

A CAPABILITIES APPROACH TO ACCESS TO JUSTICE

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“Impoverishment is a dynamic process of public decision-making in which it is considered just, right and fair that some people may become or stay impoverished”

- Upendra Baxi¹

This article examines the association between ensuring access to justice to those traditionally deprived of such and the development of capabilities that lead to entitlements. While the capability approach has been used in many analyses spanning multiple disciplines, the link between access to justice and the development of capabilities remains significantly, and perhaps surprisingly, unexplored. Through the course of our paper, we shall elucidate the role of access to justice in poverty eradication, and examine whether the right to access to justice can be comprehended in terms of an increase in capabilities. This shall be done in two ways: first, by providing a theoretical framework for applying the capabilities approach to access to justice and second, through the assessment of this right under the Legal Services Authorities Act in India, using the capabilities approach. The article is concluded with the claim that the notion that access to justice is a guaranteed right in India needs serious reconsideration, and with suggestions as to what it will really take to bring about legal succor to those in need of it.

INTRODUCTION

“Justice” has many competing theoretical foundations, from the Lockean theory of ‘natural justice’ to Bentham’s utilitarian

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¹ REINVENTING DEVELOPMENT: TRANSLATING RIGHTS-BASED APPROACHES FROM THEORY INTO PRACTICE 239 (Paul Greedy and Jonathan Enser eds., 2005).

exposition of legal positivism. This paper is not an examination of these philosophical underpinnings, but about what ‘justice’ translates to in everyday lives. Viewed in that prism, we believe that justice implies the Rawlsian notion of fairness and the implicit recognition of the principles of equality. It evokes images of rule of law, of the resolution of conflicts, of institutions that make laws and of those that enforce it. The core principle contained in the preamble to the Constitution of India is ‘justice - social, economic and political’.² Thus, a commitment to provide justice to all is central to our democratic process. Further, access to justice is universally recognized as being essential to human development, critical for ensuring democratic governance, reducing poverty and for conflict prevention among impoverished groups.³ Though there is no precise definition of the term “access to justice”, it is undoubtedly a broader concept than mere access to services of lawyers and legal institutions. As aptly put by Michael Mansfield, it encompasses the recognition that everyone is entitled to the protection of the law and that rights are meaningless unless they can be enforced. It is about protecting ordinary and vulnerable people and solving their problems.⁴

This paper examines the association between ensuring access to justice to those traditionally deprived of it and the development of capabilities that lead to entitlements. While the capability approach

² S. MURALIDHAR, *LAW, POVERTY AND LEGAL AID: ACCESS TO CRIMINAL JUSTICE* 1 (2004).

³ See U.N. Development Programme (UNDP), *Practice Note on Access to Justice* (Mar. 9, 2004), http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf (Access to justice is a vital part of the UNDP mandate to reduce poverty and strengthen democratic governance. 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 strong commitment to the Millennium Declaration and the fulfilment of the Millennium Development Goals).

⁴ J. Robins, *Access to justice is a fine concept. What does it mean in view of cuts to legal aid?* THE GUARDIAN, Oct. 6, 2011, <http://www.guardian.co.uk/law/2011/oct/06/access-to-justice-legal-aid-cuts>

has been used in many analyses spanning multiple disciplines,⁵ the link between access to justice and the development of capabilities remains significantly, and perhaps surprisingly, unexplored.

Through the course of our paper, we shall elucidate the role of access to justice in poverty eradication, and examine whether the right to access to justice can be comprehended in terms of an increase in capabilities. This shall be done in two ways: first, by providing a theoretical framework for applying the capabilities approach to access to justice and second, through the empirical assessment of this right under the Legal Services Authorities Act in India, using the capabilities approach. Sen's reluctance in defining a basic set of capabilities but to leave it open to be defined by local actors and contexts is useful in arguing in favour of access to justice being viewed as a capability, i.e. as a tool to facilitate the enjoyment of a set of functionings that people value. Further, a significant portion of this paper shall be dedicated to the space where capabilities and rights co-exist, as access to justice is both a basic human right as well as a basic capability. We shall elucidate this concept by a study of the 'fundamental right to legal aid', as has been guaranteed in India post *M. Hoskot v State of Maharashtra*⁶ and *Hussainara Khatoon v. Home Secretary, State of Bihar*,⁷ and as a human right as entrenched in international law.⁸

⁵ See, e.g., B.S. Gigler, *Indigenous Peoples, Human Development and the Capability Approach* (Aug 8, 2005), https://docs.google.com/viewer?a=v&q=cache:mZPoLMoZpTEJ:zunia.org/uploads/media/knowledge/Indigenous%2520peoples-human%2520development%2520and%2520the%2520capability%2520approach1.pdf&hl=en&gl=in&pid=bl&srcid=ADGEESgHhb-ekrz75bk mZ7k_j d0hJJ I N q d z h 0 W C c P S C k 7 V T E W M o t p - A A 9 s m Z B I J C H S 4 V 0 Q h H j 0 L Q S - q D E r o V t j t W F k M T l x W g Z K A U b n W U M 9 U z K s S n - 9 p r f h - g U k Z F c _ D i 8 L 1 D r x i U N Y i & sig=AHIEtbStRvdhCLxhAhDn3JPw43Npzx3Pfg (applying this in the rights of indigenous peoples in sustainable development).

⁶ (1978) 3 S.C.C. 544.

