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LAW COMMISSION OF INDIA

Need for Justice-dispensation through ADR etc.

Report No. 222

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LAW COMMISSION OF INDIA
(REPORT NO. 222)

Need for Justice-dispensation through ADR etc.

Forwarded to the Union Minister for Law and Justice, Ministry of Law and Justice, Government of India by Dr. Justice AR. Lakshmanan, Chairman, Law Commission of India, on the 30th day of April, 2009.

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India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi.

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D.O. No. 6(3)/154/2007-LC (LS) 30th April, 2009

Dear Dr. Bhardwaj Ji,

Subject: Need for Justice-dispensation through ADR etc.

I am forwarding herewith the 222nd Report of the Law Commission of India on the above subject.

The Law Commission has already given varied recommendations in its earlier reports on the subject of judicial reforms, which is a subject very dear to my heart. The present Report is in the continuum of those reports.

The present Report has drawn on my two-volume book titled *Voice of Justice*, and re-emphasizes and reaffirms that there is an urgent need for justice-dispensation through ADR mechanisms. The ADR movement needs to be carried forward with greater speed. Besides, many other suggestions, which may now be called hackneyed, need a fresh look.

With warm regards,

Yours sincerely,

(Dr AR. Lakshmanan)

Dr. H.R. Bhardwaj,
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Need for Justice-dispensation through ADR etc.

I. PROPOSITIONS

1.1 One of the terms of reference of the 18th Law Commission of India reads:

> "To keep under review the system of judicial administration to ensure that it is responsive to the reasonable demands of the time and in particular to secure:-
>
> (i) Elimination of delays, speedy clearance of arrears and reduction in costs so as to secure quick and economical disposal of cases without affecting the cardinal principle that decision should be just and fair.
>
> (ii) Simplification of procedure to reduce and eliminate technicalities and devices for delay so that it operates not as an end in itself but as a means of achieving justice.
>
> (iii) Improvement of standards of all concerned with the administration of justice."

1.2 The present Report is in the continuum of the Law Commission's various earlier reports on the subject of judicial administration.

1.3 Man is not made for law, but the law is for man. Law is a regulator of human conduct. No law works smoothly unless the interaction between the two is voluntary. An act is justified by law, only if it is warranted, validated and made blameless by law.

1.4 The Indian Constitution guarantees justice to all. All Indian citizens are guaranteed equal rights of life and personal liberty, besides many other fundamental rights. There are various other legal rights conferred by different social welfare legislations, such as, Contract Labour (Regulation

and Abolition) Act 1970, Equal Remuneration Act 1976, Minimum Wages Act 1948. But, these rights are of no avail if an individual has no means to get them enforced. Rule of law envisages that all men are equal before law. All have equal rights, but, unfortunately, all cannot enjoy the rights equally. Enforcement of the rights has to be through courts, but the judicial procedure is very complex, costly and dilatory putting the poor persons at a distance.

1.5 The Constitution of India through article 14 guarantees equality before the law and the equal protection of the laws. Article 39A of the Constitution mandates the State to secure that the operation of the legal system promotes justice on a basis of equal opportunity, and ensure that the same is not denied to any citizen by reason of economic or other disabilities. Equal opportunity must be afforded for access to justice. It is not sufficient that the law treats all persons equally, irrespective of the prevalent inequalities. But the law must function in such a way that all the people have access to justice in spite of economic disparities. The expression "access to justice" focuses on the following two basic purposes of the legal system:

1. The system must be equally accessible to all.
2. It must lead to results that are individually and socially just.

1.6 Traditional concept of "access to justice" as understood by common man is access to courts of law. For a common man a court is the place where justice is meted out to him/her. But the courts have become inaccessible due to various barriers such as poverty, social and political backwardness, illiteracy, ignorance, procedural formalities and the like.

1.7 To get justice through courts one has to go through the complex and costly procedures involved in litigation. One has to bear the costs of litigation, including court fee and, of course, the lawyer's fee. A poor litigant who is barely able to feed himself will not be able to afford justice or obtain legal redressal for a wrong done to him, through courts. Further a large part of the population in India is illiterate and live in abject poverty. Therefore, they are totally ignorant about the court-procedures, are terrified and confused when faced with the judicial machinery. Thus, most of the citizens of India are not in a position to enforce their rights, constitutional or legal, which in effect generates inequality.

