galanter and Krishnan 2004: 813]. Hence, the police officer as a "regulator" acts as the authority with the power to bring criminal charges against the consumer, if s/he does not settle the case.

The argument that is forwarded by Galanter and Krishnan [2002] speaks to the agenda of the legal empowerment of the poor by making it manifest that while the reform of judicial institutions draws on the powerful symbolic appeal of the agenda to empower the poor, in fact the procedures and outcomes dis-empower the already dispossessed. However, Galanter and Krishnan do not seem to reject informalism in state law *per se* but argue against those forms of informalism that are set up in order to "bypass" the routine

¹³ The procedure followed by the electricity company in pursuing the charge of the theft of electricity entails the "filing of a formal report with the police" and upon the substantiation of charges, the police inform the company [Galanter and Krishnan 2004:812]. If the electricity company decides not to file a civil liability suit in the courts, and the defendant agrees to bring the case to the Electricity Lok Adalat, then the case is heard here.

judicial system. Lok Adalats have been characterized as illustrating *debased informalism* since “it is commended not by the virtues of an alternate process, but by avoidance of the torments of the formal institutional process” [Galanter and Krishnan 2004:809]. They argue that forms of debased informalism vary in different types of Lok Adalats, and that these forms of debased informalism are embedded in existing regimes of law and governance that dispossess the poor of basic rights, in the first instance. Hence, the question that judicial reform must decide is whether a “dual legal system” will be created “where, on the one hand, governmental and corporate elites have access to proficient courts, while most Indians remain trapped in an under-capitalized gridlocked system” [Galanter and Krishnan 2002:37].

Galanter and Krishnan argue that “the new informalism represents an intensification of stratification into a two-tier system of civil justice. As the lower courts diminish in function, the higher judiciary’s are enlarged. As the cases of “little people” are removed from regular courts the higher courts will not deal with the problems of ordinary Indians on a regular and routine basis, but only in intermittent paternalistic ‘public interest’ sorties, leaving those courts to take up cases from the government and from the business sector. Changes in the organization of law practice will amplify such a bifurcation of remedies unless there is investment in innovative reorganization of non-elite law practice and in building a strong and effective system of lower courts in which ordinary Indians can find expeditious remedies to everyday harms” [Galanter and Krishnan 2002:37-38]. Hence, the cunning of judicial reform lies in its being able to conceal the perfidious expansion of the power of state law in order to dispossess ordinary citizens with limited means of their basic rights by effectively deploying mainstream access to justice discourses to legitimize this expansion.

The *Harmony Ideology of the State*

The ideology that underlies alternate dispute resolution not only assumes that the state provides the only mechanism of access to justice to the poor but that the *alternatives* to the formal state law forms are the true *corrective* to the *pathologies* of the Indian legal system. Thereby, legal pluralism stands excluded from this model even though

indigenous forms of law are often appropriated and transformed by state law, as we see in the instance of the *Lok Adalat*. While the genealogy of the Lok Adalat as a form of peoples' law remains to be detailed in far greater detail, Galanter and Krishnan [2002] suggest that the word Lok Adalats was popularized by the research by Upendra Baxi on the *lok adalats* in Rangpur [Gujarat] as an illustration of peoples' law, which constitutes state law as the undesirable "alternative" to access to justice. Although the discourse on alternate dispute resolution creates heterogeneous forms of state law, it remains grounded in the framework of legal centralism thereby fuelled by the desire to expand the rule-of-law in everyday life.

The values of speed, competency, efficiency and cost by themselves do not assure justice. Nor is the ideology of compromise or harmony in itself just. The point made by Laura Nader [2002], whose review of the histories of ADR in the US remains extremely pertinent to routinised discourses on access to justice, is entirely valid in this context. Nader [2002] has argued that the *harmony ideology* that is advocated by the state's form of alternate dispute resolution is often enforced on the poor. It is therefore coercive. This use of harmony ideology by the state may be expressed through alternate dispute resolution, the innovation of new forms of state law such as the family courts or the institution of compromise through out of court settlements as the instance of conciliation in the mass torts case in Bhopal.