⁷ (1980) 1 S.C.C. 98.

⁸ For instance, according to Article 8 of the Universal Declaration of Human Rights, everyone has the right to get remedy for violating fundamental rights guaranteed by the constitution or by law. According to Article 14(3) of the International Covenant on Civil and Political Rights, everyone has right to chose his pleader. If

The paper will proceed in the following manner: Part I shall recount the crucial link between capabilities and impoverishment as was brilliantly illustrated by Sen in his seminal work *Development as Freedom*⁹ and developed subsequently by many scholars, particularly Nussbaum.¹⁰ Part II shall focus on the linkage between rights and capabilities. Part III shall follow from its preceding sections and deal with the evaluation of the 'right' through the capabilities approach. This section shall focus on this right in a normative sense. Part IV shall focus on the right to access to justice, both substantively and procedurally, in the Indian scenario, and evaluate its success with the capability approach. We conclude with the claim that the notion that access to justice is a guaranteed right in India needs serious reconsideration, and offer suggestions as to how legal succor can be brought about to those who are in need of it.

I. CAPABILITIES AND IMPOVERISHMENT

Sen's analysis of poverty as capability deprivation¹¹ proceeds from the basic recognition that human freedom is both the primary objective and the principal means of development. The former is a normative claim formulated on the understanding that the assessment of development must not be divorced from the lives that people can lead and the real freedoms that they can enjoy.¹² Thus, development is meaningless when seen merely in terms of enhancement of traditional indicators of prosperity, such as a rise in the GNP, industrialization, technological advances, etc.¹³ Sen's approach is to shift attention away

he is indigent and does not have legal assistance then it should be provided without payment.

⁹ See A. SEN, *DEVELOPMENT AS FREEDOM* 87-110 (1999).

¹⁰ See generally Martha Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21 (2007).

¹¹ SEN, *supra* note 9, at Ch. 4.

¹² SEN, *supra* note 9 (classifying 'freedoms' into five different categories, namely, economic empowerment, political freedoms, social opportunities, protective security and transparency guarantees).

¹³ See A. Sen, *Development as Freedom: An Indian Perspective*, 42 INDIAN J. INDUS. REL. 157, 160 (2006).

from the *means* of poverty determination (specifically income) to the *ends* that people have reason to pursue, and correspondingly to the *freedoms* that satisfy these ends.¹⁴ Capabilities are defined as the freedom to achieve desired functionings, which are ‘the various things a person may value doing or being’¹⁵. Sen claims that since enhanced capabilities in life would tend to make a person more productive,, it is capability improvement that would lead to higher productivity, and not the other way around, as is commonly presumed.¹⁶ This is a particularly important benchmark to evaluate any poverty alleviation strategy – if it leads to a development of capabilities, it would lead to higher income generation in the long run.

Sen’s analysis of the relation between capability and impoverishment is useful. The prevalent poverty alleviation schemes such as subsidies and cash transfers seem to become insufficient when viewed through this prism. Poverty mitigation initiatives will not be useful unless these take into account how significant disadvantages such as old age, physical handicaps or social disabilities¹⁷ can cause severe adversities in converting incomes into ‘functionings’, and consequently hinder the enjoyment of ‘freedoms’ in the real sense. Thus according to Sen, no matter which model of empowerment one looks at, whether it be through a general right or through a more exclusive scheme, it is important to evaluate whether the diversities in human beings, which can differentiate their abilities to translate the fruits of empowerment into social functionings, are

¹⁴ See SEN, *supra* note 9, at 90.

¹⁵ SEN, *supra* note 9, at 75.

¹⁶ SEN, *supra* note 9, at 75; Sen gives the instance of economic reforms in India post 1990. His study with Dreze illustrates that these reforms would have been much more productive had social facilities existed to trickle down the benefits of reforms to all sections of society. Supporting capabilities of literacy, basic health care, etc were absent.

¹⁷ See e.g., M. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273 (1997) (analyzing women’s right to vote which is rendered hollow in countries where the social realities make it impossible for them to go out and vote); see also SEN, *supra* note 9, at 96–99 (analyzing health care and mortality in Europe and America).

being adequately dealt with under the plan, and whether such classification is reasonable.¹⁸

While it is conceded that in Sen's examples of 'functionings' which are indispensable, access to justice is not a common issue, it will be worthwhile to note that Sen expressly refuses to make (or to agree with) an exhaustive list of 'functionings'.¹⁹ The difference between capabilities and functionings needs to be emphasized. Functionings denote the range of activities that a human being can undertake, whereas capabilities denote the person's real freedoms and opportunities enabling him to achieve these functionings, thus creating a spectrum of the realized and the effectively possible as between functionings and capabilities.²⁰ Martha Nussbaum advocated for the strengthening of capabilities rather than functionings as the desired political goal, based on the greater need for freedom of choice. She went a step further and created a list of central human capabilities which consisted of: I. life, II. bodily health, III, bodily integrity, IV. sense, imagination, and thought, V. emotions; VI. practical reason; VII. affiliation; VIII. other species; IX. play and X. control over one's environment,²¹ but didn't mention access to justice as part of that list²².

The overarching argument running through this paper is that access to justice *is* a basic capability, although not mentioned in Nussbaum's list. The absence of inclusion in itself takes nothing away from the merit of the aforementioned proposition, since Nussbaum herself responds to criticisms of her list by admitting that the list is

¹⁸ A good example of this is in the exception to the right to equality under Article 14 of the Indian constitution, which allows positive discrimination through affirmative action to traditionally disadvantaged castes.