1.8 It is one of the most important duties of a welfare state to provide judicial and non-judicial dispute-resolution mechanisms to which all citizens have equal access for resolution of their legal disputes and enforcement of their fundamental and legal rights. Poverty, ignorance or social inequalities should not become barriers to it. The *Maneka Gandhi*[1] principle, as enunciated by the Indian Supreme Court, that fundamental rights do not constitute separate islands unto themselves but constitute a continent ushered in what Krishna Iyer, J. terms the jurisprudence of access to justice. He said:

> "We should expand the jurisprudence of Access to Justice as an integral part of Social Justice and examine the constitutionalism of court-fee levy as a facet of human rights highlighted in our Nation's Constitution. If the State itself should travesty this basic principle, in the teeth of Articles 14 and 39A, where an indigent widow is involved, a second look at its policy is overdue. The Court must give the benefit of doubt against levy of a price to enter the temple of justice until one day the whole issue of the validity of profit-making

[1] (1978) 1 SCC 248

through sale of civil justice, disguised as court-fee is fully reviewed by this Court".[2]

1.9 Article 39A, as noted above, provides for equal justice and free legal aid. The said article obligates the State to in particular provide free legal aid, by suitable legislation or schemes or in any other way, to promote justice on the basis of equal opportunity. Article 39A puts stress upon legal justice. The directive requires the State to provide free legal aid to deserving people so that justice is not denied to anyone merely because of economic disability. The Supreme Court in *Sheela Barse v. State of Maharashtra*[3] has emphasized that legal assistance to a poor or indigent accused arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by article 39A but also by articles 14 and 21 of the Constitution. In the absence of legal assistance, injustice may result. Every act of injustice corrodes the foundation of democracy and rule of law. Article 39A makes it clear that the social objective of equal justice and free legal aid has to be implemented by suitable legislation or by formulating schemes for free legal aid.

1.10 Though Article 39A was introduced in the Constitution in 1976, its objective of providing access to justice could never have been fulfilled but for the majestic role played by the Supreme Court in 'Public Interest Litigation Movement'. This is a movement whereby any public-spirited person can move the Court for remedying any wrong affecting the public. This is a significant step by the Supreme Court in giving access to justice to the people belonging to the lowest strata of society. Further, it was only through cases filed in public interest that the Supreme Court was able to

[2] *State of Haryana v. Darshana Devi*, AIR 1979 SC 855
[3] AIR 1983 SC 378

encourage legal aid service to poor and indigent persons. Through public interest litigation the courts are able to deal with poor people suffering from injustice and exploitation, such as, bonded labour, dalits, women, children, physically challenged, mentally challenged and so on.

1.11 The Lok Adalats, Nyaya Panchayats, Legal Services Authorities are also part of the campaign to take justice to the people and ensure that all people have equal access to justice in spite of various barriers, like social and economic backwardness.

1.12 The Judiciary is playing a significant role in providing justice to the under-privileged, indigent and helpless individuals through public interest litigation. The legal aid network is taking firm roots and legal services functionaries are actively engaged in fulfilling the constitutional promise of equality before the law. The provision of legal aid to eligible persons, the speedy settlement of their legal disputes by counselling and conciliation and failing that by Lok Adalats rank high on the agenda of legal services functionaries, as high as running legal education awareness programmes. Of course, we have miles to go before we can claim that the realm of equal justice for all has become a reality. Dr. A. S. Anand, a former Chief Justice of India, has wished that the next century would not be a century of litigation, but a century of negotiation, conciliation and arbitration. This dream has to be fulfilled for settling disputes both pending in courts as well as at pre-litigative stage. Where there is a huge pendency of cases, the only panacea is establishment of more and more permanent Lok Adalats where the expertise of the judicial officers both in service and retired could be effectively utilized in resolution of matters by conciliation. A large number

of consumers in our country feel handicapped in getting justice due to poverty, illiteracy, social backwardness and also geographical barriers.

1.13 Earlier, in India, disputes were settled by a council of village elders, known as a Panchayat. This was an accepted method of conflict resolution. Since the *Vedic* times, India has been heralded as a pioneer in the achievement of the social goal of speedy and effective justice through informal but culminating resolution systems. ADR methods are not new to India and have been in existence in some form or the other in the days before the modern justice delivery system was introduced by the colonial British rulers. There were various types of arbitral bodies., which led to the emergence of the celebrated Panchayati Raj system in India, especially in the rural locales. The decisions of the Panchayat were accepted and treated as binding. In 1982, in Junagarh in the State of Gujarat, a forum for Alternative Dispute Resolution was created in the form of Lok Adalat (People's Court). Keeping in view the usefulness of Lok Adalats, the Government of India also set up in 1980 a Committee under the chairmanship of Mr. P. N. Bhagwati, a former Chief Justice of India, and later, the Parliament enacted the Legal Services Authorities Act, 1987 in view of the mandate of article 39A of the Constitution. The Legal Services Authorities Act, 1987 implemented in its true spirit has created popularity for and utility of Lok Adalats for speedy resolution of disputes.

