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ALTERNATE DISPUTE RESOLUTION AT THE GRASSROOT LEVEL

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INTRODUCTION

Eminent jurist, Nani Palkhivala has reflected on the irony of the judicial system, in this fashion:

"If longevity of litigation is made an item in Olympics, no doubt the Gold will come to India"

Our judicial system has been embroiled in fierce criticism for its tremendous backlog, rigidity of procedure, exorbitant costs and interminable delays in adjudication of disputes. The adversarial character of litigation in conjunction with the formality of procedure renders the judiciary inept to address the longstanding problem of court congestion. The abysmal state of affairs as reflected in the statistics reveal that there are 35.4 lakh cases pending in 21 High courts in the country. On the other hand, the subordinate courts are plagued with a backlog of over 2 crore cases for as long as 25 to 30 years.[1]

Amid such a dismal state of affairs, Alternative method of dispute resolution presents itself as a panacea of most ills embossed in the traditional litigation mechanism. Alternative Dispute resolution (hereinafter referred to as "ADR") a term used to refer to a wide array of non-judicial dispute resolution processes ranging from arbitration, mediation, negotiation, minitrials, and private judging –has become the cynosure of attention of the legal fraternity. The exponential rise in the prominence of ADR has been due to a combination of factors, such as saving of monetary, time and emotional costs, preservation of privacy and confidentiality, and party's control over the resolution process. In contrast to the court's fixation for procedural rules, ADR rests on an effective problem solving approach wherein the parties adopt creative and innovative strategies to fashion relief particular to the substance of dispute.

The above context of ADR motivates the aim of this essay. First, it explores the historical origin of the ADR system in India coupled with an examination of the existing ADR machinery. Second, it develops an understanding of the reasons owing to which the utilization of ADR machinery is confined to corporations and denied to common man. Thirdly, it undertakes an analysis of the proposed legislative Bills to present a framework for induction of Ancient India's Nyaya Panchayats

[1] Annual Report, 2005-06, Law Ministry, Government of India

in the grass root level. Fourthly, it remarks on the lacunas in the proposed bills and presents suggestions to strengthen the system of delivery of justice in the village level for the benefit of Aam Aadmi.

EXISTING ADR MACHINERY IN INDIA

A glimpse of the dispute resolution system prevalent in ancient times reveals that the philosophy of amicable and speedy ADR based on the premise of participatory justice is firmly entrenched in the legal history of India. Ancient Hindu Jurists laid more importance on the determination of disputes by arbitrators or tribunals not established by the king. Yajnavalkaya and Narada state that village councils (*kulani*), corporation (*sreni*) and assemblies (*puga*) used to decide lawsuits.[2] The decision of *Kula* was subject to revision by *Sreni*, which in turn could be revised by the *Puga*.[3] These arbitral tribunals assumed the form of "*Panchayats*" in the villages wherein the "*Panches*" decided matters informally untrammeled by the technicalities of procedure and evidence. The Panches were village elders elected according to their wealth, social standing and influence in their village. Fear of social ostracism corroborated the binding value of the decisions delivered by the Panches in rural India. However, with the change in social and economic conditions, the functioning of such arbitral bodies became inadequate and outmoded, albeit in some form or another, even today, some variants of such arbitral bodies are prevalent in the rural areas.[4]

The resurgence of interest in ADR owing to rapid advancements in the commercial arena led to the enactment of a consolidated and comprehensive legislation, namely, the Arbitration Act of 1940 (Act No. 10). Post independence in 1947, the growing inclination of the business community towards arbitration for settlement of disputes as against court – litigation, led to the revelation of certain deficiencies lacunas in the 1940 enactment. It was felt that the provisions of the 1940 Arbitration Act, about the duties and powers of arbitrators or about the procedure for conducting the proceedings after a reference, were notably inadequate. Hence, the law on ADR was revamped by enactment of the Arbitration and Conciliation Act of 1966 (hereinafter referred as "The Act"), wherein statutory recognition was allotted to conciliation as a mode of dispute resolution.

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[2] P.V.Kane, *History of Dharmashastra*, Vol.III, (1946) p.242

[3] *Chanbasappa v. Baslingyya,* AIR 1927 Bom 565

[4] O.P. Malhotra, *The Law and Practice of Arbitration and Conciliation*, ed. (2002) p. 4.

