

## THE ART OF INDIAN JUSTICE SYSTEM AND THEORIES

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### ABSTRACT

*Conflict is a natural norm in human lives. It happens when one party prevents, stresses or forces another party to accept his opinion when after that, the latter feels not secured with the actions of the first party. Although conflicts can be solved by the conflicting parties but most of the time, it requires a third party to resolve it. Through it, the involved parties will become more satisfied and responsible to the resolution achieved since the decision is made by them. Conflict resolution is a constructive resolution approach towards a conflict faced that helps in the negotiation process in order to achieve a solution that can be accepted by all parties involved. Among the conflict resolution approaches practiced is the participation of a neutral third party that assists conflicting parties to negotiate and reach an agreement. A negotiation process that gives more impact is mediation that involves a third party who provides space for discussion and assists conflicting parties to find alternative resolution and then negotiate until a resolution that all parties can agree upon is reached. This research aimed to discuss on the art of the Indian Justice System and theories that will highlight the old system which has been used in the social system administration of modern India and has become the backbone of the today's society. Being a library based-research, reference will be made to relevant authoritative texts, case studies, and applies the method of literature review through content analysis of documents. Overall, this research finds that the realization that the justice system is less than perfect has haunted the lives of the community, hence the Indian government agrees to provide legal assistance by restructuring the legal system in order to prepare a more efficient and effective legal service program and to embrace the Alternative Dispute Resolution (ADR) systems. It aims to include every type of legal assistance to provide the rights and justice to everyone especially among the rural society. The poor and less fortunate are restricted from getting the benefits of the legal system due to high cost and longer time consumption. This is the truth of the legal system in India.*

**Keywords:** Alternative Dispute Resolution, Justice System, Conflict

### INTRODUCTION

Justice is a quintessential objective desired in every legal system existed. When an error is made or an imperfection is found in a system, the results received are usually seen as an injustice. When an individual or an innocent party is claimed to commit an offence, the accusation made is seen as a miscarriage of justice. The concept of justice has become the focus in creating a civilized society since the beginning of time. However, today, the concept of universal justice is prioritized and taken more seriously. Today, difficulties to access justice have always been debated, encompassing various issues that require resolution and arbitration. It includes judgment in choosing the best resolution mechanism, methods to hasten dispute resolutions and using legal services without involving complicated bureaucracy through various alternative techniques. What does it mean by 'justice'?

Aristotle, a Greek philosopher is among the earliest scholars that are responsible in introducing several thoughts and philosophies on justice. His thoughts are still being used and are invaluable until today. He assumed that a fair law will cause an individual to feel that he belongs to a society. Besides, he can also differentiate between 'distributive justice' and 'corrective justice' (C. Elliot and F. Quinn 2001).

'Distributive justice' is related to the wealth asset distribution and veneration to society in a community. The purpose of this type of justice is to achieve balance although not through equal distribution. Aristotle opined that an individual must obtain benefits in the equilibrium although it does not necessarily need to be equal. Meanwhile, 'corrective justice' is related to a fair situation but has been misused and disrupted by a specific party that as seen as wrong in the eyes of the law. Judges are given the responsibility to find a solution to the offense and demand monetary compensation or charging any fine and relevant punishment if needed. It cannot be denied that it is difficult to provide an accurate definition to the meaning and phrase 'access to justice'. Cappelletti and Garth (1987) provided the meaning to the phrase which points to two (2) main purposes and the most basic in a legal system of a country. Among other, they mentioned that:

*....a system that made possible for the public to ensure their rights and/or to resolve disputes faced under a general administration of a country. First, this system must be easily accessed equally by all and secondly, this system must converge to one fair decision individually and socially.*

Sothi Rachagan and Mimi Kamariah (1993) stated that the term, 'access to justice', in the context of consumers is 'encompassing all existing channels provided to amend any offence, if committed and detected, or to prevent from any oppression in the future.' Hon Russell Fox Ac QC (2000) too mentioned that 'access to justice includes access to courts and tribunals involved in providing justice. Justice for governance and manifestation must be made opened as well as easily accessible by all, in a level of equal power and position.' In the years 1995 and 1996, Lord Woolf has carried out a comprehensive survey in order to increase access to justice in English Courts. His last report suggested a new civil justice landscape to be introduced wherein the litigation process must be avoided as best as we can and the landscape will include a less adversarial and complex resolution mechanism besides providing a stricter case management process by judges (Lord Woolf, 1996).