1.14 The philosophy behind setting up of permanent and continuous Lok Adalats is that in our country, the litigant public has not so far been provided any statutory forum for counselling and as such, these Lok Adalats may take upon themselves the role of counsellors as well as conciliators. Experiment of Lok Adalat as an ADR mode has come to be accepted in

India as a viable, economic, efficient and informal one. The provisions relating to Lok Adalat are contained in sections 19 to 22 of the Legal Services Authorities Act 1987.

1.15 Section 22B of the Legal Services Authorities Act, 1987, as amended in 2002, enables establishment of permanent Lok Adalats and its sub-section (1) reads as follows:

> "Notwithstanding anything contained in section 19, the Central Authority or, as the case may be, every State Authority shall, by notification, establish Permanent Lok Adalats at such places and for exercising such jurisdiction in respect of one or more public utility services and for such areas as may be specified in the notification."

1.16 Permanent and continuous Lok Adalats established in every District Court's Complex provide a statutory forum to the litigants where they may go themselves before litigation and courts may also refer to them, pending cases, for counselling and conciliation. These permanent and continuous Lok Adalats would certainly be in a better position to try conciliatory settlements in more complicated cases arising out of matrimonial, landlord-tenant, property and commercial disputes, etc., where repeated sittings are required for persuading and motivating the parties to settle their disputes in an atmosphere of give and take.

1.17 The disposal of legal disputes at pre-litigative stage by the permanent and continuous Lok Adalats provides expense-free justice to the citizens of this country. It also saves courts from additional and avoidable burden of petty cases, enabling them to divert their court-time to more contentious and old matters.

1.18 The philosophy of permanent and continuous Lok Adalats sprouts from the seeds of compassion and concern for the poor and downtrodden in the country and deserves support from all of us to make it grow as a tree giving fruit, fragrance and shade to all.

1.19 The Statement of Objects and Reasons appended to the Bill preceding the Legal services Authorities (Amendment) Act 2002 points out that the system of Lok Adalat, which is an innovative mechanism for alternate dispute resolution, has proved effective for resolving disputes in a spirit of conciliation outside the courts.

1.20 The Delhi Legal Services Authority has set up 9 permanent Lok Adalats in Government bodies/departments and 7 MACT permanent Lok Adalats have been functioning regularly in Delhi.[4] Similarly, permanent Lok Adalats have also been set up in some other States. But, there is a need to establish more permanent Lok Adalats throughout the country.

1.21 We firmly believe that the legal literacy and legal awareness are the principal means to achieve the objective of equality before the law for the citizens of our country. All efforts should be made to achieve the object of the Legal services Authorities Act and make the legal aid programmes meaningful and purposeful.

1.22 Legal aid without legal literacy is less meaningful and purposeful. So, it would be highly useful if some important legal topics are included as compulsory subjects from primary education stage itself. Such legal

[4] http://dlsa.nic.in/lokadalat.html, visited 14.04.2009

education would enable the people to settle several of their disputes outside the courts at the grass roots level without seeking help from legal experts who are generally expensive.

1.23 It is high time that fora for the poor and needy people for redressal of their grievances speedily are created. As we all know, delay in disposal of cases in law courts, for whatever reason it may be, has really defeated the purpose for which the people approach the courts for redressal. It is said that justice delayed is justice denied. So, we will have to find out a via media to render social justice to the poor and needy who want their grievances redressed through law courts.

1.24 It is heartening to note that the Parliament has very recently enacted the Gram Nyayalayas Act 2008. Justice to the poor at their doorstep as the common man's dream is sought to be achieved through the setting up of Gram Nyayalayas which will travel from place to place to bring to the people of rural areas speedy, affordable and substantial justice.

Alternative Dispute Resolution (ADR) in modern India

1.25 The first avenue where the conciliation has been effectively introduced and recognized by law is in the field of labour law, namely, Industrial Disputes Act 1947. Conciliation has been statutorily recognized as an effective method of dispute resolution in relation to disputes between workers and the management. The provision in the Industrial Disputes Act 1947 makes it attractive for disputing parties to settle disputes by negotiation and failing that through conciliation through an officer of the Government, before resorting to litigation.

1.26 In *Rajasthan State Road Transport Corporation v. Krishna Kant*[5], the Supreme Court observed:

> "The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute-resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of the courts and tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute."

1.27 The only field where the courts in India have recognized ADR is in the field of arbitration. The arbitration was originally governed by the provisions contained in different enactments, including those in the Code of Civil Procedure; the first Indian Arbitration Act was enacted in 1899, which was replaced by the Arbitration Act 1940. The courts were very much concerned over the supervision of Arbitral Tribunal and they were very keen to see whether the arbitrator has exceeded his jurisdiction while deciding the issue which was referred to him for arbitration.

1.28 There was much delay in settlement of disputes between parties in law courts, which prevented investment of money in India by other countries. India has undertaken major reforms in its arbitration law in the recent years as part of economic reforms initially in 1991. The Arbitration

[5] 1995 (5) SCC 75

and Conciliation Act of 1996 was thus enacted by the Parliament bringing in substantial reforms in arbitration, regarding domestic and international disputes.