In the 1980's, Lok Adalats were setup with an intent to provide free and competent legal services to the economically deprived sections of the society which subsequently received statutory recognition by the enactment of the Legal Service Authorities Act, 1987.[5] This noble initiative was implemented to secure the faith of the rural masses in social justice and promote the ideals of equality before law and equal protection before law as embedded in our constitution. In such village level people's courts, trained mediators presided over the dispute resolution process and ensured the participation of village men in arriving at a mutually agreeable decisions sans onerous litigation costs and delay. The statutory foundation provided by the Act awarded legal recognition to the decisions made by the Lok Adalats and conspicuously helped to uphold the cause of quick and inexpensive justice to the poor and needy.

Introduction of section 89 and Order X Rule 1A, 1B and 1C by way of the 1999 Amendment in the Code of Civil Procedure, 1908 is a radical advancement made by the Indian Legislature in embracing the system of "*Court Referred ADR*". Section 89 confers on the court the authority to refer certain disputes for resolution if there exists an element of settlement which may be acceptable to the parties. The law codified in section 89 recognizes four different types of methods under ADR stated as follows.

1. Arbitration

   Arbitration involves procedurally simplified and expedited fact finding and decision by a neutral third party, which decision is only binding on the parties in the instant case and carries no precedential effect.

2. Conciliation

   Conciliation involves direct discussion and bargaining between disputing parties to arrive at a mutually acceptable resolution of disputed issues. Part III of the Act comprising sections 61 to 81 deal with the procedure for conciliation.

3. Mediation

   Mediation is a voluntary and consensual process wherein the disputing parties are assisted in reaching a mutually agreeable settlement by a neutral third party, whose role is to facilitate communications and discussions, but who has no decision making power

[5] Marc Galanter and Jayanth K. Krishnan, "Bread for the Poor: Access to Justice and the Rights of the Needy in India" Hastings Law Journal, Vol. 55, p. 789, 2004

4. Judicial settlement including settlement through Lok Adalat
   As elaborated above.

Delving into the nuances of arbitration, there are essentially four kinds of arbitration mechanisms functioning in India. Firstly, The Indian Council of Arbitration (hereinafter referred as "The ICA"), established in 1965 is the Specialized Arbitration organization at the national level, promotes the amicable settlement of disputes through arbitration. Disputes between the Government of India, State Governments and Public Sector Undertakings with foreign governments, trading organizations are referred to arbitration under the rules formulated by the ICA. Secondly, Ad Hoc Arbitration refers to proceedings which guarantee full autonomy to the parties to determine all aspects of the arbitration such as number of arbitrators, manner of their appointment, procedure for conducting the arbitration etc. Parties wishing to include an ad hoc arbitration clause may avail the option of negotiating a completely new set of rules and procedures tailored to their specific needs. Thirdly, there are 23 recognized arbitral institutions in India which come under the head of Institutional Arbitration, the most prominent ones being the Federation of Indian Chambers of Commerce and Industry (FICCI), the Bengal Chamber of Commerce and Industry (BCCI), Indian Chamber of Commerce etc. Fourthly, apart from the Code of Civil Procedure, 1908 and Arbitration and Conciliation Act, 1966 many central and state Acts signifying Statutory Arbitration provide for arbitration in respect of disputes arising on matters covered under those Acts. The Railways Act, 1890, the Land Acquisition Act, 1894, the Indian Electricity Act, 1910, the Cantonment Act, 1924 and the Forward Contracts Regulation Act 1956 illustrate the position on statutory arbitration.

CORPORATE CENTRIC ADR: NEED FOR EXPANSION

In the wake of globalization and liberalization of economic policies, India has witnessed a marked increase in complicated and intricate contractual and commercial disputes involving international investment firms, foreign banks and transnational corporations. Furthermore, the presence of an international party to a dispute unfolds complex issues relating to choice of forum, choice of law, and judgment enforcement in foreign jurisdiction. Hence, Multinational Corporations remain reluctant about litigating in a foreign jurisdiction owing to fears of bias being exercised in courts in favour of the national party. In such a scenario, ADR presents itself as a ready solution to such time

consuming legal questions and offers promptness in dispute resolution leading to cost effective, creative business driven solutions.

ADR process provides an opportunity to the parties to maintain privacy and confidentiality on the nature of proceedings. The tenets of ADR cater to the needs of the business community as they are able to escape public eye and maintain public confidence in their products and services. ADR also helps in the preservation of the business relations between disputing parties as they retain the discretion of choosing the applicable rules of dispute resolution coupled with control over the nature of outcome. Thus, ADR being less hostile than traditional litigation is considered to be most pertinent for resolution of international and national commercial and business disputes.

