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DISPUTE RESOLUTION IN RURAL INDIA: AN OVERVIEW

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This nation had courts, lawyers and doctors, but they were all within bounds. Everybody knew that these professions were not particularly superior; moreover, these vakils and vaids did not rob people; they were considered people's dependants, not their masters. Justice was tolerably fair. The ordinary rule was to avoid courts[i]. -M.K.Gandhi

Abstract

Every society has evolved its own mechanisms for dispute resolution. The informal settlement or resolution of local disputes has been seen throughout India from ancient times. But we could not see any homogeneity in dispute resolution practices. The idea of panchayat justice is not new to us. Since the ancient period *panchayats* have played an important role in village level dispute resolution. Elders resolve the disputes in the village by harping on their intimacy with the people and by taking into consideration local conditions, language, habits, customs and practices. The informal local governance system of the past has now given way to a formal local governance system. Mediation, negotiation and facilitated problem solving are practical and desirable means to face a conflicting situation and to create peace in our communities and neighbourhoods. The paper deals with the history and dynamics of dispute resolution practices especially on informal practices in India from the ancient period to the present.

Introduction

One can identify three phases in analysing the dispute resolution tradition of India; a) the traditional or indigenous phase b) the colonial period and c) the post- independence era. The Indian legal system had undergone changes effected by rulers from time to time as well as the colonial powers. The indigenous legal system in India did not display any homogeneity and reflected the basic characteristics of the Indian social organisation. According to Yogendra Singh the three basic components of the social system in India were relatively autonomous, i.e., the polity, the system of stratification and cultural norms. Even though the king and his administrative system was top in this hierarchy, the system prohibited the king to intervene in many disputes related to local customs, norms and practices of castes, sub castes or tribes, which had their own dispute resolution processes through panchayats, community leadership of elders or the intervention by the chief of local dominant castes. The main features of this

legal system and its 'judicial processes' were wider participation, paternalism, flexibility and innovativeness, emphasis on compromise and hierarchy (Singh, 2005). In rural communities, justice was imparted through 'adjustment' rather than 'judgement'. This process was informal and inexpensive. This was in accordance with the cultural ethos of the community and moral values. There are various studies carried out by many scholars on the indigenous Indian legal system (Baxi, 1976; Galanter and Baxi, 1979; Galanter, 1989).

Administration of Justice in Ancient India

Communities in India did not consider law as a set of rules, but as a moral one or *Dharma*. In Indian tradition, dharma is not a body of rules practised for its own sake. Dharma has a definite end and is a comprehensive concept. When it is used in the sense of obligation, its purpose is to keep everybody within his assigned role, prescribed by the *dharmasastras*. The visible end is to maintain the status quo in the society and the ultimate end lies in providing to each one in the society an opportunity to realise his ultimate goal of human existence (Sharma, 1988: 38-9).

Robert Lingat, the author of *Classical Law of India* (1993) explains that Dharma is not simply a 'set of eternal laws', inherent in the nature of things but is also a 'morality addressed to men in society', a morality which specifies the totality of duties which bears upon the individual according to his status (*varna*) and the stage of his life (*asrama*)' (Lingat, 1993: 3-4). The morality of *dharma*, which is superior to *artha* (wealth) and *kama* (pleasure), is both social and religious: dharma 'is essentially a rule of interdependence, founded on the hierarchy corresponding to the nature of things and necessary for the maintenance of social order' To deviate from its requirements 'is to violate one's salvation' (ibid: 211). Law is only one of the meanings of dharma.

In ancient India the legal order was based on *Dharma*. It was the king's duty to administer justice in his kingdom acting according to the rules of law or *dharma* laid down in *smritis*[ii]. The king also was under the law laid down by dharma. The fulfilment of their duties and responsibilities by ancient Indian rulers was of vital importance to the stability and organised development of society and to the happiness of individuals in the state. The term *vyavahara* is also used in ancient Indian legal literature to denote disputes or law suits[iii]. The procedures for dealing disputes are elaborately described in *smritis*[iv].

The king was the supreme head of the state, but it appears that in ancient India, king was not the maker of laws. The King did not make decisions alone. Katyayana states that the king should administer justice with the help of the judges, ministers, learned brahmanas, the *purohita* and sabhyas[v]. Narada says that the king should take into consideration the views of his chief judge as well as the rules stipulated in the *Dharmasatras*[vi]. Laws came from the guilds themselves, or were derived from the sacred scriptures as interpreted from time to time by scholars[vii]. The *Gautama Samhita*, an ancient book of law laid down seven rules. In *sankha* period, an assembly called *Manrum* (Place of Justice) existed which discussed the public affairs of a village in a common place[viii]. The inter-personal disputes were settled by elders in the *Manrum*.

In ancient India, the disputes are mostly settled by local or regional councils (Bose, 1998: 67). The foundation of the system of local administration through peoples' popular bodies, generally called Panchayats or Sanghas was deeply embedded in the Indian culture and civilisation[ix]. Indra Deva observed that *kula*, *puga* and *sreni*, the bottom level social institutions, were engaging in private mediation, which is in some ways quite close to the modern day panchayats[x]. These institutions resolved disputes except criminal ones. From the various sources, historians have identified patterns of association and resistance among peasant communities in both north and south India. The terms used to describe such communities include the *bhaiband* or 'brotherhoods' in the villages of the Bombay Deccan, and the *nurwa* and *patidar* in Gujarat. Further back in time, the *gana*, *sabha*, *samiti* and *parisad* in the north and the *nadu*, *brahmadeya* and *periyanadu* in southern India refer to equivalent political or social communities. Anthropologists have observed the functioning of caste panchayats in later twentieth century and even in recent times[xi]. The method of amicable settlement of disputes through mediation and conciliation was prevalent in Indian society from the very ancient times (Morje, 1984). Indian people preferred conciliated settlement with community intervention than adjudicated decisions through the process of formal court systems (Menon, 1986). Village panchayats were the best judges of the merits of the case which existed in the place where the accused person resided and where the subject matter of the dispute had arisen (Khosla, 1949: 17). In the olden days *Sehana* (elderman) used to dispense justice by properly hearing both the parties. An oath of Lord Buddha used to be administered to testify the truth of the statement. The *sehanas* (eldermen) were highly impartial people and men of integrity[xii] (Mamgain, 1975: 225, 226). Davids describes the role of guilds which had powers of arbitration between the

members of the guild as well as their wives (Davids, 1916:97). Bose portrayed the peaceful nature of ancient Indian tradition in which people answered hatred by love, anger by calmness, or in other words, invited self-suffering instead of inflicting suffering and punishment upon others for the vindication of a just cause. He argued that the Gandhian method is a continuation of one of the comparatively important traditions produced by Indian civilisation (Bose, 1998).

Kautilya's *Arthashastra* (324-300 BC) described the dispensation of justice in India. Boundary disputes between two villages were settled by the elders of the neighbourhood (or of the villages)[xiii]. Sen came to the conclusion that consideration was made for a defeated party to ensure good relation between the disputants in future[xiv] (Sen, 1925: 347-8).

The ancient system takes in to consideration of 'local usage' and customs of the disputants they belong to. Katyayana says that the disputes of residents of the same village should be decided by their own conventional usage. According to Brhaspati, disputes of people among various professions should be settled by their own conventions and usages. Thus the dispute resolution mechanism at that time gives consideration to the needs and requirements of the people and adopts a practical approach. It respects the diversity of the land, norms of the different groups as well as *Dharmasatras*.

Gram Panchayats as dispute resolution institutions continued functioning with minor variations till the advent of Muslim rule in India. Muslim rulers created courts of judicature totally at variance with traditional system. Thus village disputes were referred to the central courts. Kazis, Muftis and Mir Adals were appointed to dispense justice and these courts functioned at the district level or above[xv]. Between the 11th and 18th century, the Muslim and Mughal rule prevailed in India and the traditional dispute resolution system through the panchayats and *panchas* was not very much affected by the introduction of Kazi as a social adjudicatory system[xvi].

Legal System in British India

The village republics existed up to the time of Mughal rule and they were vastly affected during 1750-1850 due to various factors such as 'growth of transport and communication, spread of commerce and organisation of markets, patterns of revenue settlement, penetration of the bureaucracy, introduction of British justice, irrigation, roads, education etc' (Baxi,1982:296). (Tinker, 1954:1-26; Venkatarangaiya and Pattabhiraman, 1969: 5-9; Baxi, 1976: 395).

In the eighteenth century, the company established a parallel system of laws and law courts. In the Presidencies of Bengal, Madras and Bombay were the Crown Courts – initially these were Mayor's Courts, which were supplanted by Supreme courts in 1773. The Crown Courts were tribunals of English law with jurisdiction over everyone within the limits of the Presidency and in all cases involving Britons anywhere on the subcontinent. In the interior of the country, called the *mofusil*[xvii], was a hierarchical arrangement of Company Courts that administered a plurality of laws and, for the most part, had jurisdiction only over Indians and non-British Europeans (Kolsky, 2010:31). After the first war of independence in 1857 (finally put an end to Mughal rule), British government took over the administration of all Indian territories from East India Company through Government of India Act 1858[xviii].

The British rule led to upper hand of elites and directed towards a uniform 'national legal framework' (Rudolph and Rudolph, 1967). A 'high culture law' (literary law inscribed in classic texts- *dharmasastras* for Hindus and the Koran for Muslims) flourished and developed during 1772-1864, at the 'expense of the popular law of the peasant society' (Ibid: 269)[xix]. The British rule did not take in to consideration the diverse customs among the numerous castes and localities. They gave prime importance to laws propounded by the *Dharmasastras* and Shariat. Thus 'high culture laws' got an ascendancy over the customs and usages of the common folk. The emphasis shifted from community feeling to individual rights as British law and justice envisaged. The major portion of litigation came from land-related disputes as a corollary of British imposed laws in India.

J. D. M. Derrett, who analysed the patterns of interaction of English (European) law and institutions with indigenous legal culture and institutions, especially of Hindu and Muslim law wrote: 'loss of belief in law, the loss in terms of conversion of the regular courts and the system they applied in to a mere machine for manipulation and application of pressure.' Derrett maintains that the 'distinction between search for justice and the application of law, familiar to Eastern people, was abhorrent to the British; and the result was a distinct loss for a country not yet sufficiently mature, if that is the term, to profit from the intellectual trauma which ensued' (Derrett, 1976:xii).

Eric Stokes traces out the underlying ideologies which govern the first half of the British administration in India. 'The role of law in extension of power and social innovation was central to this debate in the eighteenth and nineteenth centuries. The three main currents of thought were 'whiggism' represented by Cornwallis, liberalism represented by Munro and

Elphinstone, and utilitarianism expounded by James Mill and Macaulay' (Baxi, 1986:21). Cornwallis came forward with the features of this model as 'security of property, and the administration of justice, criminal and civil, by rules which were to disregard all conditions of persons, and in their operation, by free influence or control from the government itself' (Stokes,1959:8). Cornwallis model stressed security of property rights, a government under law and independent judiciary. The Munro group looked for 'a continuation of the Indian tradition of personal government.' They encouraged *ryotwari* system and rejected the notion of division of powers (Ibid: 8-25).

In pre-British India, both caste and village panchayats existed. Caste panchayats were concerned with issues related to *jajmani*, marriage, and rituals. Village panchayats consisted of elders of prominent households in a village. They were concerned primarily with adjudicating civil disputes of residents related to rights in land and administering criminal justice. They also performed regulatory functions related to village commons. Dispute resolution through mediation was popular among businessmen. Impartial and respected businessmen called *Mahajans* were requested by business association members to resolve disputes using an informal procedure.

The role of *panchayats* as institutions administering justice was undermined by the British Raj. Legislation in 1860 such as the Indian Penal Code (IPC), Criminal Procedure Code (Cr.P.C.), Contract Act etc., along with Baden- Powell's schema for land revenue settlements supplanted the customary/traditional law. Collectorates and courts took over powers of caste/village panchayats to establish the rule of law. The impact of the IPC and Cr.P.C. on transplanting European notions of equality to Indian soil remains under-researched[xx].

Dhagamwar raised some questions regarding the authority of British raj for the introduction of laws in India. They 'tended to make laws for the country on the basis of their experience and general ideas gathered in England.' But these ideas were 'drawn from their limited upper middle class background rather than from the entire nation.' Baxi says that the ignorance as well as alien class composition of thinkers and administrators became clearly manifest in two areas of criminal law. One was the area of 'offences against the person, especially where they involve concepts of family honour' and the other was the area of master-slave relations. In both these, the law-makers and the law followed the English middle class attitudes, giving rise to an important 'gap between British attitudes and Indian social structure' (Baxi, 1986:22; Dhagamwar, 1974).

There are studies about the impact of British jurisprudence in local social dynamics (Whitcombe, 1972; Ravinder Kumar, 1968). Ravinder Kumar's Western India in the Nineteenth century analysed the British jurisprudence and ryotwari system of land revenue in Maharashtra. The pre-existing panchayat system had allowed some kind of protection to *kunbis* (agriculturists). They were familiar with the workings of the traditional authority structures and the notion of social equity upheld by them. But the British courts and law disrupted the traditional system of adjudication carried out through the Panchayats. The doctrine of freedom of contract and its pre-eminence ingrained in the judicial process was advantageous to the *vanis* (agents of money lenders) over *kunbis*.

Conciliation had to be incorporated in the Deccan Agricultural Debt Relief Act (1879), thereby providing for informal arbitration through conciliators 'based upon the traditional principles of social equity.' *Kunbis* made use of this conciliatory provision to regain their right to survive. It was less expensive than court proceedings. This case also raised some questions about the legality of contracts in the judicial process that often was blind to ground level realities. Thus the British legal system codified the laws that led to procedures that were unfamiliar to the ordinary people and not in conformity with the codes and rules of local traditions and customs.

The massive codification of procedural, civil, commercial and criminal law, together with the reorganisation of the judicial system for British India during the period 1859-1882, can be regarded as an attempt to consolidate and extend attributes of 'legalism' in a structural sense' (Trubek, 1972). Weber maintained that the system of formal justice 'legalises' the unequal distribution of economic power by 'guaranteeing maximum freedom for the interested parties to represent their formal legal interests' (Weber, 1968:812).

It is interesting to note that in 1934, the Privy Council refused to interfere in an award by the panchayat in a family dispute[xxi]. The idea of the village community and of the Panchayat got importance in the writings of Maine who described them in his *Ancient Law* (1861). He traced the evolution of legal systems, connecting these systems to what he saw as the various stages in the progress of civilisation. Meanwhile villagers were becoming increasingly unwilling to submit their disputes to the informal jurisdiction of elderly high caste peers due to the development of the parallel British court system. They would often then turn to the local British magistrate to override a judgement they had just received if it were not to their taste. Thus the authority of the village Panchayat therefore, where it existed, was gradually undermined. The administration of justice during British period had initially a different history. In the beginning

the magisterial functions were delegated to the native people due to the reason that the Britishers were not acquainted with local languages and the local laws.

By the later nineteenth century the ideal of village self-rule had been firmly well-established among the colonial officials and public. Some British administrators suspected that there was a dichotomy between the imposed British legal system and Indian notion of justice. So they incorporate panchayats in to their administration. Mayo Resolution of 1870 on decentralisation and Lord Ripon's enthusiasm for local self-government (1882) and attempts by William Wedderburn in Bombay and by others to revive the village Panchayat are significant. Following the report of the Royal Commission on decentralisation (1920), the Government of India Resolution (1915) and the Montague-Chelmsford report (1918), village Panchayats were formally vested with legal powers in five provinces. Although the village committees set up by the 1920 act had some initial successes (eg. the Bengal panchayats disposed of some 122,760 cases in 1925), they soon lost their importance, partly due to their subversion by the British court system (Galanter 1989; Tinker 1954).

The development of village governments from 1920 to 1947 consisted primarily of the creation of *Panchayat* bodies blending 'administrative' and 'judicial' functions. Except in the United Provinces, village councils were elected bodies; in some the franchise was limited by literacy criterion. There were no doubt certain *ex officio* members including the village headman, nominees of government, certain classes of landlords, and -after 1939- women, communal groups and untouchables (Galanter, 1989: 58). Hugh Tinker pointed out the pre-eminently judicial role of some of the panchayats. The available literature on these panchayats recorded their judicial functions[xxii]. The U.P. Panchayat Act 1920 stipulated that the 'principal function of the panchayat was to act as a petty court'[xxiii]. Judicial functions were pre-eminent in the ordinary *panchayats* of Central Provinces, Punjab and the 'union courts' in Bengal and 'village courts' in Madras. Tinker noticed that judicial functions constituted a considerable part of the role of Panchayats in other provinces also.

During British rule the judicial administration of the villages by the agencies of central government, extension of jurisdiction of modern civil and criminal courts, with their adversary system of adjudication which was unknown and new to village population, increase in the means of communication, progress of English education, new land revenue system, police organisation, migration of people from villages to towns, growing spirit of individualism resulting from new English education, growing pursuits of individual interests and

consequently listening of community's influence over the members attributed to a great extent to the decay of ancient village people's courts (Pillai, 1977: 439; Malaviya, 1956 :19).

'Lawyers' Law' Vs 'Local Law ways'

Galanter and Bernard S. Cohn (1965) found two streams of legal system emerging in British India. 'Local law ways' referred to the local dispute resolution practices prevailed in rural India along with an adversarial mode of dispute resolution by means of court through third party pleaders. The relationship between the 'local law ways' and 'lawyers' law' can be i) marked by complementarity and reciprocally reinforcive co-existence and ii) characterised by conflict and tension, resulting in a miscarriage of justice-values embodied in either or both (Baxi,1986:75). Cohn observed a clash between indigenous Indian values and the values of the British-based courts (Cohn, 1959: 90).

The Gandhians failed to implement a polity based on village autonomy and self- reliance through constitution. At the time of formation of constitution, states like Madras, Mysore and Travancore had a system of village courts. The state of Madhya Pradesh and Uttar Pradesh established *Nyaya panchayats* taking their cue from the Directive Principles of state policy. These judicial *panchayats* were neglected due to many reasons[xxiv]. Various attempts were made by a number of individuals and groups to make the Gandhian concept of village swaraj a reality[xxv].

The nationalist movement inherited the ideals of liberal constitutionalism and Cornwallis model legal system. It undermined the plurality of Indian culture and instituted a monolithic world view of justice. The constitution of India reflects many of the values inherent in the western legal system in opposition to the values of the traditional Indian system of dispute resolution. Before the end of the nineteenth century, Britain had furnished India with legal doctrines and judicial procedures sufficient to govern a modern economy.

Unfortunately, entry of the British legal system got rid of the values embedded in the Indian village life. But at the same time, it eroded certain social evils from the Indian villages. The fact is that it blindly undermined the life situations, emotions and culture of the people or land. In 1931 Gandhi wrote in *Young India* as follows:

> ...we may not replace trained judges by untrained men brought together by chance. What we must aim at is an incorrigible, impartial and able judiciary right from the bottom. I regard village panchayats as an institution by itself. But thanks to the

> degradation of the caste system and the evil influence of the present system of government and the growing illiteracy of the masses, this ancient and noble institution has fallen into desuetude, and where it has not, it has lost its former purity and hold. It must, however, be revived at any cost, if the villages are not to be ruined (CWMG, Vol. 47:363).

It is interesting to mention that there exist three different carved stone images depicting various views about justice in the Mumbai High Court building. Even though it may be the architect's impressions of justice in nineteenth century British India, it is a very relevant articulation of the different notions of justice that also questions the monolithic version of justice and equity. Nariman gives details of the 6 figures in the high court building caricaturing justice (Nariman, 2005:54-56)[xxvi]. The first picture is the British (Victorian) model. The second is a representation of the Indian ideal of justice. The third is that of a cynic and realist, who treats justice as a commodity, bought and sold in the marketplace by hard bargaining.

In the first picture, Justice is picturised as blind, and the person dispensing it is expected to act without fear and favour and does not provide any space for emotions and bodily appearances. The second picture is about the normative ideal of justice that conforms to the Indian understanding. A lady in flowing robes with a sword in her right hand and a pair of scales in her left hand with clear eyes looking focussed at the shifting scales is seen. The tip of the sword rests close to her feet enabling her to punish swiftly the guilty and spare the innocent.

Second Dawn of Panchayati Raj

In the constituent assembly, the possibility of a continuing judicial and administrative role for the village Panchayat was considered, but it was rejected. Consequently, the only reference to Panchayats in the Indian Constitution is in the Directive Principles of State Policy, which is not enforceable by any court. The basic structure of Indian legal system remains unchanged even after getting independence.

Soon after the launch of the first five year plan, it was evident that there were some weaknesses in realising the objectives of the plan. Some states which did not have statutory village panchayats enacted legislations and states which had panchayats went forward to strengthen them[xxvii]. The number of panchayats increased from 14.8 thousand to 164.3 thousand during the first decade of independence (Jain, 1968:129-39). It was during the third five year plan that a methodology of preparing state plans for rural development on the basis of district and block

plans, was evolved and attempts were made to constitute three-tier system of PRIs, based on the recommendations of the Balwant Rai Mehta Committee (1957). The Committee concluded: 'Community development can be real only when the community understands its problems, realises its responsibilities, exercises necessary powers through its chosen representatives and maintains a constant and intelligent vigilance on local administration'. (Mehta, 1978: 2-3)

But these ideas were not worked out, as the PRIs, except in some states, were stagnating or declining, after the initial interest for their development. The case for governmental decentralisation was also later affirmed by the National Development Council, and once again panchayats came back on to the political agenda and the phrase 'panchayati raj' came into fashion (quoted in Mukherjee, 1947). Jai Prakash Narayan was a great advocate of Panchayats in the late 1960's and early 1970s - his vision being quite a radical one, championing the notion of party less democracy.

During sixth five year plan, block level was considered important to implement rural development programmes. Ashok Mehta Committee on Panchayati Raj (1977) considered inadequacy of resources as the reason for failure of PRIs and recommended to revive and strengthen the declining Panchayati Raj system. As a result of this report, the Indian states of Karnataka, Andhra Pradesh, and West Bengal passed new legislation. The committee recommended that the Nyaya Panchayats should be kept as separate bodies from that of development Panchayats and it should be presided over by a qualified judge. C.H. Hanumantha Rao committee (1984) recommended that planning process at the district level should be sufficiently decentralised, having a good deal of autonomy, administrative and financial adequacy.

In the late twentieth century, however, the notion of Panchayati Raj has returned once more to the political agenda. Since the early 1990s, there have been concerted efforts for strengthening restoring Panchayati Raj in the states. The Indian Parliament added a new chapter (Part IX) to the constitution by passing the Constitution Seventy-third Amendment Act, 1992. It was brought into force with effect from June 1993and it was a land mark in the history of local self-government in the country, gives a constitutional mandate to the state governments to restructure and restore local bodies as institutions of self-government. The Act provides for (i) the creation of a three-tier system of PRIs (ii) the creation of State Election Commission, and (iii) the creation of State Finance Commission.

Nyaya Panchayats

Panchayati justice is not a new idea but an ancient institution with its roots deep in the ethos of the country. An important innovation since independence is that of the Panchayati Raj system which incorporated the activities of community development and the system of Nyaya Panchayats (NP) for local dispute resolution. Nyaya Panchayats have existed in India from the ancient period. NPs were resolving disputes in accordance with the local customs. With the advent of British colonialism NPs' role was diminished. Some regions like, Madras, Mysore and Kerala had a system of village courts at the time of the adoption of the constitution. But few states implemented article 50 upon the adoption of the constitution by creating separate NPs. Several committees and commissions have studied the panchayati justice system and they recommended for revitalising this traditional institution[xxviii]. Following the Balwantray Mehta Committee Report (1959) and the reorganisation of the village institutions both as local government and developmental agencies, many more states established NPs as separate judicial bodies. Apart from the ideology of separation and considerations of efficient division of labour, the creation of NPs can be seen to illustrate two other aspects i) their creation testified, at the level of values, concern for providing easy legal access to village population, ii) at the same time, it also represents a massive attempt by the state to displace the existing dispute institutions in village areas, such as caste institutions, territorially based secular institutions or other special initiatives by the social reformers e.g. Harivallabh Parikh's ,Rangpur Peoples Court (Baxi, 1976; Baxi,1982:307). Several attempts have been previously made at the state level to revive the panchayati justice. But the studies (Baxi,1976; Baxi and Galanter, 1989; Galanter and Meschiez, 1982)) on the functioning of these revived NPs conclude that the NPs once established had low and declining case loads and failed to inspire public confidence in the villages.

The recommendations of the various commissions revealed that NP system would ensure public participation in the administration of justice. The NPs would encourage confidence and help to lighten litigant's apprehensions regarding the judicial system because of their informal atmosphere, conciliatory approach, and use of local language, lack of procedural and evidentiary technicalities. Since the adjudication of the NPs would be based on local custom and tradition, many of the defects and inadequacies of the ill-suited British legal system would be eradicated.

It is argued that NPs guided by local traditions, culture and behavioral pattern of the village community infuse confidence in the people towards the administration of justice. The Law

Commission, in its 114th Report[xxix] indicating that Nyaya Panchayats made precisely this point, observed:

> Article 39A of the Constitution of India directs the State to secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by economic or other disabilities. This is the constitutional imperative. Denial of justice on the grounds of economic and other disabilities is in a nutshell referred to what has been known as problematic access to law. The Constitution now commands us to remove impediments to access to justice in a systematic manner. All agencies of the Government are now under a fundamental obligation to enhance access to justice. Article 40 which direct the State to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government, has to be appreciated afresh in the light of the mandate of the new article 39A.

The Bhagavati Committee Report on National Juridicature recommends retention and invigoration of the NP. So does the brief chapter on the NP in the Asoka Mehta Committee report on PRIs. Perhaps a new national policy on decentralised popular bodies is emerging. It is a policy that directs attention once again to the unanswered questions posed by the fate of the Nyaya Panchayat experiment (Baxi, 1982:327).

Williams commented that the only cohesive and realistically effective rationale for the implementation of a panchayati system of justice is that of increasing access to justice for all the citizens of India (Williams, 1990). He remarked that the 'mere extension of the existing court system to the village level, without a corresponding simplification of procedure and change in judicial approach' would be insufficient. He put forward some corrective measures, to ensure the representation of the community in all respects, to rectify the failure of the previous experience (Williams, 1990:10-11). So, many initiatives on this line are done through legislation. Lok Adalats and newly constituting Nyaya Panchayat Bill[xxx] aiming for informal dispute settlement at local level are the apt example for that.

Alternatives to Litigation: Evolution and Development

In India, the quest for justice has been an ideal, which the citizens have been aspiring for generations down the line. Our Constitution reflects this aspiration in the Preamble itself, which speaks about justice in all its forms: social, economic and political. Justice is a constitutional mandate. About half a century of the Constitution at work has tossed up many issues relating to the working of the judiciary; the most important being court congestion and judicial delays.

The possibility of a justice-delivery mechanism in the Indian context and the impediments for dispensing justice in India is an important discussion. Delay in justice administration is the biggest operational obstacle, which has to be tackled on a war footing. As Justice Warren Burger, the former Chief Justice of the American Supreme Court observed in the American context: 'The harsh truth is that we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and bridges of judges in numbers never before contemplated. The notion — that ordinary people want black-robed judges, well-dressed lawyers, and fine panelled courtrooms as the setting to resolve their disputes, is not correct. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible'. This observation with greater force applies in the Indian context. Therefore, this explains the need for Alternative Dispute Resolution in India. In a country, which aims to protect the socio-economic and cultural rights of citizens, it is extremely important to quickly dispose the cases in India, as the Courts alone cannot handle the huge backlog of cases. This can be effectively overcome by applying the mechanisms of Alternative Dispute Resolution.

Along with the common tradition of local customary practices of dispute resolution, some exemplary mechanisms were seen in the rural landscape of India. Among this, the People's Court of sarvodaya social worker Harivallah Parikh was the most impressing one. It is not wrong to say, People's Court of Parikh is a precursor to Lok Adalat movement in India. 'It was through his role as a mediator in village disputes that the leader of Lok Adalat, Parikh attained legitimacy, and a degree of charisma. In turn, he used Lok Adalat to translate his vision of socio-economic reforms by making it a vehicle of reform-oriented adult education. He made the adjudicatory occasions to educational ones, both through actual decisions and plain preaching on many themes-family planning, ill-effects of over consumption of alcoholic drinks, honesty in credit transactions, civil liberties irrationality of belief in witchcraft, equality of women, agricultural innovation etc. (Baxi, 1986:77). Lok Adalat is an alternative dispute resolution(ADR) forum which has the potential of increasing access to justice. They are informal, flexible, participatory forums which have as their purpose the encouragement of

settlements, compromises and the avoidance of litigation. Lok Adalats serve as mediatory and conciliatory forums which are voluntarily utilised by parties to a dispute as a means of understanding their rights and obligations under the 'rule of law' and of facilitating the settlement or compromise of their disputes. Lok Adalats have no legal authority to impose their decisions. Lok Adalat judges, who are usually retired judges of the courts, advocates or social workers act only as mediators or conciliators.

ADR in India was founded on the Constitutional basis of Articles 14 and 21 which deal with Equality before Law and Right to life and personal liberty respectively. These Articles are enshrined under Part III of the Constitution of India which lists the Fundamental Rights of the citizens of India. ADR also tries to achieve the Directive Principle of State Policy relating to Equal justice and Free Legal Aid as laid down under Article 39-A of the Constitution. In 1999, the Government enacted the Code of Civil Procedure (Amendment) Act, 1999 (CPC Amendment Act) where a new Section 89 was introduced in to the Code of Civil Procedure. The new Section introduces the concept of 'judicial mediation' as opposed to 'voluntary mediation'. A court can now identify cases where an amicable settlement is possible, formulate the terms of such a settlement and invite the observations thereon of the parties to the dispute. The Acts which deal with Alternative Dispute Resolution mechanisms are Arbitration and Conciliation Act, 1996 and the Legal Services Authorities Act, 1987.

ADR in India is not new and it was in existence even under the previous Arbitration Act, 1940. The Arbitration and Conciliation Act[xxxi], 1996 has been enacted to accommodate the harmonisation mandates of UNCITRAL Model. To streamline the Indian legal system the traditional civil law known as Code of Civil Procedure, (CPC) 1908 has also been amended and section 89 has been introduced. Section 89 (1) of CPC provides an option for the settlement of disputes outside the court. It provides that where it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation or judicial settlement.

Due to extremely slow judicial process, there has been a big thrust on Alternate Dispute Resolution mechanisms in India. The Law Commission in its working paper on 'Alternative forum for Resolution of Disputes at Grassroot Level' has observed that the present system of administration of justice is not suited to the needs of our people and the real remedy lies in reforming the existing judicial system by undertaking some interim steps immediately. ADR has been a vital, and vociferous, vocal and vibrant part of our historical past. Conciliation cells

operating regularly in certain rural areas of Tamil Nadu are settling a large number of pre-litigation disputes almost on the pattern of the Lok Adalats (Menon, 1986:129). Some traditional community dispute resolution systems like tribal council of Malana village in Himachal Pradesh, do not give emphasis on procedural aspect of law (Chitkara, 1993:33).

Undoubtedly, Lok Adalat (Peoples' Court) concept and philosophy is an innovative Indian contribution to the world of jurisprudence. It has very deep and long roots not only in the recorded history but even in pre-historical era. It has been proved to be a very effective alternative to litigation. The system has received laurels from the parties involved in particular and the public and the legal functionaries, in general. It also helps in emergence of jurisprudence of peace in the larger interest of justice and wider sections of society.

While Arbitration and Conciliation Act, 1996 is a fairly standard western approach towards ADR, the Lok Adalat system constituted under National Legal Services Authority Act, 1987 is a uniquely Indian approach.

Evolution of Lok Adalat

Lok adalat is not a substitute for the present judicial system. According to Fali S. Nariman the only alternative means of dispute resolution which exists in India and which has so far proved reasonably successful is the system of *Lok Adalats.* Committee for Implementing Legal Aid Schemes (CILAS-1980) headed by P. N. Bhagawati, recommended holding of Lok Adalats for settlement of disputes through conciliation. The concept of Lok Adalat is considered to be the brain child of P. N. Bhagawati, former chief Justice of India.

The true basis of settlement of dispute by the Lok Adalat is the principle of mutual consent and voluntary acceptance of the solutions with the help of a conciliator. The basic purpose of Lok Adalats is not merely to give justice based on evidence, law and legal know-how, but adopt a humane approach is. Lok Adalat is a voluntary institution and is the direct outcome of an activist approach to judiciary. Lok Adalats are voluntary efforts of judiciary and litigants. There is no compulsion to settle the disputes. If parties agree to decide their disputes, only then Lok Adalats comes in to the picture.

Lok Adalat takes up cases which could be settled by conciliation and compromise and those pending in the regular courts within their jurisdiction. A case can also be transferred to a Lok Adalat if one party applies to the court and the court sees some chance of settlement after giving an opportunity of being heard by the other party. The process of negotiations usually starts

when both the parties come before the Lok Adalats. The negotiation is assisted by the volunteers, advocates of both the parties and judges of the Adalat. They interact with the parties and assess the scope of settlement acceptable to them. Parties can directly interact with the judge, which is not possible in regular courts. Once the settlement is arrived at, it is reduced to black and white on the spot and parties voluntarily agree to be bound by the decision of the Lok Adalat and the signatures of the parties are obtained. Finally, this agreement is ratified by the respective judges of the local courts where the case was pending and accordingly a consent decree is passed. However, if a compromise is reached, an award is made that is binding on the parties. It is enforced as a decree of a civil court. An important aspect is that the award is final and cannot be appealed, not even under Article 226 because it is a judgement by consent. One of the distinct advantages of the Lok Adalat strategy is that it can invent new prospects for resolution of disputes which is not possible under the conventional justice delivery system. The Lok Adalats can invent new device under which both parties to the dispute can be accommodated. The Lok Adalat contemplates a place of justice at the door of a common man, to settle his dispute at the earliest opportunity and without any delay and costs. The Lok Adalat is based on the principles of honesty and moral character as embodied in Indian culture and civilization, with a view to restore the confidence of a common man in the judicial system.

The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat. The procedural laws and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat. Main condition of the Lok Adalat is that both parties in dispute should agree for settlement. The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the award of the Lok Adalat. Lok Adalat is very effective in settlement of money claims like MACT cases. Disputes like partition suits, damages and matrimonial cases can also be easily settled, as the scope for compromise through an approach of give and take is high in these cases. Lok Adalat is a benefit to the public litigants, where they can get their disputes settled fast and free of cost. Parliament enacted the Legal Services Authorities Act 1987, and one of the aims for the enactment of this Act was to organise Lok Adalat to ensure that the operation of legal system promotes justice on the basis of an equal opportunity. The Act gives statutory recognition to the resolution of disputes by compromise and the settlements by the Lok Adalats.

The Lok Adalat Movement was started in Gujarat and the first Adalats was held at a village in Junagarh district in 1982. Lok Adalats have been functioning in various parts of India for over twenty years with the active support of the high courts and other lower courts.

In order to get over the major drawback in the existing scheme of organisation of Lok Adalats under Chapter VI of the Legal Services Authorities Act, 1987, in which if the parties do not arrive at any compromise or settlement, the unsettled case is either returned to the Court of law or the parties are advised to seek remedy in a court of law[xxxii].

Family court

After the enactment of the Family Courts Act, 1984, many family Courts have been set up throughout India. The Family Courts Act 1984 was enacted with a view to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs, based on non-adversarial and multi-disciplinary approach. The Family Courts are expected to adopt a totally different approach than that adopted in ordinary civil proceedings, and make reasonable efforts for conciliated settlement before the trial commenced, and during this stage the proceedings are to be informal. Conciliation, speedy settlement, non-adversarial approach, multi-disciplinary strategy to deal with family disputes, informal and simple rules of procedures and gender justice are believed to be the major principles in the idea of Family Court.

Family Courts are working on the basic foundations of counselling and conciliation. In fact, counselling is the foundation on which the philosophy of conciliated settlement rests. The counsellors, their skill and competence have an extremely important role to play in the whole process. The role of the counsellors is not limited to counselling but extends to reconciliation and mutual settlement wherever deemed feasible.

Jamwal (2009) argues that the practice of allowing the legal practitioners in family disputes militates against the very spirit (informality, non-adversarial approach and non-precipitation of relationship punctuated by marital discord during legal proceedings) of Family Courts in the Act.

Conclusion

In India, the role and visibility of informal practices has declined in recent years. The dispute management procedures adopted by the village elders is certainly a fast track one. There are number of merits in the manner in which conflicts are resolved at the level through the

mediation. From the perspective of the poor people, this is a short cut to settling their disputes since they lack the time and resources to engage in legal means of dispute settlement. Thus the disputes in the rural India are settled through conciliation and mediation. The panchayat system in the ancient India reveals this heritage. Presently, we have adopted court annexed ADR practices like Lok Adalat and Family Court as the extension of local level mediation across the country.

Notes

[i] M K Gandhi's Hind Swaraj: A Critical Edition, Suhrud and Sharma, p. 57, 2010, New Delhi: Orient Blackswan

[ii] In ancient India, the principal source of law was the *smritis.* Smriti meant literally 'that which was remembered', the recollections handed down by the rishis. *Smritis* were the compilation of principles for the regulation of the human conduct. The authority of their legal injunctions was derived partly from the reverence in which they were held and partly by the belief that what they laid down was agreeable to good conscience. They claimed to be the exponents of divine precepts of law and compilers of the traditions handed down over generations. There are references to 100 or more *smritis*, but many of them are untraceable. The principal smritis are 1) *Manusmriti* (200BC-100AD), 2) *Yajnavalkya smriti* (200AD- 300AD), 3) *Narada Smriti* (200AD). (Nariman, 2006:1-2) Deva says about grand trio of Indian jurisprudence -three *smritis* of Narada, Brhaspati and Katyayna which were composed from the fourth to the sixth century AD (Deva, 2005).

[iii] U. C. Sarkar says that the term *vyvahara* has been used in the *smritis* and commentaries in the sense of civil law, positive law, litigation or dispute. Kane says that it means law suit, or dispute in a court and legal procedure. Katyayana's explanation of the etymological meaning of *vyvahara* is interesting: *vi* is employed in the sense of various; *ava* in the sense of doubt and *hara* means removing (setting aside) - removing various doubts ( ). In the Naradasmriti and Brhaspatismriti law suits are termed as *vyavahara.*

[iv] Narada described that every trial has four stages. The facts of the dispute are received in the first stage. The appropriate title of law in which the dispute falls should be found out in the second stage. The pleadings and evidence are examined in the third stage. A decision should be taken only after completing these stages (Deva, 2005).

[v] *Katyayanasmriti*,55-6

[vi] (*Naradasmriti* I, 35, 37)

[vii] Majudar examines the relation between the guilds and the king in detail. He wrote, "…it is clear that the guild was recognized as a corporation in a law court where it was represented by selected members to contest the possession of a field, garden etc"(Majumdar, 1918:21).

[viii] There are indications of *Manrum* in *Samkha* literature like *Pathittuppath* (23:5; 25:4; 29:9). *Manrum* is a place which observes *Arum* or *dharma.*

[ix] Panchayat as an agency for settling local disputes is fairly ancient (Khan and Sharma, 1982), See 14th Report of Law Commission of India. It is believed that panchayat system was first introduced by King Prithu, while colonising the dotes between the Ganges and the Yamuna. In the ManuSmriti, Shanti Parva of Mahabharat and Kautilya's Arthasasthra (400B C), the existence of Gram Sanghas or rural communities was mentioned. S. Sahayi pointed out that the administration of justice by village panchayats through peoples' participation is as old as the Indian village itself. 'In village, justice was dispensed by assembly of the village castes or community. The village headman was the judge. Family courts were also established due to the prevailing joint family system. *Puja* assemblies consisting of groups of family in the same village decided civil disputes among family members' (Chitkara, 1993:21). We can see three levels of courts, *Kula- Sreni- Puja. Kula* or Panchayat was the lowest one headed by Kirismen having jurisdiction upon small matters concerning the members of the *Kula.* The *Sreni* was the next higher court having jurisdiction over the traders, artisans etc. pursuing similar or related means

of livelihood. The *Puja* was the court having jurisdiction over members of different castes and occupations inhabiting the same village or town (Dyal, 1970:95). The notable aspect of these institutions was that they did not consider any legal technicalities and laid much importance to amicable settlement of disputes with mutual give and take. The adjudicators had a deep faith in arbitration and conciliation (Misra, 1980).

[x] Some slightly different version about the grass root level social institutions is given by Indra Deva based on the *smritis* of Narada, Brahaspati and Katyayana. The institutions which managing disputes are '*Kulani* or family gatherings of agnatic and cognatic relatives, *puga* or councils, *sreni* or corporations of traders or artisans, *gana* or assemblies of Brahmans. Two more courts have been mentioned: one headed by the judge who has been appointed by the king and another headed by the king himself. These courts are arranged in the descending order of importance, with each court being superior to the one preceding it' (Deva, 2005:18). According to Katyayana, *puga* refers to one village or city consisting of different caste and professions, *sreni* means guilds of artisans or group of persons having the same trade while they may belong to different castes.

[xi] 'Of White Whale and Countrymen'; (Thapar, 1984) From Lineage to State; (Stein, 1980) Peasant, State & Society. To a large extent however the modern idea of the Panchayat, its nature and its functions, derives from the image of the Indian village Community were seen in the writings of Sir William Jones, Hector Munro, Mountstuart Elphinstone, John Malcolm and a variety of other colonial authors of the Orientalist school in the late eighteenth and early nineteenth centuries. Describing about villages around Delhi in the years after the collapse of Mughal power in 1761 Metcalf wrote to the 1832 Select Parliamentary Committee on the East India Company's charter: 'The village communities are little republics, having nearly everything they can want within themselves and almost independent of any foreign relations. They seem to last where nothing else lasts. Dynasty after dynasty tumbles down; revolution succeeds to revolution; Hindoo, Pathan, Mogul, Mahratta, Sikh, English, are all masters in turn; but the village community remains the same...This union of the village communities, each one forming a separate state in itself, has, I conceive, contributed more than any other cause to the preservation of the people of India through all the revolutions and changes which they have suffered, and is in a high degree conducive to their happiness, and to the enjoyment of a great portion of freedom and independence' (Dewey, 1972). (Perlin, 1978),

[xii] In this process the disputes were settled by arbitration. The aggrieved party would invite two or three persons, called *sianas* of the village to look into its complaint. The *sianas* would usually assemble in a santhant or at any other suitable place for both the complainant and the defendant. The *sianas* afforded opportunity to both the parties of relating their respective cases and thereafter adjudged the truth or otherwise of the complaint. On reaching upon a definite conclusion they would pronounce their verdict which was mostly accepted by all. The *sianas* used to be paid by both the contending parties a tiny amount in consideration of the time they spent on the issue. It was believed that the *sianas* were mostly honest, unbiased and fair in the matter of administering justice (Mamgain, 1971: 256, 286).

[xiii] More explicit references are furnished by R Shamasastry in his translation of the regulations on statecraft by Kautilya. (shamasastry, 1929: 191-2).

[xiv] Surendra Nath Sen made a study of the administrative system of the Marathas, who were Hindu rulers over a north western area of India in the 18th century. Instead of strictly enforced law in civil suits, they encouraged amicable settlement and gave every chance of proving their case. Sen give an example of the dispute between Maloji bin Shahaji Bhanga and Hiroji bin Narsoji Bhanga about the proprietary right of a piece of land. Hiroji had failed to substantiate his claim, *Panch* directed Maloji to give Hiroji a site of land to build a home and 30 *bighas* of land. Some human considerations were made in regard to punishment also.

[xv] Kazis were the Islamic functionaries having the powers of judicial administration during the Mughul period. During the colonial period, the Hastings Plan of 1772 included Kazis in matters involving Muslim law. This was continued up to 1864. But due to the consistent demand from the Muslims, the system of Kazis was revived in 1880. But the colonial government gave power to provincial governments to enact laws to recognise Kazis performing non-judicial private functions. During the period 1867-1921, Muslims referred their disputes regarding succession, marriage, divorce family relations to local *muftis*, assigned the duty of dispute resolution. Thousands of family disputes were (now also) settled by these informal dispute resolution institutions.

[xvi] Alternative Dispute Resolution , Legal Aid News Letter, May- August, 1990, p.14

[xvii] There was 'less formal procedure and less English law in these 'back-country' courts (Jain, 1972).

[xviii] A uniform legal system with civil and criminal courts was established. High courts for each presidency, and later each province, were established under the Indian High Courts Act 1861. The subordinate judiciary was established, and civil courts were organised in a regular hierarchy in each district- courts of the district judge, the additional District judge, subordinate judges and the munsif. Criminal courts were organised in to Courts of Sessions, Presidency Magistrate Courts and Courts of First, Second and Third Class Magistrates. The high courts were given appellate and supervisory jurisdiction over all civil and criminal courts in the province (Nariman, 2006: 23-24).

[xix] The Hindu and Muslim laws that were formulated by the British rulers had not contained the genuine content of the texts. Actually they could not understand fully these traditions and inserted their own interpretations in to them. But many of the changes they brought out were the deliberate 'expropriation of law' (Deva, 2005:20; Baxi, 1986:12).

[xx] Discussion Paper on Decentralisation in India: Challenges & Opportunities by United Nations Development Programme.

[xxi] This case is about the partition of an estate between the members of a Hindu family. The award was challenged in the Madras high court. But the court upheld the panchayat award. On an appeal from the decision of the High Court, the Privy Council commented on the award by the panchayat.

[xxii] The judicial functions were sometimes performed by special village courts (as in Madras) or by 'ordinary territorial panchayats'...The ordinary panchayats of C.P., Punjab, and U.P. were mainly occupied with judicial work'. In Bengal 'there were special union benches to try criminal offences and union courts to which civil suits might be taken'; by 1937 'there were 1521 union benches and 1338 union courts'. The village courts were elected by villagers though in some cases there was indirect election and nomination (Tinker, 1954: 206-7).

[xxiii] The Bombay Village Panchayat Act of 1920was also similar to this (Tinker, 1954:117).

[xxiv] The report on *Panchayati Raj in Maharashtra* (1971) found that out of 3446 *Nyaya Panchayats*, only 723 were functioning actively. In Rajasthan, a high-powered committee concluded that the *Nyaya Panchayats* in the state were declining. In the 1970s, the state legislatures of Maharashtra and Rajasthan abolished these bodies.

[xxv] Ashok Mehta committee to 73rd amendment

[xxvi] Nariman took the details from the article, *Three faces of Justice* (1995) by Barzo Taraporewala in the publication of the Incorporated Law Society in its centenary year.

[xxvii] Rajasthan was the first State to pass legislation authorising the constitution of a Panchayat, the first such Panchayat, assuming largely administrative powers, being established at Naguar, the state capital in October 1959. Another was soon set up at Shadnagar in Andhra Pradesh, and by 1959 every State had passed a Panchayati Act and some sort of Panchayat was thereafter established.

[xxviii] Law commission report on Gram Nyayalas, report of the expert committee on legal Aid, 'Procedural justice to the People'1973, Committee on Judicare's Report on National Juridicare: Equal justice social justice 1977

[xxix] August 1986 (Chapter V para. 5.3)

[xxx] To draft legislation about Nyaya Panchayat, a drafting committee, under the chairmanship of Upendra Baxi , has been formed by the Ministry of Panchayati Raj, Government of India. The bill is proposed to be debated in the Indian Parliament soon. Now it is under the ministerial consultation.

[xxxi] The Arbitration and Conciliation Act, 1996, first introduced mediation into India. Section 30 of the Act specifically encourages parties to seek mediation and conciliation even when arbitrage proceedings are underway. The Act however does not draw up the rules for mediation as it does for conciliation, thus rendering the provisions a dead letter. Part I of this act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. (Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.)

[xxxii] Chapter VI A was introduced in the Legal Services Authorities Act, 1987, by Act No.37/2002 with effect from 11-06-2002 providing for a Permanent Lok Adalat to deal with pre-litigation, conciliation and settlement of disputes relating to Public Utility Services, as defined u/sec.22 A of the Legal Services Authorities Act, 1987, at pre-litigation stage itself, which would result in reducing the work load of the regular courts to a great extent.

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