ACCESS TO JUSTICE THROUGH THE ALTERNATIVE DISPUTE RESOLUTION

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ABSTRACT

In the times of crises, an individual tends to approach the authorities who can resolve his matter. It may be to address his grievance or to defend himself. When in such situation, lengthy and complicated procedures tend to increase the trouble he or she is facing. Considering the same scenario in adjudication or Alternative Dispute Resolution, access to justice becomes strenuous. It becomes even more difficult with the increasing expenses and delay in resolving the matter. The entire purpose of access to justice is defeating as the aim to reach to the solution entangles the individual with additional burden of complexity of procedures, time and investment of money.

The aim of the paper is to look into the meaning of access to justice and the approach towards its legal system for dispute resolution. This takes place by considering the socio-economic background, financial capabilities and the investment of time that the individual can invest to put forth the dispute in the court of law. The capacity and capability of the individual to approach any form of dispute resolution would result in that person getting access to justice. In this essay, the efficiency of ADR mechanisms is being looked into by focusing on three parameters i.e. procedure involved, cost and time.

INTRODUCTION

Access to justice means getting access to judicial protection when the individual is aggrieved or has to defend his claim or even himself. There are legal institutions established as well as well-defined laws made available to the people. Access to justice would mean that the services of these institutions are utilized by the people for dispute resolution, defend their claims and exercise their right to litigate.[i] The advocates and the judges who play a major role in these institutions are the mediums to get access to justice.

Merely accessing the institutions or people attached to the institutions is not sufficient. There are various other factors which impact the right to access to justice. These factors play a major role in determining whether the people can access the courts or seek any resort from the legal system. These factors include the financial capacity of the person to spend on the litigation.[ii] Litigation is a time-consuming process of dispute resolution. In this process, a lot of money is invested by the litigant. The costs include the advocate's fees and other court-related expenses. The life of the case may on average be around 3-8 years or even more. The litigant has to invest until the disposal of the case. Any person who does not have the financial capacity to undertake the cost of litigation may not be able to access justice.

The second factor is time. As stated above, the duration of the cases involves an investment of a considerable amount of years to get the final decision.[iii] It involves visiting the courts on the specific dates of hearing, undergoing strenuous procedures of the court, dealing with the delaying tactics of the advocates and other such issues. It is difficult for the earning member of the family to attend the case in the court on a working day. It could result in a loss of earning for that particular day.

Another factor which can be included could be that the cost of resolving the dispute could be higher than the amount of claim[iv] The balance of economies gets affected on the part of the litigant. In this case, the litigant would opt to go for an economical solution such as out of court settlement which could lead to compromising the individual's right in some manner.

The above factors play a major role in impacting an individual's right to access to justice. Taking this into account, I will look into various methods or techniques in ADR practiced in

India and the shortcomings in these processes which prevents to reach the goal of access to justice for all.

SHORTCOMINGS IN ALTERNATIVE DISPUTE RESOLUTION TO ACHIEVE ACCESS TO JUSTICE

Dispute Resolution is essential for the maintenance of a peaceful and harmonious society. Since the justice system in our country already faces a lot of pressure and backlog; and also suffers from few inadequacies due to which dispensing justice to everyone through the court of law is not feasible, Alternative Dispute Resolution (ADR) has been proposed as an effective means of delivering justice. It has been developed as a plausible alternative to the problem of delay in delivering justice. As compared to a regular trial which may involve the expend of time and resources, ADR is less expensive, less formal, less time consuming as well as flexible since it lets the disputants choose the process of resolution.

ADR techniques are being increasingly used in the commercial sector, civil, industrial and family disputes etc. The other areas in which ADR is shown to be successful, especially through conciliation are – real estate, insolvency, insurance, service, partnerships and intellectual property related disputes. Matters relating to labour, consumer protection and taxation are also seen to be resolved using ADR[v].