From Woolf's survey a code of procedural rules incorporated holistically also known as the Civil Procedure Rules or CPR that prepared a proposal toward the objective and reformation program introduced. These rules are enforced on 26th April 1999 and applied in every High and District Courts' proceedings in England as well as Wales. After that, it has become the court's responsibility to manage cases actively by encouraging disputing parties to cooperate and use available ADR mechanism channels. These rules too has stated specifically that the opportunity given to every disputing party during the early stages of trial proceedings to apply and use the ADR mechanism channel first before making the decision to go through with a full trial or not' (CPR, r. 26.4 (1). CPR too has introduced a possibility to impose a sanction cost if both parties do not abide to court orders related to ADR (CPR, r. 44.5 (3). This matter is decided in the Dyson and Field v. Leeds City Council case (M. Nestic 2001), in which the Appeal Court reminded the disputing parties that they can apply for indemnity expenses and high interest in compensation if the other party involved refuses the court's proposition to try another alternative, ADR without reasonable cause. The real purpose is to prove that ADR is not just a regular resolution method but also to highlight several strategic approaches according to proper laws. The judges agree that if a case must be brought to a trial proceeding, it is best if both parties have tried their best to find a solution through the ADR

mechanism until they are satisfied. If it cannot be solved with ADR, therefore the litigation process becomes the next alternative. The scenario and proposal provided by Woolf showed the importance of ADR to handle disputes. The responsibilities of disputing parties to refer their cases to ADR first before being taken to a full court trial have given the implication that ADR is not just an option but has been made mandatory in dispute resolution.

## **THE INDIAN JUSTICE SYSTEM – THE INDIAN SPECIAL COURT**

Besides the judicial system, there is a Special Court to try certain and more specific cases compared to the cases tried using the regular litigation system. The court has similar procedures and proceedings with litigation but existed to resolve cases quicker (In re The Special Courts Bill, 1978 (1979) 1 SCC 380). The Special Court existed not for cases based on certain policies or due to cases that involved certain expertise but solely to expedite the resolution process in a case tried. The judges responsible are appointed from the staff of the Indian judicial field. The appeal on the decision made of the Special Court can be forwarded to the High Court or even to the Supreme Court. Just like in other countries, the Indian judicial system is forced to go through various experience that can be summarised as follow (Mahfooz Nazki 2003):

### **First – The judicial burden**

The Indian Court System is based on the adversarial common law system which is cumbersome, expensive and cumulatively disastrous. It is overburdened. The court is forced to give a little time available to solve the too many cases in arrears and the new filed cases are increasing in time. The hierarchy of the court has a certain arrangement for appealed cases that worsens the situation.

### **Second – The lack of judicial members compared to the population numbers**

The increasing number of population in time worsens the existing situation. This is not in line with the insufficient number of judges and causes cases to become arrear and the trials to be postponed (Institute of Developing Economies (Ide-Jetro), March 2002).

### **Third – State as the largest litigants**

The central government and state is the main litigants that take actions whether by an organization and bodies from the government to file a case in Indian courts (Subhash Kothari 2000).

### **Fourth – Adversarial judicial administration**

The adversarial model existed in India is basically taken from United Kingdom. It causes the judge to become a passive listener similar to ‘a sort of umpire in a game of cricket’, and denies his right as a judge to be active together in finding the truth with the disputed parties. The judge is subjected to the rules of evidence in deciding case.

### **Fifth – Long-term case resolution**

The saddest matter in the Indian judicial system is the lateness in trials and this causes the process of resolving a case is delayed. The time taken usually is between 5 and 15 years for a case to be resolved.

### **Sixth – Delayed on complex cases**

The situation causes problems in the delay of several complex cases are contributed by these matters: The lack of responsibility and transparency in administration, the increase in the

number of population, the radical change in the litigation system, the multifarious litigation, the lack of judges and expert staff, the delay in case trials and many more complex reasoning.