Conciliation in Mass Torts: The Case of Bhopal

The settlement of the Bhopal case in 1989, according to Galanter and Krishnan, illustrates how "informalism has also emerged in the judicial setting" [2002:28]. The settlement had been justified on the grounds that the costs of litigation which could have extended between 15-25 years would not have benefited the survivors, and hence, anticipations of the cost of judicial delay was cited as the ground on which the survivors stood to gain. The Supreme Court treated judicial delay as "given and unchangeable" aspect of the judiciary wherein the value of compensation is calculated not on the basis of fair claims or entitlements [Galanter and Krishnan 2002:28]. Therefore judicial delay itself becomes the measure for calculating compensation rather than taking seriously the

suffering of those survivors who suffered terrible health consequences. This modality of crafting the temporality of mass torts which uses judicial delay as a measure denied the survivors the means to imagine a future.

The Supreme Court's view was widely supported to the extent that the Law Minister in a speech given at the NALSAR Law University while felicitating the first batches of lawyers to have specialized in ADR a few years ago said that settlement in the Bhopal case was one of the finest examples of conciliation in Indian history. Thereby, reducing the valiant struggles of the Bhopal survivors to access to justice for more than twenty years to the cacophonous complaints of malingerers who display a lack of gratitude to the state. *Conciliation* in the infamous Bhopal mass disaster case was coercive, denying notions of a just future that were rightly voiced by the people's movements in Bhopal against the Union Carbide. Yet again, we may observe that processes of mediation, conciliation or other forms of alternate dispute resolution are defined by specific forms of statecraft wherein the site of dispute resolution is not embedded in local counter publics which re-fashion the multiple sites of subjection and resistance.

Engendering Harmony Ideology: The Case of Family Courts

The institution of the *family court* which aims to preserve the institution of the family illustrates how women are made to carry the burden of a harmony ideology that harms them in contexts of violence and discrimination in the family [see Srivastava 2003]. A large number of women go to Family Courts to seek maintenance. While the issue of maintenance has a troubled history in the way personal law is interpreted, there is an additional problem of jurisdiction since women are often sent to routine courts and then back again to family courts. The amount of maintenance that a court awards often determines whether the woman will be able to support herself and her children since she is often dispossessed of any other means of economic survival. The judicial interpretation of how much maintenance women should be given has been critiqued severely on the grounds that these paltry awards get tied to issues of identity rather than gender based equity, when personal laws come into play.

However, the critique of the way maintenance is awarded is not substantively addressed by the cunning of law reform that institutes family court, since the family courts self avowedly seek to rescue the institution of the family rather than operate on notions of substantive justice to women for whom maintenance often means traversing the very right to survive the economic deprivation that the breakdown of marriage brings in its wake. Hence, like Mendelsohn's observation that we cannot meaningfully reduce court arrears without talking about substantive law reform, we see how the institution of the family court in its insistence to save the family prejudices the case of a divorced woman who may have no means to support herself or her children, rather than provide her the legal means to empower herself. When women appeal to courts with the intent of stepping out of matrimony, it is usually a last resort after having tolerated serious domestic abuse, harassment or incompatibility. Yet the very objective of the Family Court Act enforces compromise on women, which is a specific harmony ideology that often throws women back into life threatening situations in domestic spaces.

We need to see compromise as a gendered negotiation between unequal parties, where women's consent to *compromise* is often mediated through their families or the court's understanding of what is appropriate feminine behaviour. The proponents of ADR need to foreground the fact that *compromise* means different things to men and women in different contexts. In fact, women have always been subjected to cultures of *compromise*, whether these are legally instituted by the law or whether these flourish in the practice of law, contrary to black letter law. Women are also perceived to be more willingly to compromise than men in order to maintain sociality, rather than as destroying social relationships by adopting an adversarial stance. Hence, the socio-economic conditions of *compromise* need to be taken into account since women's decision to *compromise* are determined by the structures constraint and coercion that flow from the gendered inequalities of their lives in public and private realms. For a *compromise* to be just, substantive notions of equality need to be marshalled rather than upholding formal notions of equality.