The Supreme Court held that access to justice is a fundamental right guaranteed under Article 14 and 21 of the Constitution of India[vi]. Even though the Supreme Court included Access to justice under Part III, there is a considerable number of people in India who are not able to access to justice. The existing system is not very effective as it is not reaching to the people.[vii]

There are various problems which are encountered by the people in order to access to justice. Pending cases in the court, expensive litigation costs, time, inefficiency and other such issues are major problems which are existing in the system.[viii]

Alternative Dispute Resolution was founded on the principles of Article 14 and 21 which is based on the right to equality and right to life and liberty[ix]. The main aim of ADR is to provide a socio-economic and political justice system as well as uphold the values of principles laid

down under the preamble. Section 89 of the Code of Civil Procedure, 1908 was amended in 2002 to introduce mediation, conciliation and pre-trial settlement as means of dispute resolution.[x] Arbitration Act, 1940 was introduced to govern the matters of domestic arbitration. This Act was later repealed and was replaced by Arbitration and Conciliation Act, 1996 which looks into domestic arbitration, international arbitration as well as Conciliation. The 1996 Act is based on the UNCITRAL model. Lok Adalats were first introduced in the year 1982 and has gained statutory recognition under the Legal Services Authority Act, 1987. These are the various statutes that govern and promote Alternate Dispute Resolution (ADR) mechanisms in India. While there has been the development of ADR in the country, there are a few shortcomings in this system.

There are various mechanisms involved in this system such as Lok Adalat, Arbitration, Mediation, Conciliation and Negotiation. This system was introduced since there was a backlog of cases in the courts, delay in litigation and litigation being very expensive.

Lok Adalat is a forum where disputes/cases which are pending in the court of law or at the pre-litigation stage are settled/ compromised amicably.[xi] *They* have been given statutory status under the Legal Services Authorities Act, 1987.[xii] These Lok Adalats are conducted by legal services authorities present at different levels such as Taluk, District, State and National. It is a means of resolving disputes in a faster manner. While doing so, these courts settle the matter at very low compensation. Lok Adalat is a means of resolving the dispute through settlement and compromise. But not all cases are suitable for this kind of dispute resolution mechanism. Even though it is a resort to low cost justice, many unsuitable cases are sent back to the court for litigation causing delay. The time invested in this settlement goes in vain.[xiii]

The process of Arbitration is neither simple or fast.[xiv] The expenses involved in this system include advocate's fees, arbitrator's fees and other administrative charges which should be borne by both the parties. The expenses are on par with the litigation costs or sometimes even exceed the same. The arbitration clause should be present in the standard form contract in order to resolve the dispute through arbitration.[xv] The disputes which are resolved through arbitration mostly concerns with business and trade. This has led to the development of business lawyers and firms. Many big and dominant business entities adopt the means of arbitration for resolving their disputes. A lot of money is spent by these entities in this dispute resolution process.[xvi] The other party involved with these entities might be a consumer, a small business or commercial

establishment or a private party. The costs involved in the arbitration may not be affordable to such parties.

The nature of award in the arbitration is binding on both the parties. They cannot re-initiate the dispute before the arbitration tribunal.[xvii] However, the award can be challenged on the grounds mentioned in Section 34 of the Arbitration and Conciliation Act, 1996. These grounds include parties to the agreement are not in the capacity to contract, the agreement is void, the award is beyond the matters of the scope of the agreement, the composition of the arbitration agreement is not in accordance to the arbitration agreement[xviii], the subject matter cannot be settled by arbitration under Indian law and the enforcement of the award is against the public policy of India.[xix] The award should be challenged within three months of receipt of the same. Even though there is a provision to challenge the order, however, the case is again back to the court system. The award which is challenged will again have the same fate as other pending cases in a regular court. The litigant again has to invest time and money in this regular litigation process.[xx]

Mediation is a process to resolve the dispute by a neutral third party by facilitating a discussion among both parties. The discussion is informal and no legal principles are used or applied.[xxi] A problem can arise in mediation if one of the parties is withholding any information.[xxii] If mediation is not successful, then, it will have considered a waste of time, money and effort. The case will again go back to litigation. Another shortcoming of this dispute resolution process is that any party can withdraw from the proceedings anytime. This flexibility can cause hindrance in the course of the case.

Conciliation is a process where an independent and neutral third party known as a 'Conciliator' resolves the disputes between the parties. The process aims to achieve the result by mutual agreement between both parties. The process can breakdown if both the parties are not able to reach an agreement. The conciliator does not have any authority to enforce any decision on both parties.[xxiii] The parties can get to know each other's weaknesses during the course of this dispute resolution process. This can lead either of the party to exploit the other side's weakness. It may lead to further disagreement. Sometimes, the conciliator not being an expert may misconstrue any fact or understand certain information of context and may convey to the other party. There is a potential that the other party incorrectly interprets the same. This may lead to a discrepancy in the entire process. As a result, the parties have to resort to other means of

dispute resolution. If this process fails and it escalates, the matter goes to the courts and thus, leading to adjudication.

