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Original Article

Criminal Justice System vis-à-vis ADR: A Study to Understand the Possibility of Introduction of ADR Mechanism in Criminal Administration

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Abstract

The pendency of cases would be considered a major problem in the criminal justice system of India. Different modes of dispute resolution have been adopted by our courts to settle disputes outside the courtrooms. Ultimately, it proves beneficial for poor litigants. The author has tried to evaluate the reasons why the Indian criminal justice delivery system would not be ready to mould itself according to the need of present society. While civil jurisdiction has adopted a robust ADR (alternative dispute resolution) mechanism, on the other hand, the criminal court is still reluctant to adopt different modes of resolution except for conciliation and mediation. Although mediation has been used in some cases, the success rate is too low to consider it an effective mode of dispute resolution. The system of plea bargaining has also not been used properly because of various reasons which are being discussed by the author in this article. The various techniques adopted by different countries to resolve a variety of disputes will also be necessary to discuss to evaluate the progress happening in India.

Keywords: Alternative dispute resolution; Lok Adalat; Criminal Justice; Access to justice.

INTRODUCTION

The concept of ADR is not new, especially in a country like India, where a large population are not able to access the court due to various reasons. Through this paper, the author tried to find out the grey areas of the Indian criminal justice administration which required to improve to achieve the fundamental goal of our constitution. The concept of rule of law is incorporated under Article 21 of the constitution and a speedy and fair trial is one of the important constituent factors. There are many reasons behind the delayed trial. The author will reproduce and analyse those reasons with the help of relevant provisions of the law. At the same time, various fundamental principles based on the constitutional mandate are to be used in the criminal justice system and the investigation has to be completed along with the lines of the constitutional provisions. So, the author has evaluated the idea of ADR and its relevance in the administration of the criminal justice system in India.

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METHODOLOGY

The following study shall be conducted on the basis of a non-empirical, doctrinal research methodology. The researcher shall refer to books, journal articles, national and international legislations, etc., for the purpose of gaining an insight into the subject matter at hand. Although the research conducted has been strictly doctrinal in nature, significant inferences have been drawn based on the rich fora of literature by internationally acclaimed scholars.

Why Adversarial Criminal Justice System?

When we talk about the Indian criminal justice system, which is essentially based upon common law principles, obviously it's a British legacy that we have inherited from them. No doubt the system which we have adopted from Britisher are old age and obsolete in many ways. But still, we don't have any other option to replace it in a better manner. Therefore, we have seen that our parliament had made many changes and amended it various times, whenever the need arises. The beauty of this system is that it provides umbrella protection in the favour of an accused person throughout the process of criminal proceedings which is technically started from the date of registration of the FIR. But so often we have heard about the police brutality that happens in police custody even though the Supreme Court of India had made broad guidelines to stop the police atrocities that happen during custody. Justice Arijit Pasayat quoted Abraham Lincon and said "if you once forfeit the confidence of your fellow citizens you can never regain their respect and esteem. You can indeed fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time. We gain support for our above conclusion from a decision of the Hon'ble Supreme Court in D.K.Basu v. The State of West Bangal[1] while discussing the custodial violence including torture and death in the lockups, their lordships of the apex court had given certain directions and directed for forwarding those directions to the director-general of police and home secretary of state/UT for circulating the same to every police station. But the reason why we have adopted the adversarial model are many, firstly, after independence, the immediate priority of govt was to improve the social and economical condition of the country. Therefore, the idea of criminal reformation was kept in abeyance, the second reason was the British legacy which was deeply rooted in Indian society, and substituting it with other systems was almost impossible for the government.

The name itself suggests the nature which is adversarial in nature. When we think about the rights of an accused person then it will be necessary that the law should be certain in all respect. Otherwise, it will be very difficult for a person, who is under the scanner of law enforcement agencies to urge for their rights. It is an established procedure that the accused is outside the purview of preliminary investigation and has very little right to know about the evidence collected during the investigation in advance. In India situation would become worse because of the insensitive or unprofessional nature of the investigation officer. However, fundamental principles of criminal jurisprudence in India have evolved along with the lines of British common law and are reinforced by constitutional guarantees. The frequency of custodial deaths, and ill-treatment of women, children and other weaker sections of the society are increasing. Therefore, it is necessary to understand the basic canons of the adversarial criminal system upon which it entirely depended.