Cultures of *Compromise* in Criminal Trials

Having suggested that the different forms of harmony ideology imposed by the state, we must ask ourselves does the term *debased* informalism suggest that there is a form of informalism that is desirable. Are there other competing models of ADR in American legal discourses that seek to find a place in the debate on Lok Adalats? Or is *debased* informalism a strategy to highlight the pitfalls of the translation of the globalized discourse on ADR through the Lok Adalats? Galanter and Krishnan's work does not allow us to make bold statements about the nature of law reform they would advocate very clearly, it is nonetheless important to engage with their critique of official reform discourses seriously.

Moreover, we must ask ourselves whether it possible to understand the institutionalization of "compromise" as a mode of settling disputes through Lok Adalats without looking at the informal institutionalization of "compromise" in routine courts? In other words, how is the *debased informalism* different in the instance of a Lok Adalat from those *informal* processes that result in an out of court settlement which is often illegal in a routine criminal trial? Although Galanter and Krishnan do not look at how we may read the story they narrate about the forms of informalism instituted in courts to deal with delay in routine criminal trials, the term *informalism* could also include "informal" *processes* in routine criminal court proceedings such as out of court settlements in criminal courts. It is entirely possible to argue that without the institution of informal procedures in courts of law, the formal procedures of law loose their content. Hence, reform that concentrates only on formal procedures in courts or through formal interventions returns to haunt itself. It has been argued moreover that reform remains a moribund experiment when it does not translate in creating a human rights *culture* in a criminal court or does not provoke a lively engagement with the ethics of the legal profession. Rather than work within the framework of what constitutes a *formal* legal procedure versus an *informal* legal procedure in a criminal trial, it might be useful to look at the socio-legal processes that actualize a trial or its outcomes as being embedded in cultures of compromise that tarry with issues of substantive justice.

It is commonplace knowledge shared by lawyers and Judges in lower courts that even non-compoundable crimes such as murder or rape can be compromised. *Compromise* is the term attributed to an out of court settlement that is prohibited by the letter of law but finds justification on several grounds. In the instance of compromise in rape trials, the compromise is often justified by evoking the social costs of judicial delay on a survivor of sexual violence such as the diminished marital prospects of the victim due to the stigma that accrues to rape. Rape victims or their families may be coerced into making an out of settlement. In the instance of children, their guardians may settle the case to accept the financial inducement. In some of these cases, the parent or the guardian may not always act in the best interest of the child. In other cases, poor dalit or tribal women are made vulnerable to threats and harassment. In *compromise* cases, the depositions of witnesses is perfunctory, the duration abridged, *in camera* proceedings would be suspended, witnesses dropped, and the juridical record erases the processes of compromise by producing a legal subject now named as hostile. While we cannot read the processes that hollow out the criminal trial without mentioning that many substantive changes need to be made in the law on rape itself, the cunning of judicial reform lies in ignoring the fact that these cultures of compromise are produced by the law itself. Hence, the inadequacies of substantive law, complicity of the prosecutors, lawyers, police or even some Judges in the production of the hostile witness remains a public secret.

The enforcement of compromise or coercing witnesses or survivors of extraordinary violence to turn hostile in court has been one of the most perfidious ways in which access to justice has been denied to masses of impoverished Gujarati Muslims in the aftermath of the violence in Gujarat in 2002. In the instance of such mass crimes, compromise is coerced through several kinds of threats such as further violence, preventing the victims from returning to their neighbourhoods, or financial inducements. Those victims who had made criminal complaints were forced to withdraw their statements, if they wanted to return to their homes, which were destroyed. In the absence of state compensation or any legal redress, the enforcement of compromise meant the very denial of the right to life.