Negotiation is a bilateral dispute resolution process. There is no third party involved and if the dispute is not resolved between the parties, then they have to resort to other means of dispute resolution.[xxiv] Cooperation is the key to this process of dispute resolution. If there is no cooperation between parties, then negotiation can fail. There are no legal rules binding. The parties can formulate their own rules of negotiation. Since, there is no third party, this means of dispute resolution does not seem a successful means. The dominant party can influence the rules and terms of negotiation. In the case of non-successful negotiation, they either go for litigation or other Alternative Dispute Resolution mechanisms.

The process of ADR is private in nature unlike the litigation wherein the proceedings take place in an open court. The chamber where the proceedings take place only consists of the parties and the judge. These systems involve informal and private decision making. Private decision making can be questioned on various factors such as protection of the principles of rule of law, power imbalances that may have influenced the decisions, etc.[xxv]

These shortcomings of the mechanisms indicate that the ADR system is not fully equipped in the country. More focus should be engaged towards developing the ADR mechanism so that the burden of the court is equally divided. The cases which are not resolved through any one of the mechanisms comes to litigation. This shows that the ADR system is not very effective in dispute resolution as the parties have to turn to litigation. Various parties in dispute do not have the knowledge of various alternative dispute resolution mechanisms. Their either not informed by their advocates or the judges. Once the party knows about such a dispute mechanism process, they have to invest a huge amount on these mechanisms, time and effort.[xxvi] If the case is not resolved by any one of these mechanisms, then the case is fought in the regular courts wherein the party has to shell out money, invest time and wait for justice.

REFORMS SUGGESTED

There are a few reforms which I would like to suggest which can bring about positive and effective changes in the legal system in order to access justice. These structural changes are

required as the justice delivery system in India is very complex, slow and costly. The faith of the people in the legal system should be restored to bring reforms in the system to deliver justice and open the doors to access justice.

Dispute resolution through regular courts and ADR is expensive. People from the low-income class are unable to access their right to justice. The main objective of Article 39A of the Constitution of India is to provide for equal justice and free legal aid. The article promotes that the free legal aid service is an element of the principles of natural justice and no person should be deprived of accessing justice. In furtherance of this Article, legal aid services have been set up at the district, state and national levels. The Legal Services Authorities Act, 1987, specifies the eligibility criteria to avail the legal aid services.[xxvii] There are a lot of issues and challenges which prevail over this system and are not proving to be an effective system. The challenges are lack of general awareness of these services among people, there are not enough lawyers who are associated with these services, the remuneration paid by the state to the lawyers is inadequate.

Reforms are required to make legal services effective. Firstly, general awareness must be brought into notice to the society. This can be done by running legal aid camps in both urban and rural areas. The lawyers need to create confidence in the litigant in the system of legal aid. The Legal Aid Services should handle the cases effectively and sincerely with the utmost commitment by appointing efficient and senior lawyers in the panel. The remuneration paid to the lawyers by the state should increase to a substantial amount in order to retain the lawyers as well as incentivise them to provide efficient services.

The settlement of disputes can be done through ADR but the inclination to resort to ADR is relatively low. Reforms need to take place in order to make ADR the most approachable and acceptable form of the dispute resolution system. One of the measures the judges of the regular courts recommend certain cases that should be decided by ADR. Centres can be set by the government or private ADR centres to promote such practices. The process should be made economical, approachable and upholding the principles of rule of law.

While dealing with the subject of access to justice, it important that we look into the reforms which are required in the system of adjudication. It is also necessary that the court systems also lean towards technology so that the courts become more efficient in case management.

Streamlining the cases for effective case managing with the help of technology or external expertise. This will help in a swift and efficient method for justice delivery.

Adjudication should be made swift, efficient and cost-effective. One of the ways of bringing this change is by filing up the vacancies in the courts. The burden of cases on the courts will get distributed. By bringing in technology in the courtrooms, the process will become more efficient. For instance, in case of non-availability of witness or litigant on the date of hearing, they can be present through the medium of video conferencing. This will result in the case being heard on the same day instead of being adjourned.