### **Seventh – Long-term burden and collapse of confidence toward the court to try the case**

The situation is admitted to happen in India and hard to be solved. The Supreme Court stated it in the case of *K.P Tiwari v. State of M.P* (1994 Supp (1) SCC 540). In another situation, many appeal cases that are decided are different than the decision made in the lower court since the Supreme Court Judge lowers the importance of the decision made by the lower court's judge. It seems that the judge is looking the mistakes made by the lower court's Judge in the decision made and not gives them the respect they deserve. Due to the problems stated, a desperate awareness existed when the responsible party changes and find the alternative to the existing justice system. Therefore, a reformation of the justice theories must be established in order to gain access to the justice and comfort including cases involving consumer trade. This situation is then seem biased toward the spread of the use of ADR in India until today.

### **THE INDIAN ALTERNATIVE DISPUTE RESOLUTION (ADR) AND JUSTICE THEORIES**

The origins of ADR in India can be detected aligned with the beginning of the political institution. Priyanath Sen in her book entitled 'The General Principles of Hindu Jurisprudence' exposed that the dispute resolution institution existed since the 'Dharmashastras' era. She referred to resolve dispute called 'kulas' (assembly hall for members of a race), 'srenis' (parti workers association) and 'pugas' (neighbourhood assembly hall). In the Indian rural society, the 'panchayats' (the seniors and ruling chiefs assembly hall) handles almost all the decisions on the dispute that occur among the locals. However, for dispute among tribal members, it is resolved by the elders of the tribe. One of the traditional institution features in the existence is the legal administration system and not just an alternative for a formal legal system. The formal legal system at the time is established by the monarchical government or the 'kazis'. The British government introduces the 'adalat' system and the judicial court system. Both operational systems are aligned together until today. The aspects of the procedures, method and technique in the institution trial that are similar to the ADR features discussed which are simple, informal, inexpensive and fast. The decision made on the resolution is based on the common behavioral norms and not based on the abstract understanding of the law.

The procedure used by the traditional institution is quite similar to the arbitration and peace, depending on the types of dispute. However, the decision-maker is not chosen by the disputed parties. The formal legal administration system is introduced during the rule of the British in order to replace the outdated justice system. Nonetheless, the other traditional institution such as the 'kulas', 'srenis' and 'pugas' continue to play their roles even when the original names are changed. Therefore, the dispute among tribal members or 'biradari' is still managed and resolved within the said tribal system. There are several business associations provide a channel for resolution among association members that are similar to the 'srenis'. They used the method called the 'panchayat' to resolve the disputes among association members who loved in the local area.

For the Indians, the Panchayat mechanism is used and it simply refers to a Village Council consisting of a group of five influential or respected men in the village. The Panchayat is mandated to solve issues or any dispute arises in a village or area and it will make the decision by taking into account the social issues faced by the villagers. The council leader is called the Sarpanch while the council members are known as Panch. Today, this old system

has been used in the social system administration of modern India and has become the backbone of the society today known as the Panchayati Raj. The origins of the panchayat are unknown and the beginning of this practice cannot be confirmed. However, it is believed that it is first practiced in temples before expanding and becoming an organisation which later is developed into a social institution independent from temples. The Panchayat existed in temples when charity organisation cooperate with the temples to help the community and indirectly turning temples as a service centre. Through the evolution process, the panchayat system is established. The panchayat institution is mandated to make important decisions in solving issues faced by the villagers for centuries. Since the institution is a patriarch, no women is allowed to involve in it. This is viewed as a biased system but today it has evolved and female involvement in the panchayat system is very much encouraged in modern India. Therefore, when the Panchayat is introduced in farms, no publishing have mentioned about female involvement. The system brought to Malaya is followed without any changes being made to it.

The institution legal process is the same as the main features of the ADR procedure. The dispute is settled quickly, affordable, full participation of the involved parties and informal. The institution is more interested as an alternative channel to the court system due to the ignorance of the law and the inappropriate situation to solve such disputes. However, the traditional system is inappropriate to solve trade disputes involving a large sum of money and claims made based on the statutory law. At the same time, traders do not have time to involve themselves fully in the litigation process in court. Among the traditional system that has similar features as the ADR is administered in India are:

#### **THE ‘CILAS’ CONSTITUTION AND ‘LOK ADALAT’**

The realization that the justice system is less than perfect has haunted the lives of the community and the Indian government agrees to provide legal assistance by restructuring the legal system in order to prepare a more efficient and effective legal service program. It aims to include every type of legal assistance to provide the rights and justice to everyone especially among the rural society. The poor and less fortunate are restricted from getting the benefits of the legal system due to high cost and longer time consumption. This is the truth of the legal system in India.