1.29 The decision of the Supreme Court in *Konkan Railway Corpn. Ltd. v. M/S. Mehul Construction Co.*[6] summarizes the evolvement of the Arbitration & Conciliation Act 1996 and the main provisions of the Act thus:

> "4. At the outset, it must be borne in mind that prior to the 1996 Act, the Arbitration Act of 1940, which was in force in India provided for domestic arbitration and no provision was there to deal with the foreign awards. So far as the Foreign Awards are concerned, the same were being dealt with by the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961. The increasing growth of global trade and the delay in disposal of cases in Courts under the normal system in several countries made it imperative to have the perception of an alternative Dispute Resolution System, more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the UNCITRAL Model Law of International Commercial Arbitration and since then number of countries have given recognition to that Model in their respective legislative system. With the said UNCITRAL Model Law in view the present Arbitration and Conciliation Act of 1996 has been enacted in India replacing the Indian Arbitration Act, 1940, which was the principal legislation on Arbitration in the country that had been enacted during the British Rule. The Arbitration Act of 1996 provides not only for domestic arbitration but spreads its sweep to International Commercial Arbitration too. The Indian law relating to the enforcement of Foreign Arbitration Awards provides for greater autonomy in the arbitral process and limits judicial intervention to a narrower circumference than under the previous law. To attract the confidence of International

[6] 2000 (6) SCALE 71

Mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalisation policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in UNCITRAL model and, therefore, in interpreting any provisions of the 1996 Act Courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of a Court of Law. Under the new law the grounds on which an award of an Arbitrator could be challenged before the Court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the arbitrator or want of proper notice to a party of the appointment of the arbitrator or of arbitral proceedings. The powers of the arbitrator have been amplified by insertion of specific provisions of several matters. Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by an express provision inasmuch as if a party knowingly keeps silent and then suddenly raises a procedural objection will not be allowed to do so. The role of institutions in promoting and organising arbitration has been recognised. The power to nominate arbitrators has been given to the Chief Justice or to an institution or person designated by him. The time limit for making awards has been deleted. The existing provisions in 1940 Act relating to arbitration through intervention of Court, when there is no suit pending or by order of the court when there is a suit pending, have been removed. The importance of transnational commercial arbitration has been recognised and it has been specifically provided that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute. Under the new law unless the agreement provides otherwise, the arbitrators are required to give reasons for the award. The award itself has now been vested with status of a decree, inasmuch as the award itself is made executable as a decree and it will no longer be necessary to apply to the court for a decree in terms of the award. All these aim at achieving the sole object to resolve the dispute as expeditiously as possible with the

> minimum intervention of a Court of Law so that the trade and commerce is not affected on account of litigations before a court. When United Nations established the Commission on International Trade Law it is on account of the fact that the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade. The General Assembly regarded the Commission on International Trade Law as a medium which could play a more active role in reducing or removing the obstacles. Such Commission, therefore, was given a mandate for progressive harmonization and unification of the law of International Trade. With that objective when UNCITRAL Model has been prepared and the Parliament in our country enacted the Arbitration and Conciliation Act of 1996 adopting UNCITRAL Model, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act. The Statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimise the supervisory role of Courts in the arbitral process."

1.30 The Family Courts Act 1984 was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs. Section 5 of the Family Courts Act provides enabling provision for the Government to require the association of Social Welfare Organisations to help a Family Court to arrive at a settlement. Section 6 of the Act provides for appointment of permanent counsellors to effect settlement in family matters. Further, Section 9 of the Act imposes an obligation on the Family Court to make efforts for settlement before taking evidence in the case. To this extent the ADR has got much recognition in the mater of settlement of family disputes. Similar provision is contained in Order XXXIIA CPC which deals with family matters. According to section 4(4) (a) of the Act, in selecting persons for appointment as Judges for Family Courts, every

endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected.

1.31 Another right and welcome step taken was the enactment of the Consumer Protection Act 1986 for the settlement of consumers' disputes. The Act provides effective, inexpensive, simple and speedy redressal of consumers' grievances, which the civil courts are not able to provide. This Act is another example of ADR for the effective adjudication of consumers' disputes. The Act provides for three-tier fora, that is, District Forum, State Commission and the National Commission for redressal of grievances of consumers. Large numbers of consumers are approaching these fora to seek quick redressal of their grievances. There has also been a spurt in social action litigation on behalf of consumers by Consumer Activists, Voluntary Consumer Organisations and other Social Action Groups.

1.32 Advantages of ADR:

1) It is less expensive.
2) It is less time-consuming.
3) It is free from technicalities as in the case of conducting cases in law Courts.
4) Parties are free to discuss their differences of opinion without any fear of disclosure of this fact before any law courts.