In the globalized world, the astronomical surge in foreign direct and portfolio investment, capital mobility, trade and commerce has attained central focus and simultaneously stoked the development of commercial mediation and arbitration. ADR has become a rich man's domain as the big corporations are willing to shell out exorbitant sums to engage professional arbitrations in exchange for speedy resolution of disputes. With Ad Hoc arbitration being the most prominent mode in India, in contrast to Institutional Arbitration, arbitrators operate independently and exercise their discretion to charge higher "sitting fees" from their cash-rich clients. Furthermore, the demand of skilled, trained and professional mediators and arbitrators in India has outstripped the supply. News reports reveal that arbitrators tend to capitalize on the deficient supply and prolong proceedings to remain on the payrolls of corporations with deep pockets.

With the resources of ADR mechanism being solely utilized for resolution of commercial disputes, the common man is denied a chance to avail the benefits of amicable and mutually acceptable forms of dispute resolution. As a result, the economically weaker sections of the society continue to battle the travails of judicial system and face the brunt of "litigation explosion" while the corporations enjoy the luxuries of ADR. The expenses involved in litigation such as court fees, lawyer fees, added expenses from inordinate delay in adjudication etc handicap the poor litigants from accessing the judicial remedies, whereas it these poor people who are in greatest need of it. In such a dismal scenario, the government needs to take urgent action to enforce the fundamental rights of the economically and socially disadvantaged sections as enshrined under Article 14 and 21 of the Constitution and chart a legislative framework for extension of ADR mechanism to the grass root level.

ADR FOR AAM AADMI

To combat the longstanding grievance of *Aam Aadmi* with respect to access to justice, we need to revitalize the ancient times practice of decentralized and participatory justice and resurrect "*Nyaya Panchayats*"[6] in the villages of every state in India. The formulation of these village level dispute resolution forums will lead to the fulfillment of the constitutional goal under Article 39A of the Constitution. Nyaya Panchayats will empower more than 70% of the total India population, which resides in villages to exercise control over the nature of proceedings (to be conducted in local language thereby disrupting linguistic barriers) to amicably arrive at a mutually agreeable solution via the ADR methodology. The reinstatement of these village courts in every panchayat area of the village will lead to doorstep access to low cost justice by the common man and positively impact the village economy in the long run. These Nyaya Panchayats will function as a "*Community Based ADR*" mechanism which is designed to be independent of a conventional court system that may be biased, expensive, distant or otherwise inaccessible to the economically disadvantaged rural population.

Considering the rampant illiteracy and ignorance of law in rural India, the uncomplicated ADR procedure devoid of technical and formalistic court procedure will lead to the establishment of seamless communication symmetry between the Panchayat and the aggrieved rural masses. The procedural law such as Code of Criminal Procedure, Code of Civil Procedure, Evidence Act, and Limitation Act shall not apply to ADR proceedings before the Nyaya Panchayats. Furthermore, petty disputes such as the disputes over agricultural land, the rights to cultivation and grazing on common pastures, disputes over cultivation, the right to draw water from canals or tube wells or incidental questions arising in villages are most suited to be determined by ADR procedure at village level. The members of the Panchayat, being the residents of the village, and fully abreast of the

[6] Nyaya Panchayats have been in operation since pre – independence era however the institution was not awarded a clear governmental recognition. Even in the 73rd Constitution Amendment Act, which conferred constitutional sanctity to Panchayati Raj Institutions there was no specific mention of establishing a Nyaya Panchayat. Post the instant amendment, few states such as Bihar, Himachal Pradesh, Punjab, Uttar Pradesh and West Bengal inserted the provision for Nyaya Panchayats in their new Panchayati Raj Acts.

affairs of co-villagers, are adequately capacitated to carry out extensive fact finding of the land involved in land disputes and examine the nuances of a particular dispute for an effective solution in contrast to the examination undertaken by the court established commissions. Such a mobile dispute resolution forum will provide protection against fabrication of evidence, misrepresentation of key facts and perjury.

The Nyaya Panchayat Bill, 2006 reflects that the Panchayat should have five members, including one woman and one reserved post rotating between SC/ ST and OBC, which are elected directly by the voters of a territorial constituency. Reservation for women and socially backward classes in the village court will pave the path for equal opportunity to every person regardless of their caste and fair dispensation of justice. There is no requirement for members to possess legal education as a prerequisite to contest for elections for the Nyaya Panchayat. Induction of one legally trained person would inspire confidence in the rural people and safeguard the application of substantive law. Furthermore, to avoid partisan influences and undue political considerations from creeping into dispute resolution process, it must be ensured that no member is affiliated to any national or state political party. To ensure the accountability of Nyaya Panchayats to the state, the proposed legislative framework should include a provision for documentation of disputes resolved by the Panchayats, and provide for submission of these reports to the State Government.