The ‘lok adalat’ institution is introduced in India in 1982 and expanded until today with its popularity among the poor and those who are living in the rural areas. Its function is as a supplement to the existing court system and not as a choice to the court. Therefore, the ‘lok adalat’ system has managed to reduce the workload of the court with the many cases arreared that are unable to be solved. The ‘Lok adalat’ is a continuity from the Indian traditional system, ‘nyaya panchayats’ with a little improvement in function and character. The ‘Nyaya Panchayats’ is used widely in the villages and the rural areas as a trial tribunal for civil and crime cases with the involvement of the seniors and respected individuals in the village. However, the head of village will not simply disturb the tribunal trials since the involved parties will handle it the best they can. With India’s independence and the ‘nyaya panchayat’ system that is contributed in solving a dispute nicely, the government recognized the institution to enter the provision in Article 40 of the Indian Constitution from every authorized state that held the ‘village panchayats’ that are given authority as one of the units of a special authority to handle the dispute resolution process.

One of the strategic legal assistance programs that is used by the Legal Assistance Implementation Committee (CILAS) that consists of the Indian government and chaired by the Chief Justice P.N Bhagwati on September, 1980. The committee studies the application of

the 'lok adalat' as a dispute resolution method through conciliation that is finally introduced in 1982. The 'Lok adalat' is another form of innovative voluntary initiative in order to achieve a peaceful dispute resolution. The motto is justice in the fastest, simplest and cheapest way to resolve disputes through conciliation, arbitration and negotiation (Nomita Agarwal 2003). The 'lok adalat' system is not the same as the regular legal procedure and its objective is to complete the existing system and not to take over the legal system. One of the important aspects of the 'lok adalat' is to provide fast, inexpensive and accessible justice to all members of the society. This program is very popular among the rural and city people.

The 'Lok adalat' or 'lok nyayalaya' itself means a court for the people. 'Lok' refers to the people and public while 'adalat' means the court. However, it is not like a real formal court and full of procedures but functions as an agency to resolve disputes through negotiation, arbitration and conciliation easily, faster and cheaper for the poor. The informal structure and flexibility in the aspects of the procedure and approach taken to facilitate the many parties involved in the matter. The situation creates a positive impact on the two disputed parties using a shortcut to make peace and solve their disputes. Among the 'lok adalat' established in India is like the Motor Accident Claim Tribunal for accident cases, the Telephone Lok Adalat to solve disputes among telecom customers and the Indian telephone department and the 'Bijli Adalat' to solve disputes among employees and employers in the industry recognized the 'adalat' held. There is a recommendation and request presented to hold adalat in every Indian government department and the efforts are still being continued (Nomita Agarwal 2003).

## **INDIAN ARBITRATION**

The Indian Arbitration is enforced and regulated primarily through the Arbitration and Conciliation Act 1996. However the recommendation by the Indian government Law Ministry to amend the provision in the Act by adding several matters such as: (a) authorized the court for involvement in the arbitrating proceedings; (b) defines widely the domestic and international arbitration and provides specifications to relevant provision Act; (c) place time restrictions for an arbitration act; and (d) provide the 'Single Member Fast Track Arbitration'. India is a party in two international conventions which are the Geneva Convention 1927 and the New York Convention 1958 (R. K. P. Shankardass 2002). Therefore, any awards made according to any convention applied will be enforced in India according to the relation sections.

The Indian Arbitration Tribunal consists of the jurisdiction of the maritime dispute resolution, trades involving the trade association or chambers of commerce wherein both parties agree to the referred cases for arbitration. Among the Indian Arbitration tribunal are as follow:

- i. The Indian Council of Arbitration, New Delhi
- ii. The International Centre for Alternative Dispute Resolution, New Delhi
- iii. The Indian Merchants' Chambers, Mumbai
- iv. The Mumbai Chambers of Commerce and Industry
- v. The Bengal Chambers of Commerce and Industry
- vi. The Bengal National Chambers of Commerce
- vii. The Indian Chambers of Commerce, Calcutta
- viii. The Madras Chambers of Commerce

The Section 28(2) Act allows the arbitrating tribunal to decide on the dispute refer by both parties based on the amiable compositeur subjected to both parties that gives obvious authority to do so. The 'amiable compositeur' element use the ADR principles and

philosophy. The arbitrating agreement can only be enforced and if agreed in writing and signed for both parties to submit it for arbitration (Section 7, Arbitration and Conciliation Act 1996 (India)).

## **FRAMEWORK FOR ALTERNATIVE DISPUTE RESOLUTION**

Tackling its mounting court lists of commercial and non-commercial claims, in 1982 India introduced a system of ADR that built on a traditional village approach to dispute resolution (Deborah Lockhart). Since the official recognition in the 1996 Arbitration and Conciliation Act and the 1999 amendment of the Civil Procedure Code, both arbitration and mediation have shown steady growth in India (Herbert Smith Freehills 2012). In his speech on Dispute Resolution in the Construction Industry, the Minister of Justice made it clear that “one of the very important objectives of our Government led by the Honorable Prime Minister is to make India an international hub for arbitration.” The Minister went on to foreshadow future amendments to the Arbitration and Conciliation Act to ensure that “certain basic systems are put in place, like reducing the time taken for deciding a dispute, certain modifications in the process adopted and the finality of those awards and the legal sanctity attached to the legal process”.

In May 2005 the Mediation and Conciliation Project Committee was constituted in order to encourage the use of mediation. The work of the MCP [the Committee] has included standardising and regulating mediation training in India through a model training manual and curriculum, running ADR awareness programs, providing specialist training for referral judges and running a train the trainers program. In addition to the efforts of government and the judiciary, a number of institutions have been established to promote ADR. These include the Indian Institute of Arbitration and Mediation, Mediators’ Council of India and International Centre for Alternative Dispute Resolution (ICADR). ICADR was established as an autonomous organisation, but works “under the aegis of the Ministry of Law and Justice, Government of India, with its Headquarters at New Delhi and Regional Centres at Hyderabad and Bangalore” (International Centre for Alternative Dispute Resolution, About us—Introduction to ICADR, 4 September 2009).

Mediation has gained further force in India with the establishment of court-annexed mediation centres across the country” (Ashish Kumar 2012). The first Indian court annexed centres were opened in New Delhi.” (Alexander Oddy et al 2010). The Samadhan Mediation and Conciliation Centre was set up by the Delhi High Court in 2006 and continues to make a significant contribution to the development of mediation practice in the region. Samadhan has grown from two small mediation rooms in 2006 to a major ADR complex spanning several floors in the New Delhi High Court building. The Mediation Centre includes not only standard mediation rooms and break-out areas but also a play room for children and the provision of onsite psychology services in the counseling suite.

## **CONCLUSION**

In promoting ADR across the sub-continent, the Minister of Justice addressed the Bar Council in Chennai in July 2015, and was forthright in encouraging counsel to promote ADR processes to facilitate access to justice (Shri D V Sadananda Gowda Speech by Hon Minister of Law and Justice at the “Lawyers’ Meet 2015” organised by the Bar Council of India on Public Litigation Policy and Access to Justice, Chennai, 25 July 2015):

*“Though the formal systems of justice like courts, tribunals etc. are available to a person when he is in need of fair resolution to a dispute or an issue, equally important are the traditional but fair systems of adjudication, which can either be*

*peer groups, settlement of disputes by village elders, resolving the disputes at the village panchayats or any other form of alternative dispute resolution, including mediation, conciliation and arbitration etc.*

*I am very clear in my mind that the formal systems of justice dispensation consisting of courts, judges and lawyers will never be able to meet growing demands of justice dispensation in this vast country populated by twelve hundred million of people... Hence I would only request all of you that if as a responsible citizen of this country you want to ensure the access to justice to all our fellow citizens, you all need to think about this cost factor and how to do something about it.*

*The better course of action would be to adopt three pronged strategy to reduce the high level of litigation: (i) avoid litigation; (ii) adopt alternate dispute resolution mechanism; and (iii) adjudicate quickly. Litigation can be avoided if all of you advise the clients to avoid litigation.*

From the overall observation, while Lok Adalat remains a cornerstone of India's access to justice framework, arbitration and mediation are increasingly being promoted as central to it functioning effectively and representing the art of the Indian justice system and theories.

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