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REFERENCE

Children

ALL INDIA SEMINAR ON 'ACCESS TO JUSTICE' - SOUVENIR

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'ACCESS TO JUSTICE FOR CHILDREN'

HON'BLE MRS. JUSTICE RUMA PAL

Judge, Supreme Court of India

The word 'justice' means 'fairness' - and yet the phrase 'access to justice' is normally understood in the limited sense of a right to litigate. Litigation assumes an existing right. No access to justice is possible without this key element. Therefore when one talks of access to justice, one has to consider what these rights are and how they are to be vindicated. I do not intend to cover the entire gamut of rights which a child in India is entitled to, but will highlight only some, where focus is necessary viz. the right of destitute children in the field of employment and crime for whom the question of access to justice often becomes a question of their survival.

The right of destitute children in both these areas is recognised internationally. The Universal Declaration of Human Rights, recognizes that Children are entitled to special care and assistance.[1] The International Covenant on Civil and Political Rights (ICCPR) also guarantees to every child, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.[2] These principles are further reiterated by the International Covenant on Economic, Social and Cultural Rights which recognizes that "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions."[3] The International Covenant on Economic, Social and Cultural Rights[4] mandates that Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law.[5] The United Nations Convention on the Rights of the Child, 1989 reiterates this right to freedom from exploitation[6] while emphasizing that the child needs special

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1 The Universal Declaration of Human Rights, Article 25 (2).

2 The International Covenant on Civil and Political Rights, Article 24 (1)

3 International Covenant on Economic, Social and Cultural Rights Article 10 (3)

4 Article 10 (3), The International Covenant on Economic, Social and Cultural Rights.

5 It requires that states should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

6 United Nations Convention on the Rights of the Child, 1989

Article 32 (1) States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, and moral or social development.

(2) States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

a) Provide for a minimum age or minimum ages for admission to employment;

b) Provide for appropriate regulation of the hours and conditions of employment;

c) Provide of appropriate penalties or other sanctions to ensure effective enforcement of the present Article.

safeguards and care.[7]

The Constitution of India also seeks to protect the child against various forms of exploitation. It mandates that "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."[8] It prohibits traffic in human beings and forced labour[9] and prescribes that any contravention of this shall be an offence punishable in accordance with law.[10] Article 39 stipulates that "the State shall, in particular, direct its policies towards securing the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength and that children are given opportunities and facilities to develop in a healthy manner in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment".

Parliament enacted the Child Labour (Prohibition and Regulation) Act 1986, providing for a uniform definition of "child" as a person who has not completed 14 years of age. The statute classifies occupations into 'hazardous' and 'non-hazardous'. While employment of children in hazardous occupations is banned, employment in non-hazardous occupations is sought to be regulated.[11] This is probably because the problem of child labour is the outcome of poverty and illiteracy and unless these causes are eradicated, it would be unrealistic to forbid child labour altogether.

Despite these Constitutional and statutory safeguards, Child Labour in hazardous industries is still prevalent in all parts of our country.[12]

According to some surveys conducted, India has about 55 million child workers[13] - while others have put the figure as high as 87 million children[14] . Most of the children are employed in industries such as carpet manufacture, gemstone polishing, bidi rolling, manufacture of brass and metal articles, glass and glassware,

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7 United Nations Convention on the Rights of the Child, 1989 came into existence in the background of various other Declarations, namely, the Declaration on Social and Legal Principles relating to the Protection and Welfare of children, with Special Reference to Foster Placement and Adoption, nationally and internationally, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict. The Convention was adopted by the U.N. General Assembly in 1989 and ratified by India in 1992.

8 Article 24.

9 Article 23.

10 The law laid down in this regard is Section 374 Indian Penal Code.

11 Under the proviso to Section 3, such regulation does not apply to any workshop where processes are carried on by the occupier with the aid of his family. This is a loophole taken advantage of by various employers to avoid giving children their due.

12 Sharma, Pawan, "Child Labour: A Socio-Legal Study", 36 Journal of the Indian Law institute (1994), p. 211.

13 Mary E. Williams, Child Labour & Sweat Shops, 1999

14 E1,E1 Barometer on Human & Trade Union Rights in the Education Sectors, 1998

footwear, textiles, silk and materials and fireworks. Of these a large percentage is bonded. According to the ILO – 70 – 80% of the 8000 to 50,000 children in the glass industry in Ferozabad are bonded and 30 – 40% children in the match and fireworks industry are bonded.[15] According to another study, of the 3,00,000 children working in the carpet industry, 2,70,000 are bonded labourers.[16]

Till very recently, the Supreme Court's decisions were directed to particular industries employing child labour. For example in 1990 the Supreme Court in ***M.C. Mehta vs. State of Tamil Nadu***[17] held that children should not be employed within the match factories directly connected with the manufacturing process up to final production of match sticks or fireworks. It held that given the economic reality which drives children to work, it would be unrealistic and impracticable to deny the employment of children altogether. So it was directed that children can be employed in the process of packing of match sticks and fireworks away from the place of manufacture. A fixed minimum wage, not less than 60% of the wages payable to adults for doing the same job, was directed to be paid. Facilities for education, recreation and medical care were also directed to be provided. Finally the State was asked to set up a contributory welfare fund contributions to which would be made by the concerned match factories and the State.

Despite these directives in 1992 an explosion took place in a factory in Sivakasi where children continued to be employed in the manufacturing process. Many children were injured and several died. The Supreme Court took suo motu cognizance of the incident and directed the State Government to pay compensation to the injured and the bereaved. A committee of lawyers was set up to visit the area and submit a report. The Report was submitted. The Supreme Court gave further directions for the implementation of the provisions of the Child Labour (Prohibition and Regulation) Act 1986 after conducting a survey. This time the direction was given to all the State Governments. The Supreme Court said[18] that Employers who violate the provisions of the Child Labour Act, 1986, "must be asked to pay compensation for every child employed in contravention of the provisions of the Act a sum of Rs. 20,000; and the Inspectors, whose appointment is visualised by S.17 to secure compliance with the provisions of the Act, should do this job. The Inspectors appointed under section 17 would see that for each child employed in violation of the provisions of the Act, the employer concerned pays Rs. 20,000 which sum could be deposited in a fund to be known as Child Labour Rehabilitation-cum-Welfare Fund."

The survey of child labour throughout the country was completed in 1997. According to this survey there were 428, 305 child labourers in hazardous industries

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15 ILO-IPEC, mainstreaming genders in IPEC Activities, 1999

16 VS Dept. of Labour, Street and Toil of Children: Consumer Labels and Child Labour, 1997

17 1991 (1) SCC 283

18 *M.C. Mehta* v. *State of Tamil Nadu*, AIR 1997 SC 699.

alone. The figure is said to be an underestimation – nevertheless it shows that the problem is continuing. The figures of children who are bonded labourers in Match and Fireworks factories in 1999 would suggest that the directions of the Supreme Court have remained unattended to. Thus even with international, constitutional, statutory and judicial recognition of a child's rights to be employed in non-hazardous work, they continue to be given work in health destroying, crippling and dangerous industries, with no effective alleviation of their lot. How then does one secure them these rights?

The solution which is simple in theory but difficult in practice lies in one word and that is "implementation". As I have said before that although the meting out of 'justice' in its widest sense to children, is the responsibility of every citizen, every institution and every limb of Government, somehow the task has been left to a large extent to the judiciary.

The Executive has the necessary means and infrastructure to give effect to and to bring into operation these rights and it is the primary duty of the Executive to implement the law. It is a duty which, if the past experience is anything to go by, it has singularly failed to fulfil.

The other method of access is through public spirited and compassionate individuals and non-governmental organizations who have and must continue to draw the Court's attention to the plight of the destitute children through public interest litigations. Such litigations are responsible for a valuable part of the jurisprudence on Child rights, particularly child labour. However, such action must be based on adequate and unimpeachable material. The issue need not be raised in a generic fashion and perhaps for any meaningful access to justice by children the problem must be particularised and specific. However, entitlement and recognition of rights by way of pronouncements and declarations by Courts, though necessary, is only a part of the solution. Without actual implementation of these rights, the process of justice to children is incomplete and meaningless. With the concept of the Continuing Mandamus,[19] the Court can and should monitor and supervise cases of child labour and exploitation till it is satisfied that the fruits of the Courts decision are in fact enjoyed by the concerned children.

But what about the children themselves approaching the Courts or the authorities under the 1986 Act? Normally, the immediate reaction to the question of litigation by children is one of protest. Horrifying visions of children suing parents and teachers are conjured up. How will the traditional fabric of our society be retained if children are allowed to start litigating is the question which will probably

[19] Vineet Narain V. Union of India 1998 (1) SCC 226; Union of India and Others V. Sushil Kumar Modi and Others 1998 (4) SCC 770; Vineet Narain V. Union of India 1996 (2) SCC 199

be uppermost in everyone's mind. The answer is that the civil law already provides for litigation by minors although their interests are represented by a natural guardian or a guardian appointed by Court. However, if a child is competent to be employed why should it not be allowed to litigate on its own? Of course, the legal process in our country is so structured that it may be expensive, although legal aid which is a constitutionally guaranteed right could be ensured by Courts. But the legal process is predominantly adversarial in nature, time consuming and might not give the relief as immediately as is required. But hopefully, with an active executive and concerned citizens who, I repeat, are all responsible to give the destitute child the 'justice' that it needs, resort to judicial intervention will be the exception and not the rule in such matters.

Apart from the obvious harm to children by their continued employment in unhealthy and unsafe environments, studies indicate strong linkages between juvenile destitution, juvenile labour and juvenile delinquency[20]. Here again the Juvenile delinquent is subjected to exploitation at various stages of the criminal justice delivery process, right from the stage of pre-investigation, arrest, and at the trial. The juvenile is perceived as a "criminal" by the law enforcement machinery according to one study and sometimes subjected to arbitrary arrests and torture and often exploited by the law enforcement and custodial authorities themselves.[21]

The United Nations Convention on the Rights of the Child, 1989 recognizes the right of every child accused of an offence "to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society",[22]

The Indian Parliament enacted the Juvenile Justice Act in 1986 which provided for two main authorities in the administration of justice for juveniles: the Juvenile Welfare Board and the Juvenile Courts.[23] Prior to the Juvenile Justice Act, 1986, there were various special and State laws dealing with the treatment of juvenile delinquents.[24] The 1986 Act has recently been replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 which came into force on 1st April 2001. It is a comprehensive code and is uniformly applicable across the nation except for the State of Jammu and Kashmir. It has been enacted to include in the domestic law, the United Nations

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20 Pande, B.B. "Implications of the Linkages between Juvenile Destitution, Labour and Delinquency forJuvenile Justice in the contemporary Indian Society: Vol. 14 Delhi Law Review (1992) p.61

21 'Police Abuse & Killings of street children in India", Human Rights Watch Children's Rights Project (http://www.hrw.org/reports/1996/India4.htm)

Convention on the Rights of the child which has been ratified by India and other international instruments.[25]

Here again the Supreme Court had already sought to purge the system of inhumane conditions that a juvenile delinquent has to suffer. It has noted that "our nation can never really be decriminalized until the crime of punishment of young deviants is purged legislatively, administratively and judicatively".[26] The Court has recognized that juvenile delinquency "is a product of social and economic maladjustment. It has been said that even if it is found that these juveniles have committed any offences, they cannot be allowed to be maltreated. They do not shed their fundamental rights when they enter jail.[27] These include the right to legal aid, the right to a speedy trial. Normally, the juvenile would be unable to engage a lawyer and secure legal services. The State is under a constitutional mandate to provide a lawyer to such a person.[28] The Judge before whom the accused juvenile appears is under an obligation to inform the accused that if he is unable to engage

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22 Article 40. The Convention also calls upon States to ensure that:
a) no child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
b) every child alleged as or accused of having infringed the penal law is to be provided with the following minimum guarantees:
(i) to be presumed innocent until proven guilty according to law;
(ii) to be informed promptly about the charges;
(iii) to have the matter determined without delay;
(iv) not to be compelled to give testimony or to confess guilt;
(v) if found to have infringed any law, to have the decision reviewed by a higher authority;
(vi) to have assistance of a free interpreter;
(ii) to have full respect for his or her privacy.

23 Institutions for housing juveniles are juvenile homes, special homes, observation homes, after-care homes. The Act lays down that a juvenile is a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years. [Section 2(h)]

24 Apprentices Act, 1850 which provided for apprenticeship of children between the ages of 10 to 15 if they committed minor offences. While this provision was historically one of the earliest providing for juvenile justice and was an attempt to segregate the juvenile offender from the hardened adult offenders, it has been criticized as amounting to forced child labour, including within its fold children as young as 10 years of age; Reformatory School Act 1976 whereby courts were empowered to send delinquent boys below the age of 15 years to Reformatory school. These enactments were followed by various Childrens Acts, namely, Children Act in 1920 by Madras, in 1922 by Bengal, 1924 by Bombay. Eventually most states enacted Children Acts. In 1960 the Children Act of 1960 was enacted by the Government of India for the Union Territories. These Children Acts were eventually substituted by the Juvenile Justice Act, 1986, enacted by the Parliament.

25 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their liberty (1990) among others

26 Hiralal Mallick v. State of Bihar, AIR 1977 SC 2236.

27 Munna v, State of Uttar Pradesh, (1982) 1 SCC 545.

28 Hussainara Khatoon v. State of Bihar AIR 1979 SC 1369

the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State.[29]

The right to speedy trial has been held to be a fundamental right under Article 21 of the Constitution.[30] The fundamental right to a speedy trial becomes even more important with respect to juveniles. The right to be treated with special care and attention, which flows from various international conventions and from the Constitution, would be rendered meaningless, if the child were to undergo the rigours of the trial for years. This right also assumes importance in light of the decision of the Supreme Court in Arnit Das[31] where the Court has held that to determine whether a person is a juvenile or not, the relevant date to be considered is not the date of commission of the act but the date he is brought before the competent authority.

The Court has also observed that children accused of offences "must not be kept in jails. It is the atmosphere of the jail which has a highly injurious effect on the mind of the child, estranging him from the society and breeding in him aversion bordering on hatred against a system which keeps him in jail. On no account should the children be kept in jail".[32] The Court has laid down norms which must be followed in dealing with the juvenile delinquent. In the matter of sentencing it has been said that within the limits of the prison rules obtaining, reformatory type of work should be prescribed to the juvenile offender in consultation with the medical officer of the jail. It was also directed that offenders should be granted parole and the authorities should consider paroling the delinquent periodically, for reasonable spells, subject to sufficient safeguards ensuring the child's proper behaviour outside and prompt return inside.[33] The primary object must be to place the child in an environment conducive to his rehabilitation and providing scope for corrective action. That appears to be the basic criterion[34]. It has also been directed that due care shall be taken to ensure that the juvenile delinquents are not assigned work in the same area where regular prisoners are made to work, and that care should be taken to ensure that there is no scope for their meeting or being kept with hardened criminals.[35] This directive of the Court was incorporated in the Juvenile Justice Act, 1986 and

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29 Khatri v. State of Bihar AIR 1981 SC 928

30 Hussainara Khatoon v. State of Bihar AIR 1979 SC 1369, where the Court held that speedy trial is an essential element of "reasonable, just and fair" procedure under Article 21 of the Constitution. Speedy trial, namely, a reasonably expeditious trial, was held to be integral to the fundamental right to life and liberty under Article 21 of the Constitution of India; State of Bihar v. Uma Shankar Ketriwal, 1981 (1) SCC 75; Kadra Pahadiya v. State of Bihar 1983 (2) SCC 104; Abdul Rehman Antulay and Others V. R.S. Nayak and Another 1992 (1) SCC 225

31 Arnit Das. V. State of Bihar 2000 (5) SCC 488

32 *Sheela Barse* v. *Union of India*, AIR 1986 SC 1773.

33 Hiralal v. State of Bihar AIR 1977 SC 2236, 2243

34 Satto v. State of U.P. (1979 Crl. L.J.943

35 Sanjay Suri v. Delhi Administration, Delhi AIR 1988 SC 414 para 6.

continues in the Juvenile Justice Act, 2000 so that a juvenile is not to be sent to jail but to a special home or a "place of safety" which is defined as "any place or institution" not being a police lock-up or jail where the person in charge is willing temporarily to take care of the juvenile and which is found by the competent authority to be a place of safety for the juvenile.

However, one of the main problems with the juvenile justice system has been that it has been entirely over-shadowed by the criminal justice model.[36] and Courts do not always fulfil the special role under the special statutes dealing with children. On the other hand the juvenile delinquents are often treated like adult offenders.[37]

Courts must therefore keep in mind that the juvenile justice system is based on two essential theories[38], namely,

(1) that the child is not responsible for its actions/ behaviour, and

(2) the notion of parens patria, legitimizing State intervention in a child's life.

Now the field is to a large extent covered by the Juvenile Justice Act, 2000. It deals with the care, protection, treatment, development and rehabilitation not only of delinquent juveniles but also children in need of care and protection. It provides for Juvenile Justice Boards, Child Welfare Committees, setting up of Special homes in collaboration with voluntary organisations for the rehabilitation and social re-integration of children and for special procedures to deal with delinquencies. The State appears to have at last recognized that unless the common citizen is involved in the process at least of dealing with issues relating to children, there is no hope of achieving the objectives of the Constitution or the various statutes enacted for the children's protection. For the first time in 2000, non-governmental social welfare organizations are to be involved not only in the matter of setting up of shelter homes, after care organizations and so on, but social workers who have been actively involved in health, education or welfare activities of children for at least seven years[39] are to be part of the Juvenile Welfare Board which is required to deal with offences stated to have been committed by delinquent children.[40] All the members of the Board

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36 Panda, Bhavani Prasad, "The Rights of Child, Juvenile Delinquency and Administration of Justice", I Supreme Court Journal (1996) p.31.

37 Razdan, Usha, "Apex Court Towards Humanizing the Administration of Justice", 33 Journal of the Indian Law Institute (1991), p.366.

38 Panda, Bhavani Prasad, "The Rights of Child,Juvenile Delinquency and Administration of Justice", I Supreme Court Journal (1996) p.31, at p.35.

37 Razdan, Usha, "Apex Court Towards Humanizing the Administration of Justice", 33 Journal of the Indian Law Institute (1991), p.366.

38 Panda, Bhavani Prasad, "The Rights of Child,Juvenile Delinquency and Administration of Justice", I Supreme Court Journal (1996) p.31, at p.35.

39 Section 4(3) of The Juvenile Justice (Care and Protection of Children) Act, 2000

40 Section 4(2) of The Juvenile Justice (Care and Protection of Children) Act, 2000

have to have special experience in dealing with children. Most importantly, the Judicial member who is a Metropolitan Magistrate is required to have special knowledge and training in child psychology before being appointed to the Board. We now have a Juvenile Justice Fund under the Act which is required to be created by the State Government for the rehabilitation of the juvenile or other destitute or neglected child and who has been dealt with by the authorities under the Act. The Fund is to be created not only by the contributions of the Central Government but with donations, contributions or subscriptions from the citizens at large. Rules have been framed as to how the statutory provisions are to be carried out. The Act is still new and it is yet to be seen how effectively it is implemented. But an interesting new section is Section 32(1) which provides that any child in need of care and protection may be produced before the Committee by either (i) any police officer or special juvenile police unit or a designated police officer, or (ii) any public servant; or (iii) childline, a registered voluntary organisation or by such other voluntary organisation or an agency as may be recognised by the State Government; or (iv) any social worker or a public spirited citizen authorised by the State Government; or (v) by the child himself".

Although a child labourer in general is not in terms included in the definition of the phrase "the child in need of care and protection", it is arguable that a child who is a bonded labourer is entitled to the benefits of the Act because the definition includes children who are being or are likely to be abused for unconscionable gains. In fact Section 26 of the Act makes the ostensible procuration of a juvenile or child kept in bondage for the purposes of any hazardous employment punishable. Perhaps this also affirms the suggestion made earlier that the time has come to give destitute child labourers such direct access to Courts.

Ultimately, however, the responsibility for ensuring children access to justice is with each of us. We are aware of the problem. We have the means. What we need is a sense of commitment to the cause of children and a determination to help those who represent the future of this country.

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JUDICIAL SYSTEM AND THE VICTIMISED CHILD

by
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This Seminar is aimed at discussing the Indian judicial system, which is based on the fundamental premises that it is accessible to one and all irrespective of religion, caste, creed, age, color etc. This is comforting to hear and say but to what extent is it true and effective?. I am here with a maiden attempt to share my views and experience and to throw open an avenue for debate relating to access of justice to the minors of our society.

A child ordinarily speaking may need to knock the doors of the courts seeking justice to protect their own rights, may be classified in areas namely child custody, guardianship, adoption, inheritance, business interests created by families in favour of minors and children, exploitation by sexual abuse, juvenile crimes and so on.

At present our system of law and justice has provided the protection of the above rights of the child and the courts have definitely adopted a very practical and positive approach in rendering justice keeping in mind the paramount interest and welfare of the child concerned. In our judicial system of precedents, the Judgments provide a law and the society is bound by the same. However, it is still felt that further thought is required in some of the branches to bring about sensitivity and awareness to the cause, effective implementation of the Judgments and also a very high priority disposal in order to make the justice effective and within the time frame which the child can bear to pull himself/herself out of the situation with as minimum trauma as is possible.

When it comes to protecting rights of children, it is not just the legal rights and obligations that the courts are bound by but also factors like, emotional repercurrsions, trauma handling, mental and physical growth, educational upbringing, social, cultural and moral values systems, human relationships, social behavioral patterns etc. All these may not be strictly speaking within the parameters of legal framework but the legal framework should not be devoid of all these factors.

Currently I want to focus on the issues of child sexual abuse and related matters. I would therefore, be reflected by my understanding in the area which needs looking into as regards effective and sensitive handling in disposal of such cases in the law courts.

In matters of child abuse, certain factors, which are required to be understood and accepted at the forefront, are:

Primarily what is Child Sexual Abuse and how aware are the concerned authorities of the same?

Child Sexual Abuse includes all forms of consensual or non-consensual contact of a minor with a sexual purpose. It may include talking abusive language, touching, fondling or all forms of pornotration. It is a crime of violence committed primarily against children, acted in an aggressive sexual way. It is an issue of power and dominance that uses sex as a weapon to violate sexual dignity. All abuse need not be verbal or tactile but can be visual as innocent as the casting evil sight might be. The CSA happens to any child (read 'boy') and not necessarily to a girl. CSA can exist in rural as well as in the urban metros. The abuser can be anybody from your public transport driver, to your near & dear ones to another street peer.

Some of the hazards dealt with by the victims after the victimisation are even more horrendous than the offence itself even before they do approach the police authorities, if they do approach that is.

Insecurity of some impending danger might hamper a child's day to day activities and might leave his/her mentally bruised and traumatised. The victim is left with a distrust and hatred for the society at large not being able to even express the crime. More often than not the victim is made to feel guilty and dirty although what they really need is more love, affection and most of all faith. The victim and his/her family might have to deal with more than just honour and dignity. Sometimes they have to deal with being framed as the accuser themselves. The chidren initiated into forced early sex might show signs of dangerous sexual behaviours for a long long time that might affect a whole new generation. The link between child sexual abuse and the killer disease is not hard to understand. The parents and loved ones of an abused victim might forsake him/her for loss of social status or to teach her a lesson.

The parents of victims after dealing with the immediate problems of the child's trauma, social stigma and ridicule, economic factors etc and consequences thereof, who do overcome the initial hazards, build the courage to approach the police and judiciary are faced with a completely ignorant and insensitive system.

Does the legal system even define the said crime and are there any specific laws for the Child Abuse as such? Does the system specifically define the punishment for such perpetrators? Are the punishments not required to be more stringent? Are there any remedial measures like mental health institutions resorted to

by the judicial system or are the said perpetrators (if and when they are convicted) just left to undergo a term in jail and then released at large in the society?

The Indian Penal Code does not have any section directly related to Child Sexual Abuse. Reliance has to be placed on laws relating to women. Need one say more on the subject here!

Are the authorities if aware and sensitive, capable of handling the situation positively and progressively?

The legal and enforcement agencies are not necessarily morally bound or sensitive to the issues of child sexual abuse, rather they might turn hostile and perpetrators themselves on occasions.

In handling such cases, the first problem is discovery of the crime itself. Thereafter the inadequacy and lack of understanding of crime by the enforcement agencies bars the way to justice in the very budding stage. The reliance on the child to not only understand but also express the crime in detail in front of strangers is not at all reasonable. With these handicaps, if and when such crimes are discovered and brought to the fore, it is found that there are many hurdles and obstacles to be crossed by the aggrieved in the form of lengthy and complicated procedures, delay in proceedings etc.

Further, identification of the accused, statement of the victim, its veracity, a child's incongruity in expression of sequence of events and repeated interrogation and pschycological pressure results in the case happening a non-starter in some situations. One is often told that on this material no cognizance can be taken. Sometimes the victims themselves turn hostile not being able to bear the trauma and pressure meted out by the system and procedure. There are no eyewitnesses or corroborating evidence except a child's level of understanding, recollection and hearsay on the same. The statute of Limitation in these cases sometimes turns out to be a hindrance as there are times when the victim may come out in the fore long after the offence is committed and here the statute of limitation comes as a bar to justice.

All these difficulties despite the progress in the provisions of law and system of courts display quite a disheartening scenario. This is certainly an under developed branch of law leaving a lot of gaps which have to be identified and plugged keeping in mind the sensitivity and gravity of the situation.

The problem although difficult, monumental and highly sensitive in more ways than one is not insurmountable. The earlier the pillars of the judicial system recognize and accept the problem as relates to CSA, take progressive, positive and practical approach and action to deal with the same, the better it is for all concerned in the society at large.

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Having thrown open the concept for debate there are a few measures suggested that may be considered in this regard which may help in making the situation more child friendly and to meet the ends of justice, giving more confidence to the victims to approach the judicial system without any apprehensions.

· Time bound trials in special courts can be the very basic minimum step the judiciary can resort to.

· Workshops on awareness and sensitization of the authorities dealing with these special cases will go a long way in positive interaction with the victims and their families. Proper handling can help ease the pain, trauma and stigma that comes along with these cases.

· The victimized child need not be made to come face to face with the perpetrator as that can lead to further damage to the psyche of the child who is already weary and scared.

· Concepts like in camera hearing and close circuit camera hearings can be introduced. Video taped statements of the child can be made admissible so that the child is spared further trauma of exposure and degradation.

· The child need not be made to repeat all gruesome details in an open court in front of strangers. The hearings may consist of very minimum people along with a support person for the child like the mother of the child, NGO representatives.

· Use of anatomical dolls and drawings can help the child relate the events without much difficulty or hesitation or embarrassment.

· Emergency protection laws can be framed and brought into force for immediate action and protection of the complainants and other prospective victims who are subject to the perpetrator at large.

· Policies and programmes can be framed and enforced to bring about coordination and strengthen communication between the law making and enforcement authorities, the medical authorities etc.

· Monitoring of the both suspects and the convicted is a step to future safeguard of the society at large. Also punishment is not the final answer but such perpetrators may be sent to reformative institutions.

These measures although may not be conclusive and final or even easy to implement, are certainly a step towards positive and progressive handling of the situation and worth consideration.

ACCESS TO JUSTICE FOR CHILDREN

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While talking of access of justice for children, the task to provide cover of justice for children is perhaps even more difficult than for other sections of the society. This is for the reason that children are not aware of their rights. They are therefore not aware of the exploitation that they are undergoing. Therefore the society has to itself provide check and balances, so as to make justice accessible to children.

Child labour, child marriage, abuse of female child are all well known instances where children suffer. To begin with, it is suggested that the first step should be to make the children aware of their rights. Awareness would come from wide circulation of the rights of the children. Awareness would come from media coverage of the various aspects of child exploitation. When this is emphasized, the rights of the children would be known to the children themselves and to the persons interested in the welfare of the children.

Supreme Court has upheld fundamental right to primary education to every child. This fundamental right has been inferred with reference to Article 21 of the Constitution of India. Supreme Court enunciated this in a 5-Judge Constitution Bench in statement in law in J.P. Unnikrishnan Vs. State of A.P..[1] This right was further affirmed and reiterated by a recent 11-Judge Bench of the Supreme Court in T.M.A. PAI Foundation vs. State of Karnataka[2].

Despite this enunciation of law by the highest Court, the number of children in India who are getting primary education as compared to the children who are deprived of such primary education – is a high ratio.

The above instance was cited to emphasize the point that mere enunciation of rights would not be enough. There has to be a machinery to extend that right to the concerned beneficiary. Motivation of public opinion is important for self-observation of any law.

In the examples available around us, non-governmental organizations (NGOs) like CRY (Child Relief and You) and several others are engaged in this enterprise.

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[1] (1993) 1 SCC 645
[2] (2002) 8 SCC 481

ACCESS TO JUSTICE IN INDIA : AN EMERGING REFORM AGENDA[1]

by

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I. India and the Asian Development Bank : Development Partnership

1. The Asian Development Bank (ADB) is a multilateral development bank (MDB) which was established in 1966. Headquartered in Manila, Philippines with 61 members of whom 44 are regional and 17 non-regional, the ADB has 18 Resident/Regional Missions in its developing member countries, of which one is in New Delhi, Representative Offices in 3 developed member countries and 5 other offices.[2] ADB's operations, focused on the Asian and Pacific region, include loans, equity investments, guarantees and technical assistance grants. These operations are designed to promote economic development in ADB's developing member countries in a sustainable and socially inclusive manner.

2. There is a significant development partnership between ADB and India reflected in ADB's operations in India. Average assistance from ADB has been about $ 1.2 billion to $ 1.3 billion a year in the past few years and programmed to increase to $ 2 billion annually in the next few years. Against the backdrop of India's liberalization policy since the early 1990s, a large part of these operations have supported reforms in infrastructure and the financial sector, as well as at the state level.

II. "First Generation" Law and Development in India : Sectoral and State Level Law Reform

3. Underpinned by a series of ADB Board papers[3] on governance, including one on Law and Development, the sectoral and state level reform operations which

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1 This paper is authored by Mr. Arjun Goswami, Senior Governance Specialist, South Asia Governance, Finance and Trade Division, ADB. The views expressed do not necessarily reflect the views or position of the ADB, or its Board of Directors or the Governments they represent. The ADB does not guarantee the accuracy of the data included in this article and accepts no responsibility for consequence for their use. The term "*country*" does not imply any judgment by ADB as to the legal or other status of any territorial entity.

2 These other offices include an extended mission office in Gujarat.

3 See "*Governance : Sound Development Management*" (R151-95) 17 August 1995; "*A Review of the Law and Development Activities of the Asian Development Bank*" (IN42-98) 18 February 1998 (hereinafter ADB's Law and Development Board paper); "*Fighting Poverty in Asia and the Pacific : The Poverty Reduction Strategy of the ADB*" (R179-99) 19 October 1999; and "*Promoting Good Governance : ADB's Medium-Term Agenda and Action Plan*" (R229-00) 13 October 2000.

India has undertaken with support of MDBs like ADB have displayed a sharpened focus on law reform, as a core contributing element to economic development and poverty reduction. At the sectoral level, for example, the *Gujarat Power Sector Development Program*[4] supported the enactment of the Gujarat Electricity Industry (Reorganization and Regulation) Act and the *Madhya Pradesh Power Sector Development Program*[5] supported the bringing into force of the Madhya Pradesh Vidyut Sudha Adhiniyam Act. At the state level, for example, the *Modernizing Government and Fiscal Reform in Kerala Program*[6] supports the proposed enactment of a cap on State Guarantees legislation and a State Fiscal Responsibility Act. These examples illustrate that the governance elements of accountability, participation, predictability and transparency for sound economic management through law reform are now an integral and established part of the sectoral and state development framework in India.

4. It may be argued that by undertaking this kind of reform, India has created an enabling environment which is more conducive to "*second generation*" law and development related to judicial reform. In part this may be ascribed to the creation of more open markets as a result of such reforms with an attendant market need for more predictable adjudication of rights and obligations. This may also be because the progress in macroeconomic stabilization compared to 1991 may allow the country to more effectively consider and more decisively address judicial reform. Economic instability, where different groups compete for basic security, contributes to an environment where enforcement of rules is more likely to be undermined and compromised. Thus, when Singapore launched a judicial reform program in the early 1990s in a more stable economic environment, its enhanced resource allocation was able to translate into a 39% improved case disposal.[7]

III. "Second Generation" Law and Development in India : Judicial Reform

5. Law and development strategy emphasizes that the contribution of economic development through good governance requires moving beyond legislative reform to "*second generation*" law and development reforms which focuses on the

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4 *Gujarat Power Sector Development Program* (R274-00) 22 November 2000.

5 See *Madhya Pradesh Power Sector Development Program* (R225-01) 15 November 2001.

6 See *Modernizing Government and Fiscal Reform in Kerala Program* (R323-02) 27 November 2002.

7 See TA 3433-PAK "*Strengthening of Institutional Capacity for Judicial and Legal Reform*" (R166-99) 30 September 1999. See also comparative analysis of Latin America in M. Dakolias, "*A Strategy for Judicial Reform : The Experience in Latin America*", Virginia Journal of International Law 36 (Fall 1995) page 230 "*The Latin American region today is politically, economically and socially better suited for judicial reform than it was in the 1960s and 1970s. There is greater economic stability in the region which has allowed these countries to begin 'second generation reforms.*"

problems of enforcement and institutional change in a systemic fashion. This means moving from technical legalistic considerations to the institutional capabilities of the legal system, including the judiciary.[8] This is at least in part because the failure to do so may contribute to non implementation of law reforms undertaken in "*first generation*" reforms which undermines confidence in such reforms.

6. India has not been oblivious to both the opportunity created for judicial reform by the "*first generation*" law and development reforms nor to the threat posed to them by an absence of judicial reform. There has been widespread recognition in the Law Commission of India, the government and the judiciary that the congestion of the Indian courts is resulting in unconscionable delays in the enforcement of laws. Thus there have been attempts to direct improvements in the human and physical infrastructure of courts, computerization and categorization of cases.[9]

7. To this has been added the increasing concern of economic policymakers that enforcement through the delay ridden public court system would hinder creditor and investor confidence. This has resulted in numerous attempts to relieve the burden of the courts. These have ranged from the Recovery of Debts Due to Banks and Financial Institutions Act of 1993[10] to the Arbitration and Conciliation Act of 1996. In addition, in 2002 India enacted the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act. This 2002 legislation in India has sought to promote stronger self enforcement rights.

8. For all these myriad efforts, the core problem of delays in the Indian courts system remains widely prevalent.[11] However, the recent spotlighting of

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8 See ADB's Law and Development Board paper, paragraph 77.

9 See *All India Indian Judges Association and Others v. Union of India and Others*, Supreme Court judgment of 31 March 2002 directing (i) that existing vacancies in the subordinate courts at all levels should be filled by 31 March 2003 in all states; (ii) an increase in judge strength from the existing ratio of 10.5 or 13 judges per 1,000,000 persons to 50 judges per 1,000,000 persons within a period of 5 years; the terms of reference of the Sixteenth Law Commission 2000-2003 which includes speedier administration of justice; Eleventh Finance Commission recommendation for establishment of 1734 fast track courts of which more than 1000 were established by May last year; central government pilot project for computerization and networking of courts in four metropolises (Delhi, Chennai, Kolkata and Mumbai) at a cost of Rupees 14.91 crores on the basis of estimates prepared by the National Informatics Center.

10 This legislation which resulted in the establishment of debt recovery tribunals and debt appellate recovery tribunals was amended through the Recovery of Debts Due to Banks and Financial Institutions (Amendment) Act 2000.

11 As reported in the Indian Parliament (i) as of 1 May 2002, 23,012 cases were pending before the Supreme Court and 3,551,213 cases were pending before 21 High Courts; and (ii) as of 31 October 2001, 2.03 crore cases were pending in the subordinate courts.

governance in the national development agenda represented by the Tenth Five Year Plan (2002-2007) provides an important signal of a broad based, concerted effort to address the issue of delays in the judicial sector as a matter of national economic priority. Thus the Tenth Five Year Plan has noted, "*The issue of governance has in recent times emerged at the forefront of the development agenda. Good governance is one of the most crucial factors required if the targets of the Tenth Plan are to be achieved ... There is an urgent need to bring about judicial reforms with a view to speeding up the process of delivery of justice.*" This approach is supported by Nobel Laureate Amartya Sen's analysis of the central role of judicial reform as part of an integrated, institution-based concept of development that underlies his work on "*Development as Freedom.*" Thus Sen has stated that, "*Economic development is not just about the formal economic opportunities that are available (such as free markets, open trade, transactional facilities etc) , but ultimately about the effective freedoms and capabilities that people have ...*" In this context a timely dispensation of justice by the judiciary is critical in making such economic opportunities effective freedoms through enforcement of contracts. Sen goes beyond this in interpreting the centrality of judicial delay reduction to development by referring specifically to the problem in India of long custodial periods without trial or imprisonment.[12]

IV. Key Elements of Judicial Reform : Comparative International, Regional and Indian Perspectives

9. India is not alone in facing the challenges of attempting to ensure improvements in court delays for meaningful access to justice. It is often forgotten that the United States of America (US) at the beginning of the twentieth century exemplified the much quoted Gladstonian adage of justice delayed being justice denied. In 1906, Roscoe Pound, then Dean of Harvard Law School and regarded by many as the father of US court reform, stated that there was "*a wide-spread feeling that the courts are inefficient*" and that the archaic judicial organization and procedure were resulting in "*uncertainty, delay and expense*" thereby creating a desire to keep out of court.[13] Meaningful judicial reform to address such problems needs to be comprehensive. Thus ADB's Law and Development Board paper has noted, "*Comprehensive judicial reform programs are likely to be required to improve the protection of contract and property rights ... Such judicial reform programs will typically include the introduction of modern court management systems, training for judges and other judicial personnel (including*

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12 See Amartya Sen, "*Role of Legal and Judicial Reform in Development*", World Bank Legal Conference, Washington DC, June 2000.

13 Roscoe Pound, "*The Causes of Popular Dissatisfaction With the Administration Of Justice*" (Speech delivered at the 1906 Annual Convention of the American Bar Association).

court administrators), improving court management information systems, encouragement of arbitration and other forms of alternate dispute resolution ... substantive and procedural law reforms that may address the wellsprings of litigation ... and investment in the physical and technical infrastructure supporting the judiciary."[14] This strategic assessment is supported by comparative analysis of judicial reform programs. Thus both the American experience of judicial reform that addressed the delays in the courts and the analyses which have underpinned ongoing judicial reform programs in the Asia and Pacific region being supported by the ADB (regional judicial reform programs)[15] suggest that a patient, holistic approach integrating several key elements is required if judicial reform is to deliver on reduction in delays in the courts.

National Authority for Administration of Justice

10. One element of judicial reform is the need to have a national institution which establishes overall policies for the court system, articulates the problems faced by the judiciary, such as lack of funding and salary levels, and establishes central procedural and administrative policies to ensure efficient coordination of administration of justice throughout the country.

11. Different countries engaged in judicial reform have sought to address this issue in different ways, ranging from a Judicial Conference supported by an Administrative Office of the Courts in the US, a mix of judicial councils and Supreme Court management in Latin America, to expanding the mandate of the Law Commission in a South Asian country to fulfill this role.[16] These institutional mechanisms have been built on existing foundations in the country. However, the various countries engaged in judicial reform appear to have determined that, without a point of nationally coordinated control over the entire judicial system, judicial reform is liable not to succeed.

12. In the Indian context it is interesting to note that the issue of addressing the question of national authority on judicial administration is highlighted in the recent report of the National Commission to Review the Working of the Constitution to the Government.[17] That report recommends the establishment

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[14] See ADB's Law and Development Board paper, paragraph 81.

[15] See "*Access to Justice Program (Pakistan)*"(R256-01) 29 November 2001 (known as AJP) financing package of three loans equivalent to $ 350 million to Pakistan and associated technical assistance projects; "*Strengthen the Independence of the Judiciary*" (R96-01) 5 July 2001 technical assistance to the Philippines; and "*Technical Assistance for Judicial Independence*" (R104-01) 24 July 2001 representing a regional technical assistance study.

[16] See AJP in Pakistan.

[17] See National Commission to Review the Working of the Constitution Report submitted to Government 31 March 2002 (hereinafter National Commission Report), Volume I, paragraph 7.7 and 7.13.5.

of a Judicial Council at the apex level and Judicial Councils at each State at the level of the High Court with Administrative Offices to assist the National Judicial Council and the State Judicial Councils. The Judicial Councils are meant to make short and long term plans and prepare budgets.[18]

Professional Court Managers

13. A second element in a judicial reform program is the development of professional court managers. This has been predicated on the notion that court efficiency and effectiveness is significantly improved as a result of the introduction of professional court managers, and indeed that without such professional management, a judicial reform program is unlikely to succeed. It is accepted that the transition from a traditional court management structure to a professional management model is a gradual transition which needs to be rooted in existing structures. Yet without this, countries have concluded that the specific implementation of solutions for problems of judicial delay and unpredictability and costs associated with such unpredictability cannot be effectively taken forward and that instead there will continue to simply be a generalized recognition of the existence of the problem by the bench and the bar.

14. In this context, it should be noted that the idea of a court manager other than a chief justice or an administrative judge was unheard of in the US until well into the twentieth century with the court management profession only properly emerging in the 1950s and 1960s. Stimulated by factors such as uneven trial court performance and growing problems of delay, US trial court presiding judges were led to support legislation that authorized trial courts to delegate management responsibilities to trial court executives. As the court management profession grew, it developed associations and training and research associations related to court management developed, such as the National Center for State Courts.[19] Regional judicial reform programs supported by ADB have focused on institutional mechanisms which will enable a transition from the traditional court structures to modern professional court management personnel and practices. One such program has focused on the enactment of laws or issuance of rules, instructions or orders which require nominated or designated high court judges to act to some extent as "*judicial ombudsmen*" in coordination with various personnel, including inspection teams, to monitor

[18] In recommending Judicial Commissions, the National Commission Report was aware of past reports and the lapsed 67th Constitutional Amendment Bill of 1990. See National Commission Report, Consultation Paper on Superior Judiciary.

[19] See Steelman, Goerdt and McMillan, "*Case Flow Management : The Heart of Court Management in the New Millenium*" (2000), page xiv.

the performance and investigate complaints regarding the subordinate judiciary.[20] Whilst tailoring and sensitivity to issues of transition are important for a pragmatic judicial reform program which is to attract consensus support, the need for such a transition to professional court management remains critical.

15. In the Indian context, the need for improvement in court management is highlighted in the recent National Commission Report which refers to the recommendation of the Report of the Arrears Committee[21] that better court management can reduce judicial delays and refers explicitly to the great need "*to put the management system of courts on a professional basis*".[22]

Case Management

16. A third element of judicial reform emerging from international and regional examples has been the development of case management techniques to reduce delays. Whilst a common view held in countries contending with judicial delays is that delays stem from the sheer volume of cases and defects in procedure, comparative analysis indicates that this is only partly true. Closer analysis indicates that while streamlining of procedures may be helpful, key advances can be made through better application of procedure by courts undertaking case management founded on the guiding principle of the court taking control of the court room.

17. Until the 1970s US efforts at reducing delay were also focused on court structures, resources and procedure. However, in the 1970s influential studies based on rigorous empirical studies of delay in state courts concluded that "*The speed of disposition of civil and criminal litigation in a court cannot be ascribed in any simple sense to the length of the backlog, any more than court size, caseload, or trial rate can explain it. Rather the quantitative and qualitative data generated ... suggest that both speed and backlog are determined by established expectations, practices and informal rules in ...[i.e.] 'local legal culture' ... the crucial element ... is concern on the part of judges with the problem of court delay and a firm commitment to do something about it ...*"[23] This laid the way to implementation of case flow management methods by US

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20 See TA 3433-PAK Integrated Report; see also AJP.

21 See Report of the Arrears Committee (1989-1990) constituted by the Government of India on the recommendation of the Chief Justices' Conference.

22 See National Commission Report, Consultation Paper on Financial Autonomy of the Indian Judiciary.

23 See Thomas Church et al., "*Justice Delayed : The Pace of Litigation in Urban Courts*" (National Center for State Courts, 1978).

courts in the 1980s. Such methods included early court intervention and continuous court control over case progress, ADR, differentiated case management, realistic schedules and meaningful pretrial court events, credible trial dates, trial management and management of court events after disposition.

18. Regional judicial reform programs supported by ADB have initially sought to address "*local legal culture*" expectations by using pilot projects for innovative experiments in application of delay reduction standards, development of leadership, ownership and consensus building, court fee structures and procedural changes. These can then be used for implementation of delay reduction guidelines, benches for commercial cases and performance based incentives to support adoption of delay reduction procedures. The results of the pilot projects under a regional judicial reform program supported by ADB indicates some remarkable progress in delay reduction. Thus a mid term report on the pilot project of February 2002 on ten pilot courts (ten subordinate court judges in three large urban centers) reported a 22 % overall increase in case disposals in February 2002 for a five month period of September 2001 to January 2002 compared to one year earlier. In a final report based on data for an eleven month period from September 2001 through July 2002, the overall increase in disposals for the ten pilot courts reached a 53% increase compared to a year previously for the same period.[24]

19. In the Indian context, the Law Commission of India's International Conference on Alternate Dispute Resolution and Case Management in New Delhi scheduled in May 2003,[25] is amongst other things, assessing the success of case management in the United States and potential strategies for implementation of case management in India.

Information technology

20. A fourth element of judicial reform relates to use of information technology. In this regard, there are undoubtedly exceptional opportunities to harness the growing capability of Indian information technology to the cause of judicial delay reduction, leading ultimately to management and legal information systems, electronic filing systems, electronic kiosks and electronic courts, including electronic documents, remote access for judges, remote testimony, video conferencing and electronic submission of evidence. In addition the global information technology revolution has also resulted in substantial

[24] See TA 3433-PAK.

[25] This conference is the result of the visit of Judges of the Indian Supreme Court to the United States in October 2002 during which they interacted with members of the US Supreme Court.

software development for court systems which is becoming cheaper and more accessible. Thus in the US, the National Center for State Courts acts as a clearinghouse for such software. Singapore has developed case management software that is being further developed for use in Sri Lanka. In addition, