Alternative Methods Of Access To Justice In India

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Abstract: The aim of the paper is to analyze the prevalent methods in access to justice in light of the power relations. Also this paper seeks to analyze the alternative methods of access to justice and suggest an alternative method of access to justice to suit the needs of Indian society. In the present paper, the author has tried to focus on the alternative dispute resolution mechanisms which can open new vistas for methods of access to justice. The process of adjudication as practiced in Courts presently, the lacunae of such approach is also dealt with in this paper. The author has tried to evolve a new method of access to justice which is suitable for the Indian legal culture. The author has made use of an analytical and descriptive style of writing. The author has done doctrinal research on the basis of available secondary sources like Books, Journals and websites.
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1. Introduction:

The term "access to justice" can not be given any precise meaning. Its meaning is intricately intertwined with the meaning of the term "justice." On its turn, the definition of justice depends on the context it is being used. For every society the term has a different significance. For some it may be fairness whereas others might term it as advantage of the stronger. In the common parlance, the term "access to justice" is used synonymously with the access to dispute resolution mechanisms provided by the State.

Earlier, a right of access to judicial protection meant essentially the aggrieved individual's formal right to litigate or defend a claim. The rationale given for such narrow approach to access to justice was that though access to justice was a natural right, natural rights did not require affirmative state action. However, in the recent theories, with the emergence of the welfare state, the right to access to justice has gained grounds. Thus from a passive right, the right to access to justice has become an effective right wherein not only the right to litigate or defend a claim, but also the right to access such forums and have parity of power with the other litigants.

However one should not confuse access to justice with access to courts only. First, that it is the police and other public officials who are seen as the face of justice rather than the courts. For most people, access to justice is not the same as access to courts. For small disputes and disturbances people are likely to seek settlement from the police in the first instance. If we are to talk seriously about access to justice we must discuss access to an entire justice system- police, prisons, prosecution, service of process, adjudication, ADR, and enforcement of judgments- that is fair and efficient.

In the present paper, the author has tried to focus on the alternative dispute resolution mechanisms which can open new vistas for methods of access to justice. The process of adjudication as practiced in Courts presently, the lacunae of such approach is also dealt with in this paper. The author has tried to evolve a new method of access to justice which is suitable for the Indian legal culture.

2. Conventional Methods Of Access To Justice: Are They Suitable To The Indian Legal System

The conventional method of access to justice is the recourse to formal adjudication mechanisms as provided by the State, i.e. approaching the courts. The present model of legal system in India is of British import. Initially confined to the four presidencies, the system started expanding with the inclusion of Indian states in the British Empire. Since the primary concern of the Colonial masters was draining the economic resources of the country to Britain, little thought was given to developing a *sui generis* legal model which could suit the need of Indian society. The community justice system as well as inquisitorial litigation model as prevalent in India prior to the advent of British was alien to the English legal system. Thus the legal system based on common law was imposed on India.

A consequence of such imposition was that the bodies of justice administration which earlier existed in India were thrown in cold oblivion and their place was taken by the court type adjudication of disputes. This model of litigation is also known as the

adversarial model of litigation. In this model, the State acts an uninterested umpire of the dispute between the private parties. If it is a criminal case, then the proceedings are launched by the State, whereas in civil cases the onus of initiating the proceedings is on the private individuals. It is a known fact that multitude of cases that reach the courts are of civil nature. Thus for a breach of contract or deprivation of a right, which would have happened due to the State's fault, still the proceedings are to be launched by the private individuals. It is pertinent to mention that in British period, no fundamental rights were recognized and thus if any violation of fundamental rights took place, still the State was not liable.

However, with the Constitution of India coming into force, the fundamental policy choice of the nation changed. The people of India, through their representatives in Constituent Assembly, resolved to secure for all its citizens Justice- social, economic and political. Apart from this solemn affirmation in the preamble, Article 14 of the Constitution makes it incumbent on the State not to deny to any person equality before law or equal protection of law. Thus the State is under a duty to ensure that every person is given equal protection of laws and breach of this duty will be a violation of the mandate in Article 14. In addition, Article 256 casts a duty on the State governments to ensure compliance with every law made by the Parliament and every existing law. Thus under the Constitution, a strict duty is cast on the State to ensure that there is a compliance with every law. Violation of a private right is undoubtedly a breach of law and as such if such a breach occurs, the presumption is that the State has failed in its duty of ensuring compliance with every law and giving equal protection of laws to every person. Thus it should be incumbent on the state to initiate proceedings against the faulting party and follow the principle of ***restitutio in integrum***.