The cunning of official law reform discourse in the aftermath of Gujarat 2002 is evident in at least two kinds of ways. First, the move to punish the *hostile* witness, irrespective of whether the witness has survived contexts of violence or she has been made vulnerable to routine processes of compromise in criminal courts through threats or inducements. Unless the reformers understand the contexts of surviving violence and reckon with the cultures of compromise that constitute criminal courts, the survivor of violence who must testify without any state protection will be condemned to criminalisation. Second, the law proposed by the government on communal violence¹⁴ entirely disregards the fact that communal violence is not an exchange of violence between two equally powerful groups of people. While the proposed law strengthens the state, it disempowers those violated and impoverished by mass crimes. By disregarding the overwhelming evidence of the gruesome forms of sexual violence against women, it adroitly produces a proposal to amend the law whereby victims of sexual violence during communal riots would continue to be abject subjects, outside the framework of access to justice.

Activists have interrogated the violence of the rule of law while questioning what it means to ensure access to justice in such contexts [see Hilal 2003, IJJ Report 2003]. In Gujarat, techniques of economic boycott, censorship, denial of compensation, and intimidation are being used against the Gujarati Muslims¹⁵. While the state has not instituted any measures towards reconciliation and rehabilitation, the state ideology of *asmita* [*literally*, self pride] has folded into the practices of the dominant community which uses techniques like economic boycott to *complete* the project of the state imposed regime of impoverishment and hate against the Gujarati Muslims. Even as state law itself produces conditions which prevent the possibility of testimony, practices of governance

¹⁴ The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill 2005 [Bill No CXV introduced in the Rajya Sabha].

¹⁵ I wish to cite a recent case reported recently from Sunav village in Anand where Muslim residents were not allowed to return to their homes, their masjid has been destroyed and they face economic boycott from the villagers in Sunav. The regime of impoverishment imposed on the survivors in Sunav did not deter them from pursuing their complaint. The accused in this case, has been declared absconding, upon their immigration abroad. With the help of *Nyayagrah* lawyer applications were filed against the absconders, and as a result one of the accused has been recalled from UK to be placed in police lockup currently.

that are premised on excluding Muslims from the formation of a Hindutva nation are most effectively carried out by the techniques of economic boycott and censorship.

Routinised versions of access to justice agendas elide how collective violence produces and sustains poverty, and expands the realm of the criminalization of the poor¹⁶. Poverty cannot be understood without understanding sectarian politics that promotes the impoverishment of the minorities. State imposed regimes of impoverishment on communities of survivors in the aftermath of mass crimes must inform the agenda of the legal empowerment of the poor. Recourse to the judiciary however does not assure a challenge to such state imposed regimes of impoverishment since the judiciary is also embedded in the politico-jural contexts of divesting body populations of minorities their basic human rights. Hence, we often see a splitting of local courts in the state and the constitutional court, which acts to intervene on behalf of community of survivors, after it has been moved by activists.

Challenging sanitised versions of *access* to justice frameworks, Hilal [2003] argues that while survivors in the Gujarat 2002 events wanted to access state law, their expectation that the legal system in Gujarat would give them justice has been betrayed. The police refused to file FIRs, they weakened the cases so that such cases would lead to acquittals, investigations were authored by the very policemen named as culpable in the violence, omnibus FIRs were written, complainants were named as accused especially in cases where they acted in self defence, investigations have been shoddy, the charge sheets were filed after considerable delay and accused declared to be absconders.

¹⁶ The anti-Sikh riots in 1984, did not result in a legal aid movement to the surviving widows who moved the court. It was up to some remarkable individual lawyers to offer legal services to these women. Even though the cases continue, legal aid to survivors of the 1984 survivors, the bulk of who are women, seems a question that remains to be asked. We need to ask how the Legal Services Authorities Act could be refashioned to address the question of providing legal representation to people who survive mass crimes [see Murlidhar 2003]. What kinds of legal aid programs could the state institute in the contexts of mass crimes, which assume that states of emergency require urgent legal redress that are sustained in the aftermath of the violence? If we continue to assume that people accessing state law for the protection of basic constitutional rights live in stable neighbourhoods, we will never be able to assure justice to those who live in camps, resettlement colonies or what Mander [2006] terms as “relief colonies” – rather this exclusion ensures that entire communities of men and women live in permanent states of exception.