The prevailing notion among the jurist of that time was that the adversarial system would provide speedy remedy to the litigants and had given the appropriate opportunity to both parties to present their cases. However, the notion was wrong because our police and judiciary were developed under the colonial regime and their objective was to control the society to benefit the British emperor instead of doing the greater good. However, later on, we made a few important changes in our legislation with the changing society. In this line, we have adopted a new code of criminal procedure in the year 1973. Without going deep into it, I would like to draw your attention to our main issue i.e., the Alternative dispute resolution system in the criminal justice system. Over a period of time, we have evolved as a nation and adopted many revolutionary changes in our system. Few of them are important to discuss before we reached any conclusion.

ESTABLISHING ALTERNATIVE MODE OF DISPUTE RESOLUTION MECHANISM

ADR refers to any means of settling disputes outside of the courtroom. Therefore, safely we can say that ADR is an alternative mode to settle disputes amicably without any interference from the court. Due to financial or other impediments, the act intends to build legal service authorities that can provide competent and free legal services to the most vulnerable people in society. It also establishes Lok Adalats to ensure that the procedure of the legal system promotes justice based on equal opportunity. The preamble of the act itself is

explanatory and has provided free and competent legal service to those who are not able to take care of their needs. However, creating a new system of Lok Adalat would have provided them with an alternative mode of resolution, which is cheap and faster than the conventional court's system. The basic idea of equality would have no effect if poor litigants did not get the desired help from the system. Therefore, this act would give them equal opportunity based upon the principle of natural justice, fairness and good conscience.

The main objective of the act is to provide clear-cut powers to the Lok Adalats in respect of matters where parties are willing to compromise the case. The language of the provision is clear in this respect. It's reproduced below for the sake of brevity:

"A Lok Adalats shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of any case pending before or any matter which is falling within the jurisdiction of and is not brought before, any court for which the Lok Adalat is organised. Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law".

"*Every Lok Adalat shall, while determining any reference before it under this act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles. Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reference has been received under sub-section (1) for disposal in accordance with the law*".[2]

Before referring the matter to Lok Adalat, a reasonable opportunity of being heard has to be given to the parties. "*Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub section (1) of section 20*".[2] *Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.*[1] In 2002, the legal services authorities act was amended to provide for the establishment of Permanent Lok Adalats to deal with cases involving public utility services. Permanent Lok Adalat is one of the most effective ADR tools in India. Permanent Lok Adalat is a special tribunal established by the National Legal Service Authority or the state legal service authority with a pre-litigation attempt to resolve public utility disputes promptly through compromise.

The success story of national Lok adalats is not new in India, after the enactment of the act of 1987, various milestones have been achieved by these lok adalats. On December 12, 2020, the National Legal Services Authority supervised the virtual and physical formation of the National Lok Adalat throughout the nation. All SLSAs (hence referred to as a State legal service authority) and DLSAs (district legal service authority) strictly followed such necessary safety protocol due to the COVID 19 pandemic during the preparation of the day-long event.[2]

To conduct the National Lok Adalat, 31 SLSAs formed a total of 8152 benches. 10,42,816 cases were successfully resolved by them. The details, as supplied by states on the NALSA webpage, indicate that the settlement amount was near Rs. 3227.99 crores out of the total cases disposed of, of which 5,60,310 cases were at the pre-litigation stage and 4,82,506 cases were those that were pending in the courts.

Cases	Pending	Pre-litigation	Total
Taken up by Court	11,54,958	22,98,771	34,53,729
Disposed	4,82,506	5,60,310	10,42,816
Settlement value in Rs.	24,76,52,09,400	7,51,47,51,636	–

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Normally, Lok Adalats are empowered to take cognisance against the cases where the possibility of compromise is apparent. Certain categories of cases are benefitted from this institution like Labour disputes, money recovery, land acquisition, maintenance disputes and cases under section 138 of the NI Act. Even though they have the power to adjudicate between the parties, still the power to decide the case on its own is not possible except in the case of permanent Lok Adalat. Hence, cases, where parties are ready to compromise, are referred to Lok Adalats.

The legal services authorities introduced virtual Lok Adalat, or e-Lok Adalat, in the year 2020 to address the challenges posed by the pandemic to make the ADR mechanism successful. Access to justice for

everyone is an important idea behind introducing Lok Adalats in India. With the help of technological advancement, E-Lok Adalat has given millions of people a platform to settle their disputes due to that 3,00,200 cases have been resolved through e-Lok Adalats in November 2020.

PLEA BARGAINING VIS-A-VIS CRIMINAL JUSTICE SYSTEM

The concept of plea bargaining is not new in the criminal justice system. However, in India, courts are still reluctant to adopt it as a judicial process due to various reasons. On the other hand legal practitioners are also not ready to suggest to their clients its benefits. But if we look at the USA, the situation is entirely different from India. In the American system, plea bargaining would play a major role in dispute resolution mechanisms. Therefore, would consider an important tool to resolve the issues that crop out between the parties. Especially in the criminal jurisdiction, defendants may have an opportunity to bargain their punishment with the prosecutor. Prosecutor and defendant will mutually agree upon a settlement term. In that way, it will provide an easy and effective mode of dispute resolution in criminal cases. Almost 90 per cent of criminal cases are resolved through plea bargaining in America and very few cases were referred for the jury trial.

On the contrary, in India judiciary was reluctant to incorporate the principles of plea bargaining in judicial administration due to various know or unknown reasons. It happened because of misconceptions surrounding the notion of the criminal justice system. In India, the concept of plea bargaining was adopted after due deliberation and after reading out various law commission reports as well as the recommendation made by the Malimath committee report. The 142nd report set out *in extenso* the rationale and its successful functioning in the USA and how it should be given a statutory shape.

The concept of plea bargaining evolved due to various reasons and is an alien concept not recognised by the American constitution. However, changing dynamics of the criminal justice system would play an important role in the development of this concept. The constitution's 6th amendment did not recognise the concept of plea bargaining. Later on, the judiciary recognised the *concept* in *Santebello v/s New York,* (1971).

But if we looked into the scenario in India, it took almost decades to accept the concept as a valid mode to resolve the case without following the trial procedure. Before accepting the concept of plea bargaining, the Indian judiciary was reluctant to accept it as a mode of resolution. In Murlidhar Meghraj Loya v/s State of Maharastra, "*Justice Krishna Iyer asserted that our system enabled the "business culprit" to evade justice by exchanging his misery in prison for the pretence of regret, convincing everyone but the victim himself and the society*". But interestingly, the situation was changed and now we have accepted this new mechanism with an open heart. However, things were quite changed after the Gujarat High court judgement, and first-time judiciary recognised the principles of plea bargaining in India.[3]

Legislative Validity after the amendment of 2005: a new chapter was introduced in the code of criminal procedure, 1973 i.e. chapter XXIA, *according to this chapter "accused shall apply for plea bargaining against whom the report has been forwarded by the officer in charge of the police station under section 173 alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force.*[5] However, the condition is ingrained in it because the same does not apply when such an offence harms the nation's socioeconomic status, has been perpetrated against a woman, or a kid who is under the age of fourteen. Unlike in America, in India plea bargaining could be possible only under the supervision of the court.

An interesting fact about plea bargaining despite all the odds is that we can use it as an alternative model to resolve the criminal dispute within a specific period. On the other hand, if we look into the way of traditional litigation, will consume time as well as money.[7] Therefore, it is the need of the hour to make plea bargaining more simple and comprehensive so that normal litigants may avail its benefit without wasting their hard-earned money or resources. Many thought that plea bargaining is against the principle ideas of section 163 of the code[5] and section 24 of IEA.[6] but the point which needs to be understood is that above said provisions are only barring police officers or other people in authority to cause inducement, threat or promise at the time of investigation and subsequent provision thereon specifically prevent them not to stop to dispose of if the person make the statement without any pressure.

POWER OF CRIMINAL COURTS TO REFER CASES TO MEDIATION

Before even deciding whether there are any elements of a settlement, the court must first consider referring the parties for the mediation. In doing so, it must first conduct a preliminary review to determine whether it is legal to end the criminal action because the matter has been referred to the mediator. No doubt that the High Court has empowered to refer the parties for the mediation but the criminal investigation is altogether different from the High Court proceedings. Therefore, both the proceedings will go side by side. There is a contrast between situations that call for the immediate arrest and those where mediation should be tried first. If the husband or in-laws are being made accused under section 498A of the IPC. In that situation, it entirely depends upon the circumstances that lead to immediate arrest and one where mediation should be attempted first. When will investigating officer may arrest the accused person in cases of section 498A. The circumstances are as follows:

- To prevent the husband and his family members from attempting to intimidate witnesses or tamper with the course of justice.
- To ensure the husband or his family members at the trial, especially in cases of Section 498A of IPC in which the husband or in-laws are guilty of physical abuse and endangering the life of the girl.
- If the wife has encountered repeated violence or mental cruelty.