Access to justice is an important and valuable principle. Every person has the right to approach institutions or resort to any dispute resolution process to defend or put forth his or her claim. The justice system should be adequate to make sure that every person is entitled to their right to access to justice. While the regular courts are overburdened and the ADR system should be developed to make it more efficient and party-friendly. The goal which is to be achieved is that every person should be made accessible to justice. It may either adjudication or through ADR. The processes should be cost effective and time saving involving less complicated procedure. This will help in the people enjoying their right to access to justice as well as there will be smooth functioning of the justice system in India.

REFERENCES

[i] Galanter, Mark, *Access to Justice in a World of Expanding Social Capability*, 37 Fordham Urb. L.J. 115 (2010), 115,116.
[ii]Cappelletti, M., Garth, B. G., & Trocker, N. *Access to justice: Comparative general report*,Tubingen: J.C.B. Mohr, (1976), 674.
[iii] Ibid, 676.
[iv] Ibid.
[v] Gaurang Thaker, Role of mediation as an effective tool of dispensation of justice, 2015, accessed on https://shodhganga.inflibnet.ac.in/bitstream/10603/44117/9/09_chapter%203.pdf > 17th May 2019.
[vi] *Anita Kushwaha and Ors. vs. Pushap Sudan and Ors.* (19.07.2016 - SC) : MANU/SC/0797/2016, para 26, 28.
[vii] Galanter, Marc; Jayanth, K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 Hastings L.J. 789 (2004), 789.
[viii] supra at 5, para 30
[ix] Thomas, Laju, *Alternative Dispute Resolution: A Gandhian Perspective*, Gandhi Marg Quarterly 37(3&4): 519-536, 524.
[x] Civil Procedure Code Amendment Act, 2002.
[xi] Khan, Sarfaraz Ahmed, *Lok adalat: an effective alternative dispute resolution mechanism*, APH Publishing, 2006, 2.

[xii] Sections 19-22, Legal Services Authorities Act, 1987
[xiii] Zainulbhai, Tameem, *Justice for all: Improving the lok adalat system in India*, Fordham Int'l LJ 35 (2011): 248. 268.
[xiv] Joseph, Jasmine, *Alternate to Alternatives: Critical Review of the Claims of ADR*, NUJS Working Paper Series NUJS/WP/2011/01, available at SSRN 1969935 (2011), 15.
[xv] Bryant G. Garthy, *Tilting the Justice System: From ADR As Idealistic Movement To A Segmented Market in Dispute Resolution*, 18 Ga. St. U.L. Rev. 927, (2002), 935-937.
[xvi] supra at 13, 16.
[xvii] Section 35, Arbitration & Conciliation Act 1996.
[xviii] Ibid, Section 34 2(a).
[xix] Ibid, Section 34 2(b).
[xx] Agarwal, Anurag K., *Resolving Business Disputes in India by Arbitration: Problems Due to the Definition of Court*, IIMA Working Papers WP2008-12-03, Indian Institute of Management Ahmedabad, Research and Publication Department, 6.
[xxi] Mediation Training Manual of India, Mediation & Conciliation project Committee Supreme Court of India, accessed on < https://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf> 3 May 2019, page 16.
[xxii] Cecilia Morgan, *Why Mediations Fail*, Texas Lawyer, March 24, 2017. accessed on <https://www.jamsadr.com/files/uploads/documents/articles/morgan_texas-lawyer_why-mediations-fail_2017-03-24.pdf> 28 April 2019.
[xxiii] Murali Neelakantan, *Conciliation and Alternative Dispute Resolution in India*, 1998 Lawasia J. 143 (1998), 149.
[xxiv] Ubangha, Choice, *The Potential Role of ADR in the Context of Access and Benefit Sharing Over Genetic Resources and Traditional Knowledge*, available at SSRN 2864671 (2016), 30.
[xxv] Mnookin, Robert, *Alternative Dispute Resolution*, Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series (1998), 232, 234.
[xxvi] Fiss, Owen M., *Against Settlement*, Faculty Scholarship Series (1984), Paper 1215.
[xxvii] Section 12, The Legal Services Authorities Act, 1987.