5) Parties have the feeling that there is no losing or winning side between them but at the same time their grievance is redressed and their relationship is restored.

1.33 Justice in all its facets – social, economic and political – is required to be rendered to the masses of this country without any further loss of time – the need of the hour. The new strategy consists in dispute-resolution by conciliation, mediation and negotiation. The constitutional promise of securing to all citizens justice, social, economic and political, as promised in the Preamble of the Constitution, cannot be realised unless the three organs of the State, i.e., the legislature, the executive and the judiciary join together to find ways and means for providing to the Indian poor equal access to the State's justice system.

1.34 In *Sitanna v. Marivada Viranna*[7], the Privy Council affirmed the decision of the Panchayat in a family dispute. Sir John Wallis, J. stated the law in the following words:

> "Reference to a village Panchayat is the time-honoured method of deciding disputes of this kind, and has these advantages, that it is comparatively easy for the panchayatdars to ascertain the true facts, and that, as in this case, it avoids protracted litigation which, as observed by one of the witnesses, might have proved ruinous to the estate. Looking at the evidence as a whole their Lordships see no reason for doubting that the award was a fair and honest settlement of a doubtful claim based both on legal and moral grounds, and are therefore of opinion that there is no grounds for interfering with it."

1.35 There is lot of flexibility in the use of ADR methods. The flexibility is available in the procedure as well as the way solutions

[7] AIR 1934 PC 105

are found to the dispute. The solutions can be problem-specific. The rigidity of precedent as used in adversarial method of dispute-resolution will not come in the way of finding solutions to the disputes in a creative way.

1.36 If the ADR method is successful, it brings about a satisfactory solution to the dispute and the parties will not only be satisfied, the ill-will that would have existed between them will also end. ADR methods, especially mediation and conciliation not only address the dispute, they also address the emotions underlying the dispute. In fact, for ADR to be successful, first the emotions and ego existing between the parties will have to be addressed. Once the emotions and ego are effectively addressed, resolving the dispute becomes very easy. This requires wisdom and skill of counselling on the part of the Mediator or Conciliator.

1.37 The ADR method is participatory and there is scope for the parties to the dispute to participate in the solution-finding process. As a result, they honour the solution with commitment. Above all, the ADR methods are cheaper and affordable by the poor also. As of now, there are some aberrations when it comes to the expenses incurred in arbitration. In course of time, when there is good number of quality arbitrators, the expenses of arbitration will also decrease. The promotion of institutional arbitration will go a long way in improving the quality of ADR services and making them really cheaper.

1.38 The development of ADR methods will provide access to many litigants. It helps in reducing the enormous work-load that is put on the Judiciary. This will go a long way in improving not only the access to justice, but even the quality of justice.

1.39 We have discussed above about arbitration, which is a process of dispute-resolution between the parties through the arbitration tribunal appointed by the parties to the dispute or by the Chief Justice or a designate of the Chief Justice under section 11 of the Arbitration and Conciliation Act 1996. The parties have the option to go for *ad hoc* arbitration or institutional arbitration depending on their convenience.

1.40 *Ad hoc* arbitration is arbitration agreed to and arranged by the parties themselves without recourse to an arbitral institution. In *ad hoc* arbitration, if the parties are not able to agree as to who will be the arbitrator or one of the parties is reluctant to cooperate in appointing the arbitrator, the other party will have to invoke section 11 of the Arbitration and Conciliation Act 1996 whereunder the Chief Justice of a High Court or the Supreme Court or their designate will appoint the arbitrator. In case of domestic arbitration, it will be the Chief Justice of a High Court or his designate. In case of international commercial arbitration, it will be the Chief Justice of India or his designate. In *ad hoc* arbitration, the fee of the arbitrator will have to be agreed to by the parties and the arbitrator. The present Indian experience is that the fee of the arbitrator is quite high in *ad hoc* arbitration.

1.41 Institutional arbitration is an arbitration administered by an arbitral institution. The parties may stipulate in the arbitration agreement to refer an arbitral dispute between them for resolution to a particular institution. The Indian institutions include the Indian Council of Arbitration and the International Centre for Alternative Dispute Resolution. International institutions include the International Court of Arbitration, the London Court of International Arbitration and the American Arbitration Association. All these institutions have rules expressly formulated for conducting arbitration. These rules are formulated on the basis of experience and hence, they address all possible situations that may arise in the course of arbitration.