In the aftermath of Gujarat 2002, the *first phase* of mobilising the Supreme Court to assure safe and just conditions of testimony resulted in the transfer of two cases to Bombay, while rest eight cases remain under a stay order¹⁷. The outcome of the second case is yet to be known, which will perhaps remain one of the first trials which read rape with riots laws. The *second phase* has seen the mobilising of the Supreme Court to re-open the cases that had been closed and attempts to embed access to justice in a movement of resistance. One of the most important recent legal challenges that succeeded was the petition filed by *Nyayagrah* with Lawyer's Collective challenging the Gujarat Government's decision to close more than 2000 cases without trial. In January 2006, the Gujarat Government had to order the re-opening of the cases, except for 22 cases, that had been closed. This has effectively meant that thousands of survivors have now the basic opportunity to choose to testify in courts of law. In these cases that have been re-opened, the most common problem faced by the victims is if they testify that they were forced to perjure themselves following processes of compromise, they are

¹⁷ Public interest litigation has been an important route for accessing justice in the context of mass crimes. While petitioning the constitutional court has not met success in all cases of communal riots, it has certainly become an important route to challenge the abdication of the state governments or judiciary towards providing redressal, compensation and rehabilitation to victims of mass crimes. The characterization of the PIL as litigation for public interest versus litigation as a form of social action has been cast as a distinction between different modes of relating access to justice to conceptions of the rule of law [see Baxi 1988]. The constitution of the very category of public interest has been challenged by different classes of citizens such as displaced people, who do not always perceive state law as a route to just legal orders rather they often perceive state law as a mechanisms of divesting them of their property rights and right to life and livelihood [see Lobo 2003]. Lobo has argued that the courts are seen primarily as spaces of contestation over the amount and nature of rehabilitation rather than as spaces where tribal people's rights over land are justly adjudicated. Public interest, in such cases, is framed by ideas of public good whereby displacement becomes a legitimate state activity for national progress and market friendly development. In some senses, we may agree with the proposition that the distinction between public interest litigation and social action litigation is precisely predicated on the production of this gap between the constitution of national or global publics produced by market friendly models of globalization versus those notions of *publics* imagined by social movements. Thereby raising the question that when the judiciary takes on functions of governance through its definitions of public interest are such functions of governance modeled on World Bank generative notions of *good* governance or are these are fashioned on constitutional forms of governance? The answers perhaps determine the difference between public interest litigation and social action litigation having different stakes in the project of access to justice.

increasingly vulnerable to perjury or contempt charges now¹⁸. While the fact that people have been forced to compromise remains a public secret, legal and public discourse continue to highlight the hostile witness without paying heed to the fact that survivors are not assured safe and just conditions of testimony even five years after the carnage. The evidence of the denial of basic constitutional rights to Gujarati Muslims and their exclusion from claims to citizenship is overwhelming. People cannot testify unless safe, just and ethical conditions of testimony are created in the existing contexts of the everyday traumas of surviving such violence.

Nyayagrah: A Case Study from Gujarat

The access to “justice” for the impoverished Gujarati Muslims which is furnished by a peoples’ movement, *Nyayagrah*, that refuses to deny that legal empowerment of the poor is important and yet, recognises that state law does not exhaust the quest for justice informs the case study I have chosen. The description of *Nyayagrah* that follows aims thereby to indicate the radical difference between legal systems that appropriate peoples’ law to reduce court arrears and people’s involvement in legal empowerment. *Nyayagrah*, which literally means ‘justice-force’ or people’s resistance for justice, according to Harsh Mander [2006a], is a mass campaign “to hold the State accountable to enforce its own just laws, and to uphold rights guaranteed by the country’s constitution and laws, and by