Another significant advance towards instilling ADR at grass root level may be made by the establishment of Gram Nyayalayas as the lowest tier of judiciary in the rural areas.[7] The State Government is expected to establish one or more Gram Nyayalayas for every Panchayat or group of contiguous Panchayat at an intermediate level. Each Gram Nyayalayas shall be headed by a Nyayaadhikari, who shall have the qualifications of a first class magistrate and possess exclusive and original jurisdiction over certain civil and criminal disputes.[8] The key highlight of this Bill is that it seeks to introduce "*Court Annexed ADR*"[9] process at the village level by way of these Gram Nyayalayas. In civil disputes the Nyayadhikari will be empowered to adjourn proceedings and allow for conciliation between parties, subject to the rules devised by High Court. The District Judge, in

[7] Gram Panchayat Bill, 2007 introduced in the Rajya Sabha on May 15th, 2007 and referred to the Standing committee on Public Grievances, Law And Justice

[8] D Bandyopadhyay, Nyaya Panchayats, Economic and Political Weekly, December 17, 2005, pp 5372-75

[9] In Court Annexed ADR, the ADR services are provided by the court as a part and parcel of the same judicial system as against Court Referred ADR, wherein the court merely refers the matter to a mediator. Law Commission of India, 114th Report on Gram Nyayalaya, August 1986

consultation with the District Magistrate shall prepare a panel of people who can act as Conciliators. These shall be social workers at the village level with the required qualification prescribed by the High Court. Hence, this bill, if enacted, will decentralize the tiers of justice delivery and reduce the burden of cases on the lower judiciary thereby paving the path for speedier and inexpensive justice for the economically and socially underprivileged people in India.

CONCLUDING REMARKS

Under the proposed Gram Nyayalayas, a self encompassing tier of judicial machinery is made available for every 50,000 rural people in villages. The benefits which will be accrued to the rural people by organization of these village courts are unprecedented. Moreover, the installation of court annexed mediation in the village level will facilitate greater access to justice and encourage the rural people to reinforce their belief in the integrity and efficiency of the judicial system. With the ADR model being directed under the control, supervision and guidance of the court, the effort of dispensing justice will become more coordinated and harmonized. It will induce the rural masses to think that conciliation is complementary and not competitive to the court system. However, on the flip side, the Gram Nyayalayas Bill, 2007 envisages the appointment of over 6,000 Nyayaadhikaris to be selected from a judicial cadre created by the Governor and High Court of the particular state. It is pertinent to note that 10% of judicial posts are currently vacant in our legal system which casts a shadow of uncertainty over the availability of trained judicial officers.[10] Thus, the formulation of judicial cadre for Gram Nyayalayas may prove to be onerous and further impair the delivery of justice.

The organization of Nyaya Panchayats as a limb of local self government under Panchayati Raj system will herald the introduction of ADR at the grass root level and become a tool of empowerment for the rural masses. Additionally, these adjudicatory forums will prove to be a much needed respite for the aggrieved villagers facing the insuperable impediments posed by the decrepit civil justice system. However, a system of checks and balances needs to be put in place by the state government to check the misuse of power by dominant classes against the lower costs and prevent

[10] As of April 1,2007 there were 126 vacancies out of 725 seats in the High Courts, and 2,722 vacancies out of a 14, 679 seats in the district and subordinate courts, about 18 percent of the total. See Annual Report 2005-06, Ministry of Panchayati Raj

the rise of caste, political, gender and religious considerations. Also, the dimension of accountability of the Nyaya Panchayats to the State Governments needs to be revisited by policy makers.

There has been considerable debate in the legal community over the Nyaya Panchayat Bill, 2006 being unconstitutional owing to violation of Article 50 of the Constitution which mandates the separation of judiciary from the executive. However, it must be understood that Nyaya Panchayats possess strictly judicial character and are in addition to the Gram Panchayats (which performs executive functions). The functions are of the two are clearly demarcated and thus, the organization of Nyaya Panchayats is in pursuance of the Directive Principles of State Policy engrained under Art. 39A of the Constitution. The Supreme Court ruling in *State of U.P. v. Pradhan Sangh Kshetra Samiti* and others. may be examined to corroborate the above stated view on panchayati raj system.

The underlying essence of the instant essay is reflected in the poignant words of Justice Brennan of the U.S. Supreme Court:

"*Nothing rankles more in the human heart than a brooding sense of injustice…when only the rich enjoy the law as a luxury and the poor who need it the most cannot have it because its expenses put it beyond their reach.*"