1.42 The following advantages accrue in the case of institutional arbitration in comparison with *ad hoc* arbitration:

1. In *ad hoc* arbitration, procedures will have to be agreed to by the parties and the arbitrator. This needs cooperation between the parties. When a dispute is in existence, it is difficult to expect such cooperation. In institutional arbitration, the rules are already there. There is no need to worry about formulating rules or spend time on making rules.
2. In *ad hoc* arbitration, infrastructure facilities for conducting arbitration is a problem, so there is temptation to hire facilities of expensive hotels. In the process, arbitration costs increase. Getting trained

staff is difficult. Library facilities are another problem. In institutional arbitration, the arbitral institution will have infrastructure facilities for conduct of arbitration; they will have trained secretarial and administrative staff. There will also be library facilities. There will be professionalism in conducting arbitration. The costs of arbitration also are cheaper in institutional arbitration.

3. In institutional arbitration, the institution will maintain a panel of arbitrators along with their profiles. The parties can choose from the panel. It also provides for specialized arbitrators. While in *ad hoc* arbitration, these advantages are not available.
4. In institutional arbitration, many arbitral institutions have an experienced committee to scrutinize the arbitral awards. Before the award is finalized and given to the parties, it is scrutinized by the experienced panel. So the possibility of the court setting aside the award is minimum. This facility is not available in *ad hoc* arbitration. Hence, there is higher risk of court-interference.
5. In institutional arbitration, the arbitrator's fee is fixed by the arbitral institution. The parties know beforehand what the cost of arbitration will be. In *ad hoc* arbitration, the arbitrator's fee is negotiated and agreed to. The Indian experience shows that it is quite expensive.
6. In institutional arbitration, the arbitrators are governed by the rules of the institution and they may be removed

from the panel for not conducting the arbitration properly, whereas in *ad hoc* arbitration, there is no such fear.

7. In case, for any reason, the arbitrator becomes incapable of continuing as arbitrator in institutional arbitration, it will not take much time to find substitutes. When a substitute is found, the procedure for arbitration remains the same. The proceedings can continue from where they were stopped, whereas these facilities are not available in *ad hoc* arbitration.

8. In institutional arbitration, as the secretarial and administrative staff is subject to the discipline of the institution, it is easy to maintain confidentiality of the proceedings. In *ad hoc* arbitration, it is difficult to expect professionalism from the secretarial staff.

1.43 In *Food Corporation of India v. Joginderpal Mohinderpal*[8], the Supreme Court observed:

> "We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating sense that justice appears to have been done."

[8] (1989) 2 SCC 347

1.44 The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of parties' choice.[9]

1.45 Favouring institutional arbitration to save arbitration from the arbitration cost, the Supreme Court has recently in *Union of India v. M/S. Singh Builders Syndicate*[10] observed:

> "When the arbitration is by a Tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired Judge/s. When a retired Judge is appointed as Arbitrator in place of serving officers, the government is forced to bear the high cost of Arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving persons as Arbitrator/s. There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge/s are Arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the Arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the Arbitrator and one party agrees to pay such fee, the other party, who is enable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee. It is necessary to find an urgent solution for

[9] *Union of India v. M/S. Singh Builders Syndicate*, 2009 (4) SCALE 491
[10] Ibid.

this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the Arbitrators' fees is not fixed by the Arbitrators themselves on case to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held. Another solution is for the court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned. Third is for the retired Judges offering to serve as Arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an Arbitrator whose fees are in their 'range' having regard to the stakes involved. What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such Arbitrator. It is unfortunate that delays, high cost, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process. Delay and high cost are two areas where the Arbitrators by self regulation can bring about marked improvement".

1.46 Section 89 providing for settlement of disputes outside the Court was inserted in CPC in 1999 and brought into force with effect from 01.07.2002. The 'Notes on Clauses' of the CPC (Amendment) Bill 1999 stated with regard to this provision thus:

"Clause 7 provides for the settlement of disputes outside the court. The provisions of Clause 7 are based on the recommendations made by Law Commission of India and Malimath Committee. It was suggested by Law Commission of India that the Court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make an attempt to settle the dispute between the parties amicably. Malimath Committee recommended to make it obligatory for the court to refer the dispute, after issues are framed, for settlement either by way of arbitration,

conciliation, mediation, judicial settlement or through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternate dispute resolution method that the suit could proceed further. In view of the above, clause 7 seeks to insert a new section 89 in the Code in order to provide for alternate dispute resolution."

1.47 Section 89 has been introduced for the first time for settlement of disputes outside the Court, with the avowed objective of providing speedy justice:

1. It is now made obligatory for the Court to refer the dispute after issues are framed for settlement either by way of -

(a) Arbitration,

(b) Conciliation,

(c) Judicial settlement including settlement through Lok Adalat, or

(d) Mediation.

2. Where the parties fail to get their disputes settled through any of the alternative dispute resolution methods, the suit could proceed further in the Court in which it was filed.

3. The procedure to be followed in matters referred for different modes of settlement is spelt out in sub-section (2).

4. Clause (d) of sub-section (2) of section 89 empowers the Government and the High Courts to make rules to be followed in mediation proceedings to effect the compromise between the parties.

