Alternative Dispute Resolution and Problems of Access to Justice

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ALTERNATIVE DISPUTE RESOLUTION
AND
PROBLEMS OF ACCESS TO JUSTICE

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Alternative Dispute Resolution (ADR) in plain terms is an alternative to the 'Formal Legal System' (FLS). The need for ADR is being underscored in the context of the failure of the formal legal system. I wish to briefly go over the reasons for a failure of the FLS.

Problems from the point of view of the user of the Formal Legal System (FLS):

- ***Awareness***: The general lack of awareness of legal rights and remedies acts as a formidable barrier to accessing the FLS.

- ***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.

- ***Delays***: The average waiting time, both in the civil and criminal subordinate courts, can extend to several years. The position in most of the High Courts is no different. Criminal appeals in the Allahabad High Court, for instance, can be pending for over a decade. This virtually negates the concept of fair justice.

- ***Expenses and Costs***: We are all aware of the ineffectiveness of our costs regime – even the successful litigant is unable to recover the actual costs of the litigation. The considerable delay in reaching the conclusion of any litigation, which traverses through various stages of the judicial hierarchy, adds to the costs and makes the absence of an effective mechanism for their recovery even more problematic.

- ***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.

- ***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.

- ***Relevance***: The most serious aspect of concern is that of 'relevance'. How relevant is the FLS for addressing the problems of the poor? In an accompanying chart, I attempt to demonstrate how large populations in the country are hurtled into a cycle of impoverishment which commences with the State's actions (backed by the law) resulting in the displacement, migration and resettlement of the rural masses in the cities and how they find themselves in various states of 'illegality' (again prescribed by the law). I attempt to contrast this with the needs of the people for social and economic rights (housing, employment, food, health and education) being dealt with only in the 'unenforceable' realm of policy. The FLS invariably rejects the demands arising out of social and economic rights as matters of policy and therefore 'non-justiciable' and correspondingly legitimises the State's actions of acquisition of land, or forcible eviction of 'encroachers' as being consistent with its powers under the law. There is a need to satisfactorily resolve this conundrum of the FLS, in which the actual needs of an impoverished population fail to get addressed.

  The above barriers to access are today posing a serious problem of legitimacy of the FLS. Even while we examine the feasibility of ADR, we must ensure that the credibility of the FLS is not eroded. Often we talk of access to justice for the poor and identify poverty as the main barrier; however, all the above are barriers faced by all litigants while poverty is an aggravating factor.

The Problems of the Judiciary

- ***Arrears***: There are 7 million pending civil cases and 13 million pending criminal cases at any point of time, and this is only in subordinate courts. So we have a fresh filing of 10 million cases every year and approximately that many cases get disposed of by the end of the year. Therefore, at the end of every year we still have the same figure of 20 million pending cases. This has been the position for many years now. This stagnation is relatable to the strength of the subordinate judiciary, which has remained unchanged at around 13,000 persons for over eight years now. There is also a lack of the necessary infrastructure in the subordinate courts.

- ***Lack of strict separation***: The subordinate judiciary faces a serious problem in its lack of strict separation from the executive. There is considerable dependency on the executive for even basic facilities and this needs to be addressed.

- ***Lack of assistance from the Bar***: This is a problem which is generally faced by the judiciary and is particularly acute in the subordinate judiciary.

- ***Lack of accountability***: The existing mechanism for investigating complaints regarding the functioning of judicial officials requires to be re-examined and made more effective.

- ***Poor responses to the problems of the institution:*** The problems that plague the administrative side of the functioning of courts cannot be satisfactorily dealt with primarily on account of the lack of an effective complaints mechanism. For instance, the problem of payment of bribes to the staff attached to a court is widely acknowledged as being prevalent but very little has been done to actually make the problem disappear. From the point of view of the litigant all these constitute 'hidden costs' which cannot be recovered at all.

State's Response

Formal Legal Aid: One response of the state has been to provide a system of "formal legal aid", that is through restricting the provision of legal aid to representation in the courts. This is apparent from the relevant statutory provisions – s.12 of the Legal Services Authorities Act, 1987 (which only talks of eligibility for person to legal aid for filing or defending a case) and s.304 of the Code of Criminal Procedure (Cr.PC) (which provides for representation fir the accused in cases before the sessions court). Therefore, legal aid as statutorily envisaged does not extend to the pre-litigation stage or to advice and counselling. And this formal legal aid itself is located within the institution of the judiciary and so its administration has to encounter the same problems that beset the judiciary.

ADR: For several yeas now, we have statutorily provided for arbitration as an alternative to civil dispute resolution. Recently, we overhauled the entire statutory framework since the earlier one proved to be ineffective. The problem here is that arbitration has become entrapped in the mould of formal legal dispute resolution and is struggling to emerge from it.

Tribunalisation: We have experimented for the last 3-4 decades with creating tribunals to adjudicate various kinds of disputes – labour and service matters, consumer disputes, debt recovery, company disputes, family courts and so on. The observations of the constitution bench of the Supreme Court in the case of ***Chandrakumar,*** lamenting the failure of the tribunal experiment, sums up the picture. Since we are persisting with tribunals, we need to examine how to make these bodies effectively respond to the problems of the FLS.

Other Responses

- Creation of the NHRC
- Commissions constituted under the Commissions of Inquiry Act: these have been wholly inadequate and ineffective particularly since executive governments invariably do not act upon recommendations of these Commissions.
- Lok Adalats under the provisions of the Legal Services Authorities Act, 1987. There are mixed views on whether these are effective only for certain kinds of disputes and whether there is any justification in virtually compelling parties to settle for something less by citing negative reasons why they should, such as delays, costs and uncertainty.
- We have very recently, in 2002, introduced s.89 in the CPC under which a pending case can be shifted to a different 'track' – arbitration ,Lok Adalat, mediation or conciliation. We are in the process of formulating rules to give effect to S.89 of the Code of Civil Procedure (CPC). This mater is pending before the Supreme Court and will be heard in January 2004. It will consider a report comprising rules to give effect to s.89 CPC, which has been prepared by a committee headed by a former judge of the Supreme Court, Justice M. Jagannadha Rao. However, there are issues arising out of this as well – for

instance, can parties be sent compulsorily for arbitration or conciliation? But more importantly, this is only for cases pending in court, not for cases that are yet to be heard in the Court.

- '**Fast Tracking'** of criminal cases is another more recent phenomenon. Already there are serious misgivings on how these fast track courts function. In some states the results have been good, but we do not have sufficient statistics or feedback to assess the performance of these courts to date.
- The establishment of '**Special Courts'** is another response, particularly to deal with offences under the newer statutes, for instance, POTA or TADA. The **Crime in India** statistics (published by the National Crime Records Bureau), show how the TADA cases are pending even though the Act in question was repealed in 1995. In practice, the very purpose of having special courts has not been achieved , which has further compounded the serious problems of delays and arrears.

Response of the Judiciary

- PIL has been a judicial innovation starting with *Hussainara Khatoon* in 1979 where the issues was of of under trial prisoners languishing in jails.
- Then you have, as far as representation in courts is concerned, the judges appointing amicus curiae from among the lawyers to argue cases;
- Constitution of Lok Adalats using powers of LSAA.

These responses are at best ad hoc and cannot possibly address the entire problem.

Response of the People

- Community/caste adalats are very much in vogue at the village/ block level. These need to be accounted for, particularly since they hold great relevance to the people engaging with those fora.
- The disenchantment of the people with the FLS is evident in their holding public hearings (Jan Sunwais), where people feel free to speak without being intimidated by courts, lawyers and judges, or without being bought over or threatened by the accused. The voices that are heard in the Jan Sunwais are very different from the voices heard in court rooms. This brings to mind the observations of Justice Albie Sachs of the Constitutional Court of South Africa. He points out that the kind of truth the court is interested in is the microscopic truth. For instance, the Indian Evidence Act is very rigid about what is 'relevant' and what is not and that which is 'admissible' and that which is not. Justice Sachs on the other hand, reminds us that the experiment of the Truth and Reconciliation Commission in South Africa where the focus was on 'dialogic' truth where both victim and accused were heard and everyone else who had knowledge of the incident were also heard. Thus, the TRC was made aware of not just the incident but the circumstances were surrounding the incident.
- People's Fact finding
- Parallel Systems, which are neither legitimate nor acceptable to victims of crime.

Serious thought needs to be given to the point of view that argues that unless the peoples' response is accounted for, the FLS cannot regain its credibility and legitimacy in their eyes.

Inadequacy of the Response

Unmet areas

- Two quick comments on Mass Crimes; to give the example of the Delhi riots – there have been hardly any convictions at the end of twenty years and we have no mechanism to deal with the problems of the victims. There has also been a total failure to deal with the impunity of the state actors involved in the carnage
- In the areas of mass torts – the Bhopal cases provide an excellent example of how justice has not been done to the victims even till today, when there are still petitions in the SC pointing to the inadequacies of the compensation and medical relief.
- Caste and community violence have not had adequate response; although the Schedule Caste/Scheduled Tribe Act is not being effectively implemented ; over criminalization has also become counter productive ; the issue is of getting acquittals because the standard of proof is very high. There has not been enough attention paid to other aspects of the Scheduled Castes and Scheduled Tribes Act, for example rehabilitation or legal aid.
- Custodial Crimes – Barring the NHRC we do not have any effective way of dealing with custodial crimes, because this issue has again been put back into the formal legal system.
- Decentralisation has not taken place even though we have the Panchayat Raj Act, which recognizes community decision-making regarding allocation of community resources, as this Act has not been given effect to date. Consequently, State governments violate these provisions with impunity.
- Pre-Litigation assistance has not been forthcoming. Recently, West Bengal has introduced block level Conciliation Boards, which provide for pre-litigation assistance at the block level. They have taken on board cases pending in court the value of which are less than Rs 1 lakh and compounding cases, and they want to try to side-track these into a body which undertakes conciliation with any respected person in locality as mediator and legal advisor.

Failure to address relevant issues

Many of the problems facing the poor may not be problems that find place within the formal legal system at all. There is no situation where the law actually gives an enforceable right to a person undergoing starvation to go to any authority to say that I am starving and I have a right to food.

There are farmers' rights but no users' rights. What do you do with huge stocks of food, which are stored and not distributed? These are basic rights issues and we have to take them back to the constitutional courts, and we know the problems faced there. We are therefore overburdening the judiciary.

Legitimacy and Competence

There are two opposing points of view – one that argues that it is not legitimate, under the constitutional framework, for the judiciary to be entering areas which are best left to the executive and the legislature. This is in the context of the argument that the judiciary interfering in 'policy' matters that involve decisions concerning distribution of resources. The second point of view is that the judiciary is not 'competent' to handle these complex issues since it lacks the

expertise to do so. The handling of complex issues by our judiciary in the PIL jurisdiction holds the answer to the proponents of the above points of view.

Suggestions

I would venture to suggest that:

- A fresh look is taken at the two expert committee reports on legal aid submitted in 1973 (under the Chairmanship of Justice V.R. Krishna Iyer) and 1977 (by Justice Bhagwati and Justice Krishna Iyer). The recommendations made in those reports still hold good;
- The feasibility of setting up neighbourhood law networks be examined since it can be of great relevance in offering legal aid at the pre-litigation stage;
- There is a need to revive a decentralised system of ADR and attempt a clear demarcation of the jurisdiction of the fora in the non-formal legal system to facilitate their integration with the FLS; and
- The need to respond in a comprehensive manner to providing effective access to justice in situations of mass crimes and mass torts.