¹⁸ The Best Bakery case as it unfolded in the Supreme Court held Zahira Sheikh, whose testimony made it possible for the trial to be transferred to Mumbai, in contempt when she turned hostile in the Mumbai court. The first time Zahira Sheikh turned hostile in the Gujarat trial, compromise was seen as an act of coercion, however the second time her hostility was seen as an act of avarice that led her to accept financial inducement. The Supreme Court seemed to have made a distinction between a *forced* and a *voluntary* compromise, when it held her in contempt by punishing her to rigorous imprisonment for one year. While a petition to the President to grant her pardon was dismissed on the grounds of merit, Zahira Sheikh was the one of the first persons to be imprisoned in the aftermath of Gujarat 2002. This ruling is very important to remember since there have been many proposals to amend the relevant law to punish hostile witnesses, including a proposal by the National Commission of Women, in its response to the Communal Violence Bill to the government. This is really alarming since these proposals fail to provide support to survivors of violence who testify in courts or understand the contexts in which victims of violence turn hostile. One of the effects of the contempt judgment on the ongoing cases in Gujarat has been that witnesses are vulnerable to judicial intimidation for wanting to come forward now with their testimonies on the ground of contempt.

international covenants. It may involve access also to courts, but this is not mandatory because courts themselves may be part of the process by which rights are withheld and violated with impunity". The campaign which is spread over four districts of Ahmedabad, Sabarkantha, Kheda and Anand. The campaign is embedded in the community in that it relies on what it calls community justice workers who are often victims, and thereafter receive preliminary training in law. These activists are working class men and women from both Hindu and Muslim communities. These community justice workers find auxiliary and critical support from young lawyers, who are called justice agents. These lawyers may be young law graduates or some of the lawyers or researchers from UK or elsewhere who have left their education or jobs to be part of this movement¹⁹.

Prita Jha, one such lawyer from Manchester, recounted to me the scarcity of good criminal lawyers to fight these cases *pro bono*. Not only was it difficult to find lawyers skilled in their craft in the Gujarati language, it is very expensive to translate Gujarati documents in English. The lower courts, I have been told, have been hostile to the survivors who want to testify now. Even the lower court Judges insist that it is the movement or rather "NGOs" who "disrupt" the so-called peace brokered between the survivors and the perpetrator communities. This brokering of peace that functions under the sign of *compromise* is yet another instance of enforcing "harmony". The style of this form of compromise is dramatic in that the courts no longer maintain the façade of legality, and compromise is not a public secret. Rather when the Nyayagrah lawyers challenged a lower court judgment that described the process of compromise as a voluntary act in a non compoundable criminal case, their petition in the higher court

¹⁹ Mander reports that "overall, we have now contacted affected persons/families in 844 cases in the four districts. This indicates a progress of 627 further contacts since February. It is estimated that about 50% of the affected people are internally displaced. The justice activists have to make many visits before they are able to win the confidence and trust of the victims to start discussing the details of their individual cases and ascertain what the problems in each particular case are. Taken across the four districts, we have managed to convince affected persons in 334 out of 844 cases which translates to about 4 in every 10 case contacted so far has agreed to fight his/her /their case. It is important to remember that because of the phenomenon of *omnibus* FIRs ... where entire villages, sometimes 2-3 villages were included in a single FIR. The result is that a case may easily have 30-40 victims/witnesses and the justice activists in such cases have to contact numerous people and call group meetings to inform and advise the people about their legal rights and the nature of support Nyayagrah can give them to fight for justice".

failed. Hence, the courtroom becomes a site where the criminal trial is hollowed out of content. In court, activist-lawyers have been admonished for disrupting peace by representing the survivor who wants to testify. The difficulties in securing court papers, the lack of competent judges who minimally follow black letter law and the struggle to find legal experts to represent survivors form formidable challenges to accessing justice in Gujarat today.

Nyayagrah provides a radical challenge to the routinization of the discourses of access to justice in five distinct ways. First, it conceives of courts of law as an important site for seeking truth, reconciliation and rehabilitation but does not consider legal notions of justice as exhausting the secular and non-violent pursuit of justice. Second, *nyayagrah* focuses on the processes of seeking justice rather than measuring justice through judicial outcomes. This is a radical counter to the enumerative practices of the state where crime rates are read as indices to *good* governance or the rate of conviction used to measure judicial efficiency. Reduced crime rates often mean underreporting and increased rates of convictions often conceal the harms caused to victims of violence who testify in courts of law, even if such trials lead to convictions. Third, the idea of legal aid is revisited by empowering those who survived or witnessed violence to participate in the legal process.