Thus as per the Constitutional scheme, adversarial model, wherein the Courts perform the role of an arbiter and are not interested in ascertaining truth, has been discarded and impliedly an inquisitorial model has been chosen. Under this model, the Court itself, with help of the officers appointed for this purpose, undertakes investigation, determines which issues are to be taken up during the proceedings and the judge has substantial discretion in doing away with the procedural technicalities.

However, the aforementioned constitutional scheme has not seen the light of the day in practical working. The colonial hang-over is still haunting our legal system insomuch so that we are still following the adversarial model of litigation. Following this alien model has lead to a lot of problems. Some of them are enumerated below:

a) Awareness: The general lack of awareness of legal rights and remedies acts as a formidable barrier to accessing the formal adjudication machinery.

b) Mystification: The language of the law, invariably in very difficult and complicated English, makes it unintelligible even to the literate or educated person. And this is the language that courts and lawyers are comfortable with. Very little attempt has been made at vernacularising the language of the law and making it simpler and easily comprehensible to the person engaging with the FLS. This is the second major barrier.

c) Delay: Due to the adversarial model, the expediency of the litigatory process has been sacrificed. In an average, a civil case takes 20 years to settle. This problem of delay is due to the extended role of advocates in the litigation process. Despite being officers of the Court, they do not have any accountability towards expedient disposal of cases. Similarly there is no accountability of the judges to dispose off cases as early as possible. With huge influx of cases on a daily basis and substantial amount of arrears, the problem of arrears is taking a gargantuan shape. In this regards, the remarks of eminent jurist, Nani A. Palkiwala can be referred:

"...legal redress is time consuming enough to make infinity, intelligible. A lawsuit once started in India is the nearest thing to eternal life ever seen on this earth.....

I am not aware of any country in the world where litigation goes on for as long a period as in India. Our cases drag over a length of time which makes eternity intelligible. The law may or may not be an ass, but in India it is certainly a snail and our cases proceed at a pace which would be regarded as unduly slow in a community of snails. Justice has to be blind, but I see no reason why it should be also lame: here it just hobbles along, barely able to walk."

d) Costs: The cost of litigation in India is very high. This is also a repercussion of the adoption of adversarial model of litigation. Since the court cases drag on for years, the costs increases manifolds. In a country like India, where a substantial proportion of population still lives below the poverty line, the adverse cost benefit of taking recourse to the courts is very low. In fact the entire adjudicatory mechanism being alien to the Indian society, there is a lack of faith on the judiciary. It aggravates due to the fact that justice seems to be illusory in India.

e) Geographical location: This is an aspect that has not merited the attention it deserves. We need to audit the physical accessibility of courts from the point of view of user friendliness. And this need not involve additional costs. For instance, we have not yet designed our courtrooms and buildings to account for the needs of differently-abled people.

f) Access to Constitutional Courts: This is a matter of concern. In our constitutional framework, petitions for protection and enforcement of fundamental rights can be filed only in the High Courts and the Supreme Court. Thus, for instance, even petitions arising out of issues such as disappearances, custodial violence, encounter killings or instances where the police cannot be activated due to various reasons, have to be sent or filed to the High Court. Invariably, this involves travel to the High Court, engaging a lawyer there and regular follow up. A lot of time and expense is involved in this process. Even habeas corpus petitions can only be filed in the High Court. Thus the division of jurisdiction between High Courts and subordinate courts needs to be re-examined. We have the example of South Africa where even the subordinate courts are empowered to enforce some fundamental rights. The question that we need to address is whether we need to permit the subordinate courts to deal with some of these critical issues, which have a direct bearing on the rights to life and liberty, in order to facilitate access to justice.

Thus it can be fairly concluded that the present method of access to justice is totally unsuitable for the Indian society. An alternative method of access to justice has to be formulated. In common parlance, the alternatives to formal adjudicatory mechanisms are known as Alternative Dispute Resolution Methods.

3. Alternative Disputes Resolution Methods

"Equality is the basis of all modern systems of jurisprudence and administration of justice…in so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal and laws which are meant for his protection have no meaning and to that extent fail in their purpose."

When we adopt a model of alternative dispute resolution, we have to see that there is a parity of power between the parties to the dispute. Thus a good dispute resolution method should be such which minimizes the advantage of money and pelf. In addition, a good alternative dispute resolution mechanism should pass the acid test of conforming to all the bands in the power spectrum as enunciated by **Prof. Julius Stone in his book, Social Dimensions of Law and Justice.** Let us now see whether the existing alternative dispute resolution mechanisms fulfill this test.

ADR today falls into two broad categories: court-annexed options and community-based dispute resolution mechanisms. Court-annexed ADR includes mediation/conciliation—the classic method where a neutral third party assists disputants in reaching a mutually acceptable solution—as well as variations of early neutral evaluation, a summary jury trial, a mini-trial, and other techniques. Supporters argue that such methods decrease the cost and time of litigation, improving access to justice and reducing court backlog, while at the same time preserving important social relationships for disputants.