In all other circumstances, we believe that the first attempt has to be made to bring about reconciliation between the parties by directing the complainant's wife and her natal family members and the husband or other family members to appear before the mediation centre. When the wife or other eligible relative under section 198A of CrPC, 1973 approaches the police station for lodging the report against the husband and his family members, the police officer in charge of the police will consider all the aggravating circumstances and may call other parties to the police station for knowing the gravity of the offence.[8] The decision of arrest has to be made according to the prescribed procedure in appropriate cases. Nowadays cases relating to section 498A will be referred to the Mahila helpline or woman cell especially established by the government to protect the interest of women. Where a women police officer has also tried to convince parties to compromise if parties are ready for the same. However, parties are always free to approach the family mediation centre for the settlement. The accused should as far as possible be personally given the notice to appear before the mediation centre on the date fixed by the mediator.[9] The presence of trained social workers (especially females) or legal aid panel lawyers at the Mahila helpline or women's cell for counselling is important to solve their dispute by mediation when the case was registered on the complaint of a woman. The procedure adopted by the court to resolve the dispute is very cumbersome and time taking. Therefore, it is important to find out the mechanism so that people may approach the right authority to resolve their dispute. In this regard, the step taken by different high courts to open up the mediation centres in their respective vicinity would be considered a stepping stone to making mediation a popular method to resolve family disputes.

To understand the entire paradigm of the justice delivery system, we need to relook at the concept of access to justice.[10] Why people are not able to access to justice? Is the system not working properly despite putting efforts into it? Or the system is burdened with the conventional continuity which leads to miscarriage of justice there are 'many questions but without answer'. Therefore, it is important to understand the fact that access to justice is inevitable to achieve rather than think about the mechanism of achieving the same. There are many obstacles to access to justice. It may economic, organisational or procedural. In 1993 a statute was passed in Italy, which Provided for the establishment of over 4,000 justice of the peace, endowing them with a limited but substantial power to decide cases based on equity rather than a strict law. In the same way, we have established Lok Adalat in India but with legislative backing. Professor Bryant Garth had rightly called it 'the third wave' in the access to justice movement.[11] The problem with alternative remedies is that the alternative will provides only a second-class justice because, almost inevitably, the adjudicators of alternative courts and their procedures would lack safeguards. They don't have adequate independence and training in comparison to ordinary judges. However, despite above said lacunas, various jurisdictions have articulated new forms of dispute mechanisms in their territory. In Japan, many types of alternative devices were developed to resolve a variety of issues. Another interesting device was developed in Canada in which 'judicial mediation within pretrial proceedings' was evolved. According to the Watsons "Pre-trial conferences are now

becoming the norm in many if not all, the common law provinces and their focus is almost exclusively on attempts by a judge to mediate a settlement".[12]

SUGGESTIONS AND CONCLUSION

Based on the above discussion, now we can say with certainty that the criminal justice system is not at all alien to alternative means of dispute resolution. The reason for not using different tools of ADR is only because crime would be treated as a serious actor in the eyes of the law. Therefore, ADR could be used but in a limited sense. However, there are certain areas where ADR can be used for example in cases of matrimonial disputes, cases of maintaining public tranquillity and petty offences. But all these areas are already exposed and conciliation and mediation are being used by judicial officers. Lok Adalats would also play a huge role to minimise the judicial burden. The creation of Permanent Lok Adalats is a unique step taken by our judiciary as per the provision of The legal services authority act. But still, a lot of steps are required to be taken off to make a robust system in India. The concept of plea bargaining is not popular among litigants. Hence, the need to improve the system so that people are aware of the provisions of plea bargaining should be taken by the judiciary with the help of the district legal service authorities. Minimise the role of practising advocates, especially in cases where the dispute is personal like matrimonial dispute. The appointment of advocates as a mediator would be detrimental to the cases. Therefore, an expert mediator would be appointed by the judicial officers. Appropriate amendments should be made to the provisions of plea bargaining to include more offences in its ambit. The procedural changes should be brought to minimise the role of the advocates. In this way, poor litigants may be benefited from the scheme. Mere creating a new body of adjudication would not ensure access to justice for all unless organisational obstacles will remove from the way of poor litigants.

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