Fourth, it introduces a radical note in the very notion of what it means to bring together ethics within the profession. The refusal to pay bribes, to participate in out of court settlements or to fabricate evidence introduces an ethical basis in the practice of seeking justice. Mander likens *nyayagrah* to Gandhi's *satyagrah* in as much as there is an attempt to bring together ethics and the struggle to access justice. Hence, the movement evolves certain ethical guidelines. These include the commitment not to use a survivor of violence as a resource to further the abstract objective of truth and reconciliation. Rather, the survivor's informed consent remains central to the idea of truth and reconciliation as a lived experience. Moreover, the movement is animated by the idea of making legal institutions ethical through their praxis. This means that the lawyers refuse to pay bribes in order to secure court papers, a normal practice in courts. The emphasis is not only on winning a case. Hence, routine strategies of lawyers which entail fabrication of evidence

or untruthful testimonies are not adopted even in those cases where guilt seems to be beyond doubt.

Fifth, the language of justice that is captured through the concept of *nyayagrah* or the norms set out for the conduct of *nyayapathiks* is a radical counter to the vernacular of hate unleashed through the political discourses of *asmita* or *rajyahir*. Hence, deploying Gandhi's notion of *satyagrah* provides a powerful counter to the politics of hate since languages of accessing constitutional rights for the internally displaced impoverished citizens of Gujarat cannot fully succeed without countering the vernacular of hate that underlies injustice.

Nyayagrah has challenged the state imposed regime of impoverishment of the Gujarati Muslims by surveying the extent of internal displacement. The survey, as Mander [2006b] points out, reveals at least 81 relief colonies, none of which have been created by the state, are abysmal without any public services or basic facilities. The sub-human ghettos that have been created by the abdication of state intervention to rehabilitate the survivors testifies to the way poverty is produced, sustained and even celebrated by the state policy of communal hate. Moreover, Mander [2006b] argues that the fact that only six of these relief colonies were supported by secular groups working Muslim organisations, points to the abdication of the task of rehabilitation by humanitarian groups. This is a serious critique of those who wish to promote the legal empowerment of the poor since it highlights that international intervention is limited due to the fear of political risks of mapping the sectarian nature of the regime of impoverishment.

However, unless international agencies take this risk by interrogating how exactly regimes of impoverishment are crafted in the aftermath of mass crimes, we will continue to reproduce a framework of access to justice that assumes an everyday context wherein a certain notion of the rule of good law is upheld. This would mean that the agenda of the legal empowerment of the poor would continue to deny people the potentiality of imagining a future where perhaps access to justice could be actualised. For, in the aftermath of mass crimes, the very notion of a legal subject or her imaginations of a future do not rest on everyday sociality. Rather, the aftermath of violence may produce a

radically different notion of self, community and the state. As ethnographies of the aftermath of communal violence show, the relationship between law and life in states of exception is precarious; however state law fails to provide the conditions of testimony in survivor's quest for justice [see Das 2007]. Nor has state law *rehabilitated* itself by providing redress to survivors of mass violence condemning them to everyday denial of justice, while positioning itself as the only legitimate route to access to justice.

Conclusion

The cunning of judicial reform lies in using the *access* to justice frameworks, in order to expand the power of state law and consolidate corporate interests. The links drawn between efficiency, speed and cost effectiveness with the reduction of court arrears do not assure access to justice to the poor. Thereby, we must not only look at administration of law as it resides in the managerial forms of legal administration but rather look towards the regimes of judicial administration that produces specific litigious practices in Indian legal history. Nor does the creation of alternate dispute resolution bodies necessarily report empowerment of the poor. Rather different styles of harmony ideology which do not involve people's participation in state law are both consolidated and dispersed at different sites to produce increased criminalization of the marginalized. Judicial reform has not adequately challenged the enforcement of regimes of impoverishment brought in the wake of violence in everyday and extraordinary violence. Instead, the poor are used as a resource to legitimize the extraordinary idea that rule-of-law must be strengthened to actualize the projects of *good* governance, economic growth and development. In order to access "justice", we need to seriously interrogate why these times have been termed as the age of "rule-of-law"?

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