Some definitions of ADR also include commercial arbitration: private adversarial proceedings in which a neutral third party issues a binding decision. In year 1996, India enacted the Arbitration and Conciliation Act based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, which makes an arbitral award legally binding and grants broad rights to commercial parties choosing arbitration. However, arbitration, once considered an alternative to litigation, is now afflicted by the same problems of cost, delay, complexity, and dependence on legal representation.

- **Negotiation**

Negotiation is one of the alternatives to formal dispute resolution mechanisms. In negotiation, one can settle the disputes by discussing it with the opposing parties or discussion can take place through the representatives of the parties to the dispute. The parties to a dispute can, on their own motion start a process of negotiations through correspondence or through one or two mediators with a view to finding a mutually acceptable solution of the problems. Negotiation, by definition, excludes the participation of an authority who has the obligation or the right to apply a particular rule to the issue in dispute. Negotiations are often dependant on the bargaining power of the parties. Often extraneous terms such as maintaining good relations with the opposing party results in compromising legal rights. Thus the method of negotiation is high on the **coercion band**, and also on the influence band. Since a number of interests get jeopardized in the process, it is also high on interest affected band. The advantage of negotiations is that time is saved and thus time count goes in favour of the process of negotiation.

- **Mediation**

Mediation is a process by which disputing parties engage the assistance of a neutral third party to act as a mediator. The mediator is a facilitator who may in some models of mediation also provide a non-binding evaluation of the merits of the disputes, if required, but who cannot make any binding adjudicatory decisions.

The parties are free to evaluate the law and the facts, even to err in what is law, is factor is important, and to walk away with no decision if either of them doesn't like the deal that is offered.

Both in negotiation and mediation, parties are free to waive of their rights. Such waiver is against the mandate of the Constitution. The Supreme Court in *Basheshwar Nath v. Commissioner of Income Tax* and

in *Olga Tellis v. Bombay Muncipal Corporation* has authoritatively pronounced that there could be no waiver of right conferred by Art 14. Thus the process of negotiation and mediation do not fit the constitutional scheme.

- **Lok Adalat**

"Lok Adalat" is defined 'as a forum where voluntary effort aimed at bringing about settlement of disputes between the parties is made through conciliatory and pervasive efforts'. Lok Adalat are thus an extended form of conciliation wherein the parties are assisted by the judges and is basically meant to avoid the inordinate delays in the formal adjudication mechanisms and to clear the backlog of arrears of cases. One of the lacuna in the present form of Lok adalats is that a case can be taken to Lok adalat only when the petitioner/ claimant wants the same, thus it takes a form of conciliatory approach. Moreover, in lok adalats there is no *restitutio integrum*. As mentioned above, conciliations are against the constitutional mandate.

- **Ombudsman**

The Ombudsman is a public sector institution, preferably established by the legislative branch of government, to supervise the administrative activity of the executive branch.

The traditional ombudsman has the power to investigate complaints from persons that the administrative activities of the government are being conducted in an illegal or unfair manner, make findings whether or not there has been wrong doing based on the results of the investigations, and make recommendations for improvement if improper administrative conduct is found. Typically, the ombudsman has no power to make decisions that are binding on the government. Rather, ombudsman uses persuasions to attempt to obtain implementation of the recommendations made for change in administrative conduct. In addition the ombudsman may also have the authority to recommend changes in laws and regulations. In addition, the ombudsman can use publicity to highlight problematic administrative activity through the medium of annual, and sometime special, reports to the legislature.

A few ombudsmen are authorized to engage in Alternative Dispute Resolution during the investigation, for example the Saskatchewan Ombudsman, South Africa Public Protector, Human Rights ombudsmen etc.

Unfortunately, in India, the experience does not seem to be encouraging. At Centre, the office of ombudsman known as *Lokpal* is still to see the light of the day. The office of ombudsman, known and called '*Lokayukta*' has started functioning in some states but is till in nascent phase with no real teeth being given to the said office.

The efficacy of the office of ombudsman is till to be seen in India. Since India has no explored this option in the real sense, it will be too early to comment on its constitutionality. However, if the ombudsman functions as an authority under the inquisitorial system, it can prove to be fruitful.

- **Nyaya Panchayat:**

Nyaya Panchayats in India are an attempt to bring justice nearer to the people. It is an extension of the panchayat systems prevalent in India before the British regime. Since Article 50 of the Constitution directs the state to take steps to separate the judiciary from the executive, nyaya panchayats can be seen as a fulfillment of this directive.

Nyaya Panchayat usually covers an area covering 7 to 10 villages and a population of over 14,000 to 15,000. It is an elected body which is elected by the Gram Panchayat which on its turn is also an elected body.

The essential features of the adjudication procedure of Nyaya Panchayats are:

a. simplicity of procedures and flexibility of functioning.

b. principles of natural justice to be followed in the proceedings and no other technical procedural laws are followed.

c. laws of the limitation and evidence are not binding.

d. complaints may be made orally or in writing;

e. No legal representation is allowed, although in some civil matters parties may be represented by an "agent".

f. at the stage of reaching a decision, parties are asked to absent themselves; *panchas* confer among themselves and arrive at a decision, which is pronounced in open court.

g. A judgment is written which, after being readout in open court is signed by the parties signifying the communication of judgment to them. Witnesses, if any, are examined on oath or solemn affirmation.

Depersonalization of power appears to arise from the observed psychological fact that readiness of an individual to submit to authority is increased by awareness of similar submission by others, and decreased by awareness their resistance. Thus the non-submission by the majority of the people to the decision of *Nyaya Panchayat* will reduce the tendency of submission of others as well. Then there will be no depersonalized power as well. A study in Uttar Pradesh indicates that factions within villages can influence the Nyaya Panchayat substantially in favour of the powerful fraction, at the expense of justice values. Thus here, even though *Nyaya Panchayat* is an institutionalized system, the power is not depersonalized or transpersonalised. It is personalized

power. In fact, the law commission in its fourteenth report reveals that nominated *panchas* may not command the complete confidence of the villagers; nominated *panchas* may be impartial, but the nominating officer may lack first hand knowledge of local conditions. In that event the freely expressed will of the villagers, in substance would be replaced by untrustworthy recommendations of sub-ordinate officials.

Thus there is violation of Article 14 of the Constitution of India, because there is no protection of laws because this arbitrariness of *Nyaya Panchayats.* Thus Supreme Court in *E P Rayappa v State of Tamil Nadu* was right in stating "equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a Republic, while the other, to the whim and caprice of an absolute monarch".

Thus one can say that the effectiveness of the present from of ADRS can be questioned. From Lok Adalats to Arbitration, from Conciliation to Nyaya Panchayats, none of the present mechanisms have been able to fulfill the need of the hour and do not fit in the Indian legal system while some ADR processes such as conciliation and mediation are not effective because of a mediator or a conciliator has no power to order a party to appear and defend a claim. Nor can a mediator or conciliator compel the losing side to comply with a decision. Sometimes the desire to remain on good terms with the other party or to preserve one's reputation provides the incentive to submit to an ADR process and waive their rights. This as mentioned above is against the mandate of the Constitution.

Conclusion & Suggestion:

Thus it can be concluded that the British systems of court adjudication as well as the present methods of alternative dispute resolution have not been effective in India. There are several lacunae in the formal adjudication mechanism which unfortunately is completely alien to the ailments of the Indian society. The legal culture of India has been different from the British culture and as such the British legal system adopted in India has created several new problems. On the other hand, the present alternative methods of access to justice are also not catering to the needs of the people.

Arbitration is, undoubtedly, a good method of access to justice. But being based on the UNCITRAL model, it does not specifically deal with the problems faced by the Indians. Another lacuna is that it is based on the adversarial model of litigation which results in delay and high costs. Conciliation and mediation are against the constitutional mandate. Similarly, the present mode of working of lok adalats and nyaya panchayats have given way to justice being termed as the advantage of the stronger.

For a model which suits the needs of Indian society, we need to look back in past. Every society develops and evolves a unique legal system which caters to its unique problems. India too had developed its own model of dispute resolution. Under this model, the executive was in charge of performing a dual role of executive as well as judiciary. The advantage of this was that the authority giving justice was also responsible for implementing it. The principles of Rajadharma are the answers for the present problems of the Indian society, On the basis of these principles, an alternative method of access to justice can be developed. Under this model, the judiciary, instead of being a spectator, is involved in the ascertainment of justice and is pro-active. Thus the model that the researcher suggests is an inquisitorial model wherein the judiciary is given the function of investigation and execution also. Not only this judiciary should be made accountable for any lapse of duty on their part.

Under the constitution, it is the State's duty to enforce compliance with every law and also to provide equal protection of law. Thus the Constitution requires a more pro-active role of the state in justice administration. It is high time that the State realizes that the Constitution has envisaged a far bigger role for the State in the Indian Society than what it is being played by it presently. We do not need an alternative method of access to justice, what we need is that the Constitution be enforced in its true spirit. For this an inquisitorial method of access to justice has to be followed.

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