1.48 In *Salem Advocate Bar Association v. Union of India*[11], the Supreme Court rejected the challenge to the constitutional validity of the amendment made in CPC and took note of the Reports of the Committee headed by M. Jagannadha Rao, J., a former Supreme Court Judge and Chairman of the Law Commission of India, including the one dealing with Model Alternative Dispute Resolution and Mediation Rules.

1.49 We should endeavour to inspire parties to settle their disputes outside the Court by more and more utilizing section 89 CPC. It is a very beneficial provision.

1.50 A new section 16 has been inserted in the Court-fees Act 1870 by the CPC (Amendment) Act 1999, which reads as follows:

> "Where the Court refers the parties to the suit to any one of the mode of settlement of dispute referred to in section 89 of the Code of Civil Procedure, 1908, the plaintiff shall be entitled to a certificate from the Court authorising him to receive back from the collector, the full amount of the fee paid in respect of such plaint."

1.51 Where a matter referred to a Lok Adalat in terms of section 89(2) CPC read with section 20(1) of the Legal Services Authorities Act is settled, the refund of the court-fee is governed

[11] AIR 2003 SC 189 and (2005) 6 SCC 344

by section 16 of the Court-fees Act read with section 21 of the Legal Services Authorities Act and the plaintiff is entitled to the refund of the whole of the court-fee paid on the plaint.[12]

1.52 A Lok Adalat award is on a par with a decree on compromise, final, unappealable, binding and equivalent to an executable decree, and ends the litigation between the parties.[13]

1.53 Public confidence in the Judiciary is the need of the hour more than ever before. The Judiciary has a special role to play in the task of achieving socio-economic goals enshrined in the Constitution. While maintaining their aloofness and independence, the Judges have to be aware of the social changes in the task of achieving socio-economic justice for the people.

1.54 Socrates said that four things improve a great Judge:
(a) To hear courteously;
(b) To answer wisely;
(c) To consider soberly; and
(d) To decide impartially.

1.55 The judges of the subordinate judiciary, which can be termed as the root of our judicial system, must be able to inspire confidence in themselves and do justice to the society. It is rightly said that judicial officers discharge divine functions though they are not divine themselves. Every judicial officer of the subordinate

[12] *Vasudevan V. A. v. State of Kerala*, AIR 2004 Kerala 43
[13] *P. T. Thomas v. Thomas Job*, (2005) 6 SCC 478

judiciary has to lead a disciplined life. The judges of all cadres should strictly observe punctuality in court. Integrity is an essential quality of a judicial officer. A judicial officer must follow the standards of integrity, morality and behaviour. The members of the judiciary should pronounce judgments within the stipulated time. Judges must decide cases without fear or favour, affection or ill will, or the feeling of a friend or foe. They must work very hard, be very honest and courteous to the litigants, witnesses and the members of the Bar and discharge their judicial functions with all humility at their command. They should not speak out their verdict, unless they propose to pronounce it in open court then and there. Judges should cultivate the art of writing judgments, which is a creative process. The language should be plain, precise and pointed. Long sentences lose their punch. Words should be chosen with apt precision. The facts should be stated precisely, the issues written clearly, the evidence should be discussed threadbare, ratiocination should be logical and should follow in a sequence from one point to another and then a case be decided. In the present times, judicial education and training too is a must, which may be called an effective and rather indispensable means to enhance fair administration of justice. Education enhances knowledge and sensitivity, whereas training revolves round skills, attitude and professionalism. The two reinforce each other in judicial performance. That is why there have come into existence the National Judicial Academy at Bhopal and other judicial academies or training directorates at the State level. Dr A. P. J. Abdul Kalam, a former President of India, has been supportive of

mediation and conciliation as ADR mechanisms and emphasized the need for their training in order that they are persons of impeccable integrity and ability to persuade and create conviction among parties.

1.56 The issue of under-trials detained in various prisons in the country has been a matter of concern. The Central Government realizing the plight of under-trials and to ensure justice to common man, made allocation of Rs.502.90 crores for creation of 1734 courts named as "Fast Track Courts" all over the country. The scheme was for a period of five years, which after intervention of the Supreme Court has been continued for another five years, that is, until 31st March 2010 with a provision of Rs.509 crores.

1.57 A successful judicial system is a hallmark of any developed civilization. The failure of criminal justice system in bringing criminal conduct under tight control is viewed as leading to the breakdown of the public order and disappearance of an important condition of human freedom. The crime-control implies orderly and efficient method for arresting, prosecuting, convicting and punishing the guilty and for deterring crime by others. The protection of individual rights is necessary to guard the accused against arbitrary exercise of powers by the State. Long delay in courts causes great hardship not only to the accused but even to the victim and the State. The accused, who is not out on bail, may sit in jail for number of months or even years awaiting conclusion of the trial. Thus, effort is required to be made to improve the

methods of investigation and prosecution. More professionalism needs to be infused in them. The State Government should create a special wing in the Police Department solely for the purpose of investigation and attending to court-work, and the prosecuting agency should be independent.

