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The need for alternatives to the formal legal system has engaged the attention of the legal fraternity, comprising judges, lawyers and law researchers for several decades now. This has for long been seen as integral to the process of judicial reform and as signifying the 'access-to justice' approach. In their monumental comparative work on civil justice systems, Mario Cappelletti and Bryant Garth point out that the emergence of the right of access to justice as "the most basic human right" was in recognition of the fact that possession of rights without effective mechanisms for their vindication would be meaningless.¹ It was not enough that the state proclaimed a *formal* right of equal access to justice. The state was required to guarantee, by affirmative action, *effective* access to justice. Beginning about 1965, in the U.S.A, the U.K. and certain European countries, there were three practical approaches to the notion of access to justice. The 'first wave' in this new movement was legal aid; the second concerned the reforms aimed at providing legal representation for 'diffuse' interests, especially in the areas of consumer and environmental protection; and the third, "the 'access-to-justice' approach," which includes, but goes much beyond, the earlier approaches, thus representing an attempt to attack access barriers in a more articulate and comprehensive manner."² The last mentioned approach "encourages the exploration of a wide variety of reforms, including changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private and informal dispute resolution mechanisms. This approach, in short, is not afraid of

¹ M. Cappelletti and B. Garth, "Access to Justice - the worldwide movement to make rights effective: a general report" in M. Cappelletti and B. Garth (eds.), **Access to Justice—A World Survey**, Volume I, Sijthoff & Noordhoff – Alphanaanderijan (1978), 5 at 8-9. This shift occurred, according to the authors, simultaneous with the emergence in the twentieth century of the "welfare state".

² *Id.* at 21. The authors explain (at 49): "We call it the 'access-to-justice' approach because of its overall scope; its method is not to abandon the techniques of the first two waves of reform, but rather to treat those reforms as but several of a number of possibilities for improving access."

comprehensive, radical innovations, which go beyond the sphere of legal representation.”³

In India too the need to evolve alternative mechanisms simultaneous with the revival and strengthening of traditional systems of dispute resolution have been reiterated in reports of expert bodies. Reference in this context may be made to the Report of the Committee on Legal Aid constituted by the State of Gujarat in 1971 and chaired by Justice P.N. Bhagwati (as he then was) which *inter alia* recommended adaptation of the ‘neighbourhood law network’ then in vogue in the U.S.A; the ***Report of the Expert Committee on Legal Aid: Processual Justice to the People***, Government of India, Ministry of Law, Justice and Company Affairs (1973) (***1973 Report***) which was authored primarily by its Chairman Justice V.R.Krishna Iyer (as he then was) which while urging ADR (*lok nyayalayas*) in identified groups of cases exhorted the preservation and strengthening of gram nyayalayas; and the Report of two-member Committee of Justices Bhagwati and Krishna Iyer appointed to examine the existing legal aid schemes and suggest a framework of a legal services programme that would help achieve social objectives [***Report on National Juridicare Equal Justice – Social Justice***, Ministry of Law, Justice and Company Affairs (1977) (***1977 Report***)]. The last mentioned report formulated a draft legislation institutionalising the delivery of legal services and identifying ADR, conciliation and mediation as a key activity of the legal services committees. Each of these reports saw the process of improving access to justice through legal aid mechanisms and ADR as a part of the systemic reform of the institution of the judiciary coupled with substantive reforms of laws and processes. The present have of legal reforms have only partly acknowledged and internalised the recommendations in these reports. Still, the implementation of the reforms pose other kinds of challenges. The attempt through the introduction of S.89 of the Code of Civil Procedure 1908 (CPC) is perhaps a major step in meeting this challenge.

The reasons for the need for a transformation are not much in dispute. The inability of the formal legal system to cope with the insurmountable challenge of arrears argues itself.

³ *Id.* at 52.

The Parliamentary Standing Committee on Home Affairs found that as of 2001, there were in 21 High Courts in the country, 35.4 lakh cases pending.⁴ Of the 618 posts of High Court judges there were 156 vacancies as on January 1, 2000.⁵ The position in the subordinate courts was even more alarming. There was a backlog of over 2 crore (20 million) cases for as long as 25 to 30 years.⁶ Of these, there were over 1.32 crore (13.2 million) criminal cases and around 70 lakhs (7 million) civil cases.⁷ The total number of subordinate judges⁸ in all the states and union territories in the country, as of September 1999 was 12,177.⁹

Despite this severe strain on resources, the performance of the subordinate judiciary has been remarkable. A joint study by the Indian Law Institute and the Institute of Developing Economies, Japan in March 2001, revealed that in a single year (1998) the number of cases disposed of by the district and subordinate courts was 1.36 crores (13.6 million).¹⁰ At the end of every year, however, the pendency of cases remains at the figure of around 20 million, which means the subordinate judiciary is running hard to remain at the same place.¹¹

In its 120th Report in 1988, the Law Commission of India had recommended that “the state should immediately increase the ratio from 10.5 judges per million of Indian

⁴ J.Venkatesan, “Panel concern over backlog in courts”, *The Hindu*, New Delhi, March 10, 2002, 12: “The Committee was particularly disturbed by the fact that cases were pending for over 50, 40 and 30 years in the High Courts of Madhya Pradesh, Patna, Rajasthan and Calcutta. And more than 5 lakh cases were pending for over 10 years – 2 lakhs in Allahabad, 1,46,476 in Calcutta 28,404 in Bombay and 5,050 in Madras.”

⁵ Indian Law Institute, **Judicial System and Reforms in Asian Countries: The Case of India**, Institute of Developing Economies, Japan External Trade Organisation (IDE-JETRO), (March 2001) 39.

⁶ *Ibid.*

⁷ *Id.* at 35.

⁸ *Id.* at 6: This would include district and sessions judges, additional district and sessions judges, subordinate/assistant sessions judges, chief judicial magistrates, metropolitan magistrates and judicial magistrates.

⁹ **First National Judicial Pay Commission Report** (1999) 1229. The judge strength rose from 9232 in 1985 to 12771 in September 1995.

¹⁰ Indian Law Institute, **Judicial System and Reforms in Asian Countries: The Case of India**, Institute of Developing Economies, Japan External Trade Organisation (IDE-JETRO), (March 2001) 37.

¹¹ The same study (*id.* at 36) points out that at the end of 1998, there were 1.93 crore cases (19.3 million) which were pending in the subordinate courts for less than ten years

population to at least 50 judges per million within the period of next five years.”¹² In 2001, the ratio remains at 12 or 13 judges per million population.¹³ While it is debateable whether this relating of the number of judges should be to the population as a whole or to the number of cases in the various courts, there is no gainsaying that judicial officers are not paid very well and work in deplorable conditions where basic infrastructure is unsatisfactory or inadequate.¹⁴

All of the above should in fact persuade prospective and present litigants, as well as those engaging with the formal legal system as judges and lawyers, to reservedly embrace the notion of ADR, conciliation and mediation. However, it does appear there are many more factors that ail the formal legal system which, if not adequately addressed in the proposed alternative system, may hinder the move for transformation. This assumes particular significance in the context of suggestions that the ADR, mediation or conciliation processes should be court-annexed and institutionalised. I propose to highlight here a few of these factors.

'Hidden' and other costs

One disincentive for a person to engage with the legal system is the problem of uncompensated costs that have to be incurred. Apart from court fees, cost of legal representation, obtaining certified copies and the like, the system fails to acknowledge, and therefore compensate, bribes paid to the court staff,¹⁵ the extra 'fees' to the legal aid

¹² *120th Report of the Law Commission of India on Manpower Planning in the Judiciary: A Blueprint*, Ministry of Law, Justice and Company Affairs, Government of India (1987), 3.

¹³ Recently, the Chief Justice of India said: “The reason why we do not have more judges across the board is because the States are simply not willing to provide the finances that are required...The expenditure on the judiciary in terms of the GNP is only 0.2 per cent; and, of this, half is recovered by the states through court fees and fines. Given the attitude of the states, is it any wonder that the jails of our country are filled to the brim, largely with undertrials.?”: “Speech by Hon’ble Mr.S.P.Bharucha, Chief Justice of India on 26th November 2001 (Law Day) at the Supreme Court” (2001) 8 SCALE J-13 at J-14.

¹⁴ This led to a public interest litigation by the All India Judges Association in the Supreme Court claiming better conditions of work as well as an increased and uniform pay structure. See orders in *All India Judges Association v. Union of India* (1992) 1 SCC 119; (1993) 4 SCC 288; (2000) 1 SCALE 136 and (2002) 3 SCALE 291.

¹⁵ For a study pointing to corruption prevalent in the district and subordinate courts in Delhi see, V.N.Rajan and M.Z.Khan, **Delay in Disposal of Criminal Cases in the Sessions and Lower Courts in Delhi**, Institute of Criminology and Forensic Science, (1982). The authors point out (at 42) “It was seen that those who greased the palm of the readers and peons were able to get adjournments readily while others waited

lawyer,¹⁶ the cost of transport to the court, the bribes paid (in criminal cases) to the policemen for obtaining documents, copies of depositions and the like or to prison officials for small favours.¹⁷ In some instances, even legal aid beneficiaries may not get services for 'free' after all.¹⁸ It is important to acknowledge the existence of a general distrust of the legal system including its processes and institutions which are mystifying, alienating and intimidating; distaste of lawyers and courts as they seem imposing and authoritarian; seeing the whole legal process as of nuisance value resulting in irreversible consequences, an uninvited 'trouble' that has to be got rid of. Unless frontally addressed, a court annexed or an institutionalised ADR, mediation or conciliation system may soon be undermined by the same problems that afflict the formal legal system. The attraction of the alternative system would then lie in the promise of not only reduced costs and uncertainties but importantly a liberation from the stranglehold of the 'court annexed bureaucracy'.

The Law and Poverty Dimension

There is an imperative need to acknowledge that those who are economically and socially disadvantaged see the entire legal system as irrelevant to them as a tool of empowerment and survival. The economically disadvantaged litigant is, notwithstanding the present concerted moves to reach legal aid through a geographically wide network of legal aid

outside the court helplessly. To those who were unwilling to part with money, these court officials were not prepared even to tell whether the presiding officer would come and the cases would be heard or not."

¹⁶ Siraj Sait, "Save the legal aid movement", *The Hindu*, June 29, 1997, V: "What is galling is that many sleazy lawyers who get legal aid cases tell the poor victims that if they want result they must pay them extra over what the Tamil Nadu Legal Aid Board pays them."

¹⁷ Kumkum Chadha, **The Indian Jail: A Contemporary Document**, Vikas Publishing Pvt. Ltd., 31 where she talks of the system of a 'setting' for various tasks involving the prisoner having to depend on the jail official in Tihar Jail in Delhi: "A minimum 'setting' even for the official to *consider* the request is Rs.500."(emphasis in original) William Chambliss, "Epilogue- Notes on Law, Justice and Society", in William Chambliss (ed.), **Crime and the Legal Process**, McGraw Hill Book Co. (1969) points out (at 421): "When a police force or an entire legal system is found to be engaged in a symbiotic relationship with professional criminals, the cause of this unfortunate circumstance is seen as residing in the inherent corruptibility of the individuals involved."

¹⁸ An empirical study of the working of legal aid schemes in Punjab showed that beneficiaries of legal aid complained that "they were provided only the services of a counsel and nothing beyond" and that they "had to spend amounts varying between Rs.100 to 900 for their cases in lower courts": Sujjan Singh, **Legal Aid: Human right to Equality**, Deep and Deep, (1998), 272.

institutions,¹⁹ unable to effectively access the system as they encounter barriers in the form of expenses, lawyers and delays. The formal system, as presently ordered, tends to operate to the greater disadvantage of this class of society which then looks to devising ways of avoiding it rather than engaging with it. Without fundamental systemic changes, any alternative system, however promising the results may seem, is bound to be viewed with suspicion. The **participatory** nature of an ADR mechanism, which offers a level playing field that encourages a just result and where the control of the result is in the hands of the parties, and not the lawyers or the judges, would act as a definite incentive to get parties to embrace it.

The Parallel system

The noted economist Hernando de Soto, in a path-breaking study of encroachments in Lima in Peru, points out that although the parallel system began as a by-product of the formal system, it has for long been the only system with which the police, the lawyers, the judiciary and the litigant are prepared to readily engage.²⁰ A similar systematic study in several areas of disputes in India might well reveal the same position. For many a litigant, the engagement with the parallel system is not a matter of choice. For the others it becomes a source of additional means of livelihood. On the other hand, the formal legal system also appears to be in the stranglehold of those for whom the economic stakes in working the system to suit their ends is too high to permit any meaningful change that can threaten their source of living. The attitude towards maintaining the status quo therefore gets firmly entrenched. The resultant cynicism that has set into the system, coupled with a skepticism of all reform requires to be rooted out gradually but firmly if the reform agenda has to be implemented progressively. This would require building in deterrent disincentives for engaging with the parallel system that presently poses a serious threat to the legitimacy of the formal system. This may have to be coupled with an audit of the formal system, both financial and social, to pinpoint those areas that

¹⁹ The Legal Services Authorities Act 1987 mandates the setting up of legal aid committees at the state, district and taluka levels. These are apart from committees annexed to each of the High Courts and the Supreme Court.

²⁰ Hernando de Soto, **The Other Path**, Harper & Row (1989). This seminal work could form a model for initiating a study of the working of the criminal justice system. This might reveal the actual costs involved in several stages of the system.

require immediate attention and correction. Since the legitimacy of the ADR mechanism is premised on parties consenting to the process, the costs of engaging with either the parallel system or benefiting from the ills of the formal system have to be raised considerably high to drive the parties to consent to the ADR processes.

From an economic point of view, it should be possible to argue that those litigants who as a class or group burden the court system the most should either bear the proportionate 'carrying' costs of the litigation load or mandatorily be driven to an ADR process. For instance, if the government is the major litigant in the courts, it should not be open for the government to both avoid the costs of the litigation it generates and also resist attempts at being driven to ADR processes. On the other hand it might well take the lead in offering to participate in such processes in all prospective and current litigation which involves the government as a party.

Audit of Lok Adalat mechanisms

It is a fact that a large number of civil disputes pending in the courts, and to a small extent petty criminal matters, have been 'disposed of' through the *lok adalats* that are a permanent 'embedded' feature of the functioning of legal services authorities. While one point of view sees this as a success, another questions whether the *lok adalat* as presently institutionalised is really a tool of 'case management' which essentially addresses the problems of an over-burdened judiciary and not so much as an instrument of justice delivery for the litigant. If the 'success' of the *lok adalat* stems from negative reasons attributable to the failures of the formal legal system, the utility of this mechanism may also be short-lived. In other words if the incentive for litigants to accept *lok adalat* decisions is that if they didn't they would be faced with the prospect of further delays, uncertainties and costs, it constitutes a confirmation for them that the formal legal system is unable to provide an acceptable quality of legal services or justice. This in turn would not augur well for the legitimacy of the system in the long run. What this then means is that there has to be a gradual but conscious effort to offering positive reasons, and not negative ones, for litigants to be willing consumers of the ADR processes. An audit of the

existing ADR mechanisms from the point of view of 'customer satisfaction' would help shape the programmes for the future in order to maximise the 'success'.

An ADR system that is both **transparent and accountable** is in the circumstances imperative in order to make the crucial difference to those presently engaged in the formal legal system which is largely perceived as lacking in this area. As has been pointed out by several speakers, a successful implementation of ADR processes will have to be preceded by an identification of categories of cases or specific dispute areas that are most amenable to their introduction.

Despite the challenges that face the ADR processes today, the benefits in the long run that they are capable of generating appear to outweigh the factors that may in the short run deter their enforcement. We have listened to many positive experiences of ADR in the past two days and this should encourage us to move forward with the reform process. The diverse nature of the country's population defies any uniform approach or set pattern and this is perhaps the biggest strength of the ADR mechanisms. Their flexibility and informality, the scope they offer for innovation and creativity, hold out the promise of a great degree of acceptability lending them the required legitimacy. Their utility as a case management tool cannot be overemphasised. ADR processes provide the bypasses to handle large chunks of disputes thus leaving the formal legal system to handle the more complex litigation. Even while they do not offer to be a panacea for all the ills of the formal legal system, ADR processes offer the best hope yet of complementing and helping to fortify the formal legal system.