¹⁹ A. Sen, Keynote Address at the 4th Human Capability Conference, Pavia, Italy (Sept. 2004).

²⁰ See, A. Sen, *Capabilities and Well-Being*, in *THE QUALITY OF LIFE* 45 (Martha C. Nussbaum & Amartya Sen eds., 1993).

²¹ See, Nussbaum, *supra* note 11, at 23.

²² Nussbaum, *supra* note 18.

open ended and is subject to modification.²³ Sen's enduring position against listing such a set of capabilities on grounds of heterogeneity of cultures and their needs, as also dynamic shifts in societal structures through time²⁴ is convincing. It leaves room for arguing different vectors into sets of capabilities that may be local or universal. In fact, Nussbaum has herself stated that certain inherent human freedoms can consist of entitlements based on social justice, thus hinting that access to justice is incidental to the realization of the aforementioned capabilities²⁵. The modus operandi of guaranteeing an increase in such capabilities is the basis of a rights-based analysis and shall form the subject of the next section.

II. CAPABILITIES AND RIGHTS

While the discussion of capabilities and rights has been limited,²⁶ it appears that there could be two views as to the exact role of rights in the capabilities approach. The first of these is that rights are an indicator of development of capabilities, while the second is that increase in functionings is a direct consequence of enforcement of rights.²⁷ Some scholars may argue against the first claim, based on the assumption that socio-economic rights can be measured by achievements or 'functionings' alone. For instance, it might be claimed that measuring the success of the right to education can be obtained by merely analyzing the literacy rates (which is an achievement; or what Sen terms, a 'functioning') However, the rationale adopted in the above approach would lead to fallacious results, for instance, stemming from an inability to distinguish between the starving poor who have no access to

²³ See generally P. Anand, G. Hunter & R. Smith, *Capabilities and Well-Being: Evidence Based on the Sen-Nussbaum Approach to Welfare*, 74 SOC. INDICATORS RES. 9 (2005).

²⁴ *Id.*

²⁵ M. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECON. 33 (2003), available at <http://avforensics.org/healthcare/Nussbaum.pdf>.

²⁶ See Nussbaum, *supra* note 17, at 278.

²⁷ See A. Haldar, *The Capabilities Approach and Women's Rights in India* (July 31, 2007), <http://www.capabilityapproach.com/pubs/Haldar07.pdf>.

educational opportunities, and the dim-witted person who does not have the desire or the ability to receive and internalize education. In reality, however, we would wish to recognize that the rich person has the capability to gain nourishment, and consequently allow him to make the choice not to eat. Thus, any attempts to increase functionings without increasing capabilities could lead to paternalistic coercions, say, in forcing the rich man to eat.²⁸ Rights do not guarantee functionings or freedoms; they guarantee capabilities to enjoy those freedoms. The role of public policy is thus merely to set the stage; the ultimate choice is left entirely up to the actor.²⁹

But does this view of rights hold even when they are not capable of being realized immediately? Clearly, the answer is an emphatic 'yes'. Such rights lead to the recognition that certain individuals have a particular entitlement, and helps in generating public debate on the right. This exerts pressure on the government to guarantee them.³⁰

The second view finds support with Nussbaum who claims that "the best way to think about rights is to see them as... combined capabilities to function in various ways... In short to secure a right to a citizen in these areas is to put them in a position of capability to go ahead with choosing that function if they should so desire."³¹

Sen however, does not give credence to the theory that all capabilities should lead to rights. He imposes the threshold

²⁸ *Id.*

²⁹ *Id.* ("The aim in enacting the legislation to guarantee equal working conditions is not to ensure that all women go to work to avail of it, but rather to provide women with the freedom to choose to work without the fear of discrimination.") (presenting a strong example of this in the context of equal working conditions for men and women).

³⁰ This is visible in the instances of Right to education, Right to information and Right to food in India; see, e.g., Jean Dreze, *Democracy and the Right to Food*, 39 ECON. & POL. WKLY. 1723 (2004); see further Philip Alston & Neha Bhuta, *Human Rights and Public Goods: Education As A Fundamental Right In India*, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT (P. Alston & M. Robinson eds., 2005).

³¹ Nussbaum, *supra* note 17, at 292.

conditions of importance and social influenceability in determining which freedoms are the appropriate subject matter for protection as legal rights.³² However, he admits that both human rights and capabilities go well with each other, since both are related to freedoms. Human rights are best seen as rights to certain specific freedoms and capabilities are also freedoms of certain kinds.³³ He admits that the two are not synonymous, simply because there is a distinction between the “opportunity” aspect and the “process” aspect of freedoms. He gives the example of a woman named Natasha going out one evening. Two scenarios arise: the first is one in which she *decides* to go out of her free will, and coincidentally the authoritarian forces of the state also *force* her to go out. In this, there is a clear violation of her freedom even though the result would have been the same had the state not intervened. Hence, this action violates the *process* aspect of Natasha’s freedom, since an action is being forced upon her.³⁴ In the second scenario, Natasha wishes to go out, but the state forces her to stay indoors. This involves an immediate denial of her *capability* to enjoy the freedom to go out, and this is a denial of the *opportunity* aspect of her freedom.³⁵ It is important to recognize that both processes and opportunities feature prominently in the context of human rights. Sen gives the example of denial of a fair trial as an instance of violation of ‘process’, even if the outcome had there been a fair trial would be the same. However, he uses ‘capability’ to primarily elucidate the ‘opportunity’ aspect of human rights — whereby seeing opportunity in terms of capability allows us to distinguish between what one possesses, and what one has the *means* or *instruments* or *permissions* to possess.³⁶

Our argument in favour of a capabilities approach further develops upon the inter-play between capabilities and rights. With the

³² Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315,346 (2004).

³³ Amartya Sen, *Human Rights and capabilities*, 6 J. HUM. DEV. 152 (2005).

³⁴ *Id.*, at 153.

³⁵ *Id.*

³⁶ *Id.*

idea of 'access to justice' as a key capability, the 'process' aspect of human rights would also cohere well with the capabilities approach. The right to access to justice would lead to not only an *opportunity* to enjoy other rights, but also answer disputed claims of *process* of any right (including itself), which if violated by any party, can cause the injured to claim relief by invoking this very right against the violator. For instance, say the state, in giving effect to the right to access to justice, enacts a law that makes it illegal for people above a certain level of income to sue in more than two cases in one lifetime. The rich can now claim that the very right of access to justice is being violated in their case, and they can claim relief by invoking their right to access courts. It is also possible that the 'process' aspect of one right can be defended by the 'opportunity' aspect of another right. For instance, the 'process' aspect of the right to work under the MGNREGA³⁷ can be defended by the 'opportunity' aspect of the right to access to justice. In such a case, the right to work would be measured purely in terms of its opportunity aspect in the creation of capabilities. The process aspect (say for instance, the element of choice, so that people are not forced to go to work, provided they do not claim wages) shall be acknowledged by seeing that the right to choose (which leads to the capability of exercising practical reason, a key capability in Nussbaum's set) is not violated, and in ensuring the 'opportunity' aspect in the right to 'access to justice', if the right is violated.

III. EVALUATING THE LAW THROUGH THE CAPABILITY APPROACH

In this part, we shall deal with two issues: first, whether the paradigm of the right to access to justice at all leads to capability development. This question shall be answered by considering what the right seeks to guarantee, and what access to justice means formalistically. The second issue relates to whether capabilities can be measured and whether there are problems of evaluating policies and programmes through this approach.

³⁷ MGNREGA refers to Mahatma Gandhi National Rural Employment Guarantee Act legal guarantee for 100 days of wage employment to every household in the rural areas of the country each year.

With regard to the first issue, it is important to deal with the concept of 'Access to Justice' at some length. This concept is wider than the popular coinage of 'legal aid', which traditionally encompassed legal representation in the courts of law. In fact, theories of legal aid now deal with other aspects such as public access to law that is preventive and protective, that brings change and hope, relieves poverty, and promotes prosperity. We can think of legal aid as providing public access to legal information, legal advice and legal knowledge.³⁸ As a result of the modern expansive understanding of legal aid, it has become an integral, if not the most important, component of access to justice. The reasons that mandate an expansive definition of access to justice have been characterized by Smith. They are: charity, poverty reduction and efficiency in the legal system, rule of law, lawyers' self-interest and human rights.³⁹ Whatever the definition, the perennial problem with access to justice, and more specifically, legal aid has been that its provision has been largely discretionary, subject to the whims of the State and relevant non-State actors.. Simon Rice provides a strong claim for the acceptance of this broader notion of access to justice as a duty of the State based on the theory of human rights.⁴⁰ A human right is a right that every person has; it is inherent in each of us from birth, and it is necessary in order to live with dignity and exercise reason and conscience.⁴¹ However, the concept of a 'human right' does not belong to an immutable set; it presents itself to debate, refinement and interpretation. For instance, although the Universal Declaration of Human Rights does not set out a human right to a clean and healthy environment, such a right has emerged through a continual process of debate and discussion in the international community.

³⁸ Simon Rice, *A Human Right to Legal Aid*, CONFERENCE ON THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH PROVISION OF LEGAL SERVICES: BEST PRACTICES FROM AFRICA, ASIA AND EASTERN EUROPE 1, available at <http://ssrn.com/abstract=106154> (follow "Download This Paper") (last modified on Feb. 6, 2009).

³⁹ Roger Smith, *Legal Aid as a Policy* (Jan. 28, 2007) (unpublished manuscript) (on file with the London School of Economics) reviewed by *id.* at 2.

⁴⁰ Rice, *supra* note 38.

⁴¹ Universal Declaration of Human Rights, G.A. Res. 217(III) A, Article 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

At this juncture, we shall examine the necessity for having a human right to access to justice. People's interactions in society lead to rules of behaviour being developed over time. These rules determine ways to lead dignified lives that optimize a person's capabilities to develop his potential to the fullest. This follows from the unarguable premise that peaceful co-existence maximizes human satisfaction, and the presence of conflicts leads to what Hobbes characterized as lives that were "solitary, poor, nasty, brutish, and short."⁴² We cannot live with dignity, exercising reason and conscience, if we do not know these rules of social behaviour, or if we cannot comply with and use these rules.⁴³ Rice argues that access to justice, should in fact, be recognized as a human right because it is both universal as well as fundamental to human existence and enables people to live life with dignity.⁴⁴ He does away with curtailment of this right by State actors and casts a duty upon States to implement this human right beyond just representation in trials. He further provides a *universal standard* by which the adequacy of any legal aid system can be judged.

Henry Shue's path-breaking exposition on rights further cements this argument. Shue contends that there are two basic rights: right of security⁴⁵, and right of subsistence⁴⁶. According to Shue, "*basic rights are everyone's minimum reasonable demands upon the rest of humanity.*"⁴⁷ These rights are basic in the sense that their enjoyment is *essential* to the enjoyment of all other rights.⁴⁸ Shue's

⁴² THOMAS HOBBS, LEVIATHAN (1651).

⁴³ Rice, *supra* note 38, at 9.

⁴⁴ *Id.*, at 10 (The content of the right of access to law is not a right to a lawyer, any more than a right to free expression is a right to make a radio broadcast, or a right to education is a right to private tutoring.)

⁴⁵ A basic right to physical security, i.e., not to be subjected to rape, murder, torture, mayhem or assault; see HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY 20-12 (2nd ed., 1996).

⁴⁶ Right to unpolluted water and air, adequate food and clothing, minimum public health care; see *id.*, at 22-23.

⁴⁷ *Id.*, at 19.

⁴⁸ *Id.*

analysis of basic rights coheres well with the capabilities approach as well; especially the view taken by Nussbaum of a basic set of capabilities; first, in that there are certain functions that are particularly central in human life, in the sense that their presence or absence is typically understood to be a mark of the presence or absence of human life and second, in that there is something that it is to do these functions in a truly human way, not a merely animal way.⁴⁹ Shue's analysis of basic rights and Nussbaum's analysis of basic capabilities thus intersect at a point – the enjoyment of both lead to the freedom to be “human.” Here, we would like to take Shue's argument a step further, and add the right to access to justice to his list of basic rights. The reasons for this are as follows: first, Shue presents a compelling picture of why the right to security is basic to the enjoyment of other rights when he says: “*No one can fully enjoy any right that is supposedly protected by society if someone can credibly threaten him or her with murder, rape, beating, etc., when he or she tries to enjoy the alleged right*”⁵⁰ and for right to subsistence, he says – “*No one can fully, if at all, enjoy any right that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy and active life.*”⁵¹ We suggest that the right to access to justice is perhaps an even stronger guarantee to the enjoyment of other non-basic rights than the right to security and subsistence, since it goes a step further to guarantee the enjoyment of these two basic rights. Further, it provides an assurance of a fair redressal mechanism in case of non-availability of the other basic rights. Shue stands out from other rights-analysts in his constant endeavour to provide conditions for the enforceability of rights.⁵² However, in our opinion, he misses the mark in terms of omitting to list this important (but greatly neglected) right that could empower people, and all classes of

⁴⁹ Martha Nussbaum, *Capabilities and Social Justice*, INT'L STUD. REV. 123, 130 (Summer 2002).

⁵⁰ SHUE, *supra* note 45, at 21.

⁵¹ SHUE, *supra* note 45, at 24.

⁵² See SHUE, *supra* note 45, at 16. (Being socially guaranteed is probably the single most important aspect of a standard right, because it is the aspect that necessitates correlative duties).

people, to make justified demands upon society. To answer the moot question now, as to whether the right to access to justice leads to capability development, we think the picture that has emerged from the discussion so far is clear. Access to justice corresponds to that basic right which inheres in us as a result of being human. It provides a security to all those capabilities which Nussbaum envisages as being central to our existence on account of the significant overlap between human rights and capabilities. Parallely, in Sen's theory which leaves room for public debate and reasoning to list the capabilities that society at any point of time views as important,⁵³ this right takes care of the *process* aspect of rights that guarantee capabilities.

Another take on this is possible. Capability is, according to Sen, "[A] set of vectors of functionings, reflecting the person's freedom to lead one type of life or . . . to choose from possible livings."⁵⁴ Thus, even rehabilitation assistance given to the accused after release, whether on acquittal, discharge or pre-trial release, can be viewed in terms of a significant capability. Here, assistance would be with regard to employment of the accused, which is vital due to the social stigma faced by such people.⁵⁵

As discussed previously, this right arguably leads to the development of capabilities in another sense as well – first, in the knowledge of society's rules and compliance of these that enables one to lead a life of dignity; second, in the resolution of conflicts that leads to development of one's fullest potential.

⁵³ Sen, *supra* note 33, at 157.

⁵⁴ A. SEN, *INEQUALITY REEXAMINED* 40 (1992).

⁵⁵ See A. Kenneth Pye, *The Administration of Criminal Justice*, 66 COLUM. L. REV. 286,298 (1996) (A system which is content to provide counsel in a criminal trial and to ignore the problems of pre-trial release, the social problems resulting from the defendant's poverty and his incarceration, and the prospects for his rehabilitation, is very much like a doctor giving morphine to a patient who has a leg infected with gangrene. It may give temporary relief from the pain but it does not help to solve the problem. The infection will continue to get worse unless something is done about the cause of the pain.)

The second issue is that of assessment and measurement, and a general account of why the capabilities approach is the best method to deal with the right to access to justice. It is clear by now that the capability approach focuses on the direct evaluation of people's well-being (i.e. indicators of quality of life) as opposed to assessing development programs through measuring inputs or means (i.e. increase in incomes, or consumptions).⁵⁶ First, this approach simplifies the assessment of development policies which do not lead to an ostensible increase in incomes (unlike poverty alleviation programmes which focus on cash flow to the poor).⁵⁷ Thus, this approach is particularly appropriate in the context of access to justice. Second, Sen's enduring position to leave room for participation by societies themselves in formulating a list of capabilities they value, through public discussion and democratic processes, succinctly solves the problem of a top-down model of legal services delivery which tries to solve the problems of access to justice faced by the impoverished by outsiders who observe them.⁵⁸ As shall be argued by us in the following section, in the absence of a participatory framework which addresses the concerns of all stakeholders, the outcome of functionings that are given priority is always going to be questionable. Third, in the capability approach, freedom is "[T]he real opportunity that we have to accomplish what we value"⁵⁹. It does not, therefore, refer to freedoms or opportunities that a person might hold theoretically or legally but which, in reality, lie well beyond his reach.⁶⁰ Thus, this approach is in consonance with the rights-based approach taken by Shue and others, where rights have to fulfill an additional criterion of enforceability to be determined as 'rights' and not mere 'proclamations'.⁶¹ This makes it easy for the

⁵⁶ See generally Sen, *supra* note 33.

⁵⁷ A good example of this is the M.G. National Rural Employment Guarantee Act, 2005, which provides 100 days of wage earning jobs to one adult member of every family.

⁵⁸ See generally UPENDRA BAXI, *LAW AND POVERTY: CRITICAL ESSAYS* (1988).

⁵⁹ SEN, *supra* note 54, at 31; see also SEN, *supra* note 9, at 74.

⁶⁰ See, Alkire, *Why the Capability Approach?*, 6 J. HUM. DEV. 115, 121 (2005).

⁶¹ See SHUE, *supra* note 45, at 15 (A proclamation of a right is not the fulfillment of a right, any more than an airplane schedule is a flight. A proclamation may or may not be an initial step towards the fulfillment of the rights listed.)

capabilities approach to appraise rights-based schemes like the one under discussion. And finally, the capabilities approach is predominantly valuable in the context of socio-economic rights, since in this domain, “the link between the procedural guarantees and the underlying goals is less tight than in the case of civil and political rights.”⁶² However, this does not imply by any means that the evaluation of social justice by the capabilities approach is a cinch. Indeed, scholars like Robeyns and Alkire have dealt in some length about the problems of prioritizing and measuring capabilities.⁶³ However, the solutions that have been offered are not without substance either. Both scholars acknowledge that the problems with this approach take nothing away from the considerable advantage it provides (primarily in shifting attention from the *means* to the *ends*).⁶⁴ While Robeyns suggests that we move beyond Nussbaum’s list, and work out a set of methods to select capabilities in a way that addresses concerns about legitimacy of such a list (possibly through democratic participation), Alkire reckons that a collaborative enterprise involving many researchers working on different aspects of the approach at the same time is the order of the day. Also, capabilities theorists including Sabina Alkire and Flavio Commim are in the process of ‘operationalising’ capabilities, i.e. developing concrete indices that can be used to measure capabilities.⁶⁵ However, Haldar contends that “capabilities, like liberty, is a concept; and just as you cannot say that a legislative act on the freedom of expression, for instance, will give each individual 12 units of liberty, capabilities cannot be quantified numerically.”⁶⁶ She argues that the purpose of adopting the capabilities approach is to bring about a paradigm shift in the way we think about the law as well as the evaluative space in which we choose to measure its success.⁶⁷

⁶² See generally Haldar, *supra* note 27.

⁶³ See, Alkire, *supra* note 61, at 121; and see Ingrid Robeyns, *Selecting Capabilities for Quality of Life Measurement*, 74 SOC. INDICATORS RES. 191 (2005).

⁶⁴ For a detailed discussion on this see SEN, *supra* note 10, at 90.

⁶⁵ See Haldar, *supra* note 27.

⁶⁶ Haldar, *supra* note 27.

⁶⁷ Haldar, *supra* note 27.

Now that we have earmarked the function of this right through the capability approach, and have devised a tentative strategy for its evaluation, it is easy to apply this theory in a practical test of any legal system. To provide an example of how this can be done, we shall examine, in the following section, whether the concerned central legislation in India, i.e. the Legal Services Authorities Act guarantees an improvement of capabilities, and consequently of the functionings of its target groups.

IV. ACCESS TO JUSTICE IN INDIA: IS EVERYTHING ALL ‘RIGHT’?

Making legal institutions accessible and responsive to the poor is one of the major challenges that confront law and judicial reform initiatives. In this section we use the capabilities approach to analyze the role of legal aid in India taking the example of the principal legislation facilitating the same. However, what we seek to achieve is a bird-eye’s view of the Legal Services Authorities Act, 1987 (*hereinafter* LSAA) with the capability lens, and not an in-depth focus of the same.⁶⁸

Under the LSAA, any person who is a member of the schedule castes or tribes, poor (with an annual income of not more than Rs.50000/-for cases in the Supreme Court and Rs.25000/- in other Courts), a victim of trafficking in human beings or beggar, disabled including mentally disabled, a woman or child, a victim of mass disaster, ethnic violence, caste atrocity, etc. unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence, and incommunicado situation, is entitled to *free legal aid*.⁶⁹ Another interesting feature of the LSAA is the introduction of the innovative

⁶⁸ The Preamble to the Act states, “An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.”

⁶⁹ See *id.* § 12.

forum of Lok Adalats⁷⁰ which have enjoyed substantial governmental and judicial support and are promoted as a promising avenue of access to justice. We further elucidate that the much-touted ‘right’ to legal aid under the LSAA has not led to any significant entitlements or co-related notions of ‘freedoms’ which scholars have repeatedly associated with the blueprint of rights.

The UNDP Note on Access to Justice identifies five stages in which support is needed to promote access to justice.⁷¹ Under the capabilities framework, these can be viewed as six essential capabilities that form the fundamentals of access to justice. These are: *legal protection, legal awareness, legal aid and counsel, adjudication, enforcement and monitoring*.⁷²

Legal protection relates to the development of capabilities to ensure that the rights of disadvantaged people are recognized within the scope of justice systems through reform in the law and the judicial system.. In the context of India, this has mainly been enhanced by an activist judiciary taking up cudgels for the rights of the impoverished through public interest litigations.

Legal awareness relates to the “[D]issemination of information that would help disadvantaged people understand the following: (a) their right to seek redress through the justice system; (b) the various officials and institutions entrusted to protect their access to justice; and (c) the steps involved in starting legal procedures.”⁷³ Undoubtedly, this is an important step in attaining the goal of Justice. The poor cannot seek remedies under the law if

⁷⁰ See *id.* Chapter VI. For a discussion on Lok Adalats as a forum for Alternate Dispute Resolution (ADR) see Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor*, 55 HASTINGS L. J. 789, 790 (2004) (“[T]he *lok adalat*, literally ‘people’s court,’ and as the name suggests it is promoted as having a different source and character than the courts of the state.”).

⁷¹ UNDP, *supra* note 4, at 6.

⁷² UNDP, *supra* note 4, at 6.

⁷³ UNDP, *supra* note 4, at 7.

they are unacquainted with their rights. The biggest failure of the LSAA is in its lack of adequate support in building this key capability. For instance, the LSAA has no provisions to compulsorily mandate the translation of legislations from English to local languages other than Hindi.⁷⁴ This defect of raising awareness has been recently sought to be remedied by the National Legal Services Authority (*hereinafter* NALSA), the parent authority created under the LSAA to oversee the functioning of legal services in the state, in their ambitious new mission of training paralegals across the country⁷⁵, (popularly christened “barefoot lawyering”⁷⁶). Under this initiative, around one lakh paralegals across the country will be trained to act as messiahs of legal awareness, removing barriers to access to justice. However, some opine that the success of the scheme hinges on the dedication of the paralegal volunteers who would have to work virtually gratis.⁷⁷ Moreover much of the initiative in this regard will have to be taken by the respective state governments in conjunction with the State Bar Councils and the local centres of legal education. This makes it difficult to extrapolate this scheme across the length and breadth of the country, mainly due to the varying degrees of response and infrastructural support from local authorities in different states. Lack of resources and problems of accessibility to remote areas also might hinder this ambitious project⁷⁸. However, lessons can be learnt from the success

⁷⁴ INDIA CONST. art. 348 cl. 1 (requiring the authoritative text of all laws to be in English, until Parliament decides otherwise.); Parliament has not exercised its power to so decide, instead merely requiring that all such laws and instruments, and all bills brought before it, also be translated into Hindi, though the English text remains authoritative; *see also* The Official Languages Act, 1963.

⁷⁵ NALSA's Plan of Action for the year 2009-10, *available at* <http://barandbench.com/content/1-lakh-paralegals-be-trained-nalsa-calls-law-students-participate> (last visited on 21st January, 2012).

⁷⁶ *Barefoot Benevolence*, THE TELEGRAPH, (Nov. 3, 2010), http://www.telegraphindia.com/11011103/jsp/opinion/story_13133405.jsp.

⁷⁷ *Id.*

⁷⁸ P. Sunderarajan, *Manmohan Calls for Overhaul of Legal Education*, THE HINDU (May 1, 2010), <http://www.thehindu.com/news/national/manmohan-calls-for-overhaul-of-legal-education-system/article419060.ece>.

of para-legal schemes in other parts of the world, particularly in South Africa and Sierra Leone.⁷⁹

The third area of support relates to legal aid in representation. The considerable costs attached to the services of legal counsel and legal processes tend to discourage those who cannot afford them from seeking legal remedies. Availability, affordability and adequacy are the three major challenges faced by the poor and other disadvantaged groups when it comes to legal aid.⁸⁰

Adjudication support needs the building of capabilities of local communities to determine the most adequate type of redress or compensation.⁸¹ Also, long delays in settlement of cases can deter access to adjudicatory institutions and need to be avoided. In India, Alternative Dispute Resolution mechanisms were devised as a way to dispose of pending cases, through the device of the Lok Adalat under the LSAA. Galanter and Krishnan studied this 'indigenous' model of delivering justice in their decisive work on the subject, and concluded that while the model does reduce the institutional burden on the courts,⁸² Lok Adalats often fail to secure the confidence of the people, with its supposed advantage of 'informalism' proving to be a setback in delivering *fairness* in procedure and outcome.⁸³ Perhaps as a result of this, Lok Adalats have typically not been able "to attract cases with heavy financial stakes or important civil litigation. Private litigation [has] remained totally outside the ambit of Lok Adalats."⁸⁴

⁷⁹ See, e.g., Vivek Maru, *Between Law and Society : Paralegals and the provision of Justice Services in Sierra Leone and worldwide*, 31 YALE J. INT'L L. 427 (2006) available at http://www.yale.edu/yjil/PDFs/vol_31/Maru.pdf.

⁸⁰ UNDP, *supra* note 4, at 12.

⁸¹ *Id.*, at 13.

⁸² Bibek Debroy, *Losing a World Record*, FAR EASTERN ECON. REV. 23 (Feb. 14, 2002), noted in Galanter-Krishnan, *supra* note 70, at 789 (stating that there were 23 million pending court cases).

⁸³ See generally *id.*

⁸⁴ P.C. Rao, *Alternatives to Litigation in India*, in ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS 27 (P.C. Rao & William Sheffield eds., 1997) reviewed by Galanter-Krishnan, *supra* note 70, at 800.

Through empirical research, Galanter and Krishnan have demonstrated that the ‘informalism’ of the Lok Adalat, with its emphasis on compromise and speedy disposal, could optimally disadvantage weaker parties.⁸⁵

Finally, to improve the overall accountability of the justice system, monitoring capabilities of civil society need to be enhanced. Key legislations such as the Right to Information Act, 2005, the pending Lokpal Bill⁸⁶ or the controversial Judges Accountability Bill⁸⁷ can go a long way in curbing abusive practices by authorities, if properly implemented. However, it is pertinent to note that the LSAA itself creates no such institutional safeguards to provide a check on the legal aid service providers or the quality of the services provided. No mechanism has been provided under the LSAA to ensure feedback from the deprived groups about the quality of services received, and this anti-participatory approach is inherently contradictory to Sen’s vision of democratic development. The paralegal scheme also suffers from this crucial defect, as there is virtually no monitoring of the competency of the paralegals under the scheme.⁸⁸ Opening channels of communication between vulnerable groups and legal aid providers will not only ensure improvement in the identification and development of high priority-capabilities of these groups, but also strengthen partnerships between the two sides ensuring greater effectiveness.⁸⁹

⁸⁵ The recent Gram Nyayalayas Act, 2008 also suffers from these defects. See, Menaka Guruswamy & Aditya Singh, *Accessing Injustice: The Gram Nyayalayas Act, 2008*, 40 ECON. & POL. WKLY. 16 (2010), available at http://beta.epw.in/static_media/PDF/archives_pdf/2010/10/C102310_Accessing_Menaka_Guruswamy.pdf.

⁸⁶ This flagged off nationwide support in the fight against corruption, headed by social activist Anna Hazare in January 2012.

⁸⁷ See *Judges accountability bill taking final shape: Moily*, ZEENEWS.COM, (Sep 14, 2010), <http://www.zeenews.com/news655133.html>.

⁸⁸ In Sierra Leone, for eg., there are Community Oversight Boards (COBs) for monitoring the para-legals work. See Maru, *supra* note 80, at 442.

⁸⁹ See, e.g., M. Abregu, *Barricades or Obstacles: The Challenges of Access to Justice*, <http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186409169154/02ConferenceProceedings.pdf> (last

CONCLUSION

Access to justice is a broad set of associated capabilities, and newer methods and innovations are needed to ensure that the right proceeds beyond mere legal representation in criminal trials. It must be extended to include a variety of reformatory and inclusive practices that give full effect to the range of functionings that this set can guarantee. The suggestions are many and varied, and come from diverse groups of people. For instance, the judiciary itself has been extremely pro-active in devising ingenious (and often contradictory) approaches. Thus, for instance, while Justice Chandrachud argues that “institutionalised conciliation has to be a “regular feature of justice delivery” and “training of Judges and lawyers in conciliation techniques is necessary”⁹⁰, there is also strong evidence to suggest that taking justice away from the courts to ADR mechanisms is not always a viable solution.⁹¹

In the absence of any consensus as to the “right” way to assure justice for all, therefore, Sen’s capabilities approach provides an

visited Jan. 22, 2012); see also Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* (Carnegie Endowment for International Peace, Working Paper No. 41, 2003) available at <http://www.carnegieendowment.org/files/wp41.pdf> (An alternative, more balanced approach often is preferable: legal empowerment—the use of legal services and related development activities to increase disadvantaged populations’ control over their lives. This alternative paradigm, a manifestation of community-driven and rights-based development, is grounded in grassroots needs and activities but can translate community-level work into impact on national laws and institutions. It prioritizes civil society support because it is typically the best route to strengthening the legal capacities and power of the poor).

⁹⁰ Y. Chandrachud, *Poverty, Access to Justice and Implementation of Human Rights*, First South Asian Regional Colloquium on Access to Justice (2002).

⁹¹ Richard C. Crook, *State courts and the regulation of land disputes in Ghana: the litigants’ perspective* (Institute of Development Studies, Working Paper No. 241, 2005) available at <http://www.ids.ac.uk/files/Wp241.pdf> (stating that there was, in Ghana, “[A] very strong demand for authoritative and enforceable settlements which only the state could provide.”).

answer. Access to justice initiatives should concentrate on building capabilities of the communities they profess to assist, and listing of such capabilities should be in consonance with democratic public reasoning. Vulnerable groups should voice their priorities when such policies are being framed. The capabilities that are valued by such groups, along with the functionings they wish to nurture should form the basis for all access to justice programmes. Participatory mechanisms need to be put in place in order to take into account the concerns of all stakeholders in the movement. This, in our opinion, is the way forward.