1.58 A prosecutor occupies a unique position in the criminal justice system. In *Hitendra Vishnu Thakur v. State of Maharashtra*[14], the Supreme Court observed that a public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The success of a trial depends mainly on effective prosecution, which is possible only through well-qualified, trained, fair and dedicated prosecutors. It goes without saying that integrity and impartiality of the public prosecutor is essential in the administration of justice. It is essential that efforts are made to improve the quality of the management of prosecution in order to secure fair, just and expeditious conclusion of trials.

1.59 In criminal matters also, settlement is recognized by the Code of Criminal Procedure in that its section 320 provides for compounding of offences mentioned therein.

Lawyers

1.60 Lawyers, as the general public expects, should be thorough professionals, persons of integrity and competence, who can uphold the

[14] AIR 1994 SC 2623

cause of justice. Lawyers must be men or women of substance having full sense of their social responsibilities as social technicians and architects of the justicing process. They must have a grasp of the endless tradition and must be aware of the greatness of their task. They must have necessary humility, being servants of justice and the conscience of the community.

1.61 The vulnerable sections of the society who are marginalized have to be dealt with sensitively and with care. Being powerless, poor and ignorant, they need assistance for empowerment with knowledge and capacity to uphold their own rights as being integral part of the society. Legal literacy campaign, paralegal training programmes, mobilization of public opinion against injustice and exploitation, out-of-court settlement of disputes, legal advice, etc. are some of the ways through which the poor and the underprivileged can be made to realize their rights and also learn about their own importance in shaping and rejuvenating this great nation.

1.62 Since the lower judiciary does the bulk of judicial work, it needs to be strengthened. Not only the infrastructure of the lower courts needs to be improved, but also the service conditions of the judicial officers need to be revamped. More courts needs to be created, so that justice is taken to the doorsteps of the people. The recent creation by the Union Government of Fast Track Court at the district level, to dispose of old cases, is a step in the right direction.

1.63 In our country, the ratio between the population and the judges is unrealistic. Therefore, the Judiciary is unable to cope up with the flood of litigation. Hence, the number of judges needs to be increased in proportion to the population. India has fewer than 15 judges per million people, a figure that compares very poorly with countries, such as Canada (about 75 per million) and the US (104 per million). In 2002, the Supreme Court had directed the Union Government that the judge-population ratio be raised to 50 per million in a phased manner.[15]

1.64 Our antediluvian laws either need to be deleted or rejuvenated. The procedure laws should be pruned and streamlined. The right to appeal on both the civil and the criminal sides needs to be restricted.

1.65 The work culture of the courts should be improved. The relationship between the Bar and the Bench should be cordial. Strikes and adjournments only delay disposal of cases.

1.66 The quality of legislation needs to be improved. Poorly drafted laws encourage litigation. If the law is clear, chances of litigation are less.

1.67 With a view to avoid inordinate delay in furnishing certified copies of judgments and final orders, etc., copies should be taken and authenticated immediately after their pronouncement and preserved in the copying section, for the purposes of issuing certified

[15] *The Hindu*, 06.09.2007

copies, whenever necessary. Sufficient number of Xerox machines for that purpose be made available.

1.68 Judicial reform is the concern not only of the Judiciary, but it is the responsibility of the Executive, of the Legislature, of the Bar and of the people also. It is not a one-time remedy, but an on-going process. They must stop blaming each other, for the malice. They must unite, to prevent and control the litigation-epidemic.

1.69 With the advent of the ADR, there is a new avenue for the people to settle their disputes. More and more ADR centres should be created for settling disputes out-of-court as is being done in many other countries. ADR methods will really achieve the goal of rendering social justice to the people, which really is the goal of the successful judicial system.

1.70 Technology has a role to play in diminishing dockets. Computers should be introduced in courts with a faster speed. This facilitates dissemination of information, creation of data, upkeep of the judicial records and betters judicial delivery system. The National E-Courts Project launched by the President on 09.07.2007 needs fillip.

II. RECOMMENDATIONS

2.1 We are aware that the propositions contained in the preceding Chapter are not new. Nevertheless, we feel that they need to be re-emphasized and reaffirmed. There is an urgent need for justice-dispensation through ADR mechanisms. The ADR movement needs to be carried forward with greater speed. Besides, many other suggestions, which may now be called hackneyed, need a fresh look.

2.2 We recommend accordingly.

(Dr Justice AR. Lakshmanan)
Chairman

(Prof. Dr Tahir Mahmood)
Member

(Dr Brahm A. Agrawal)
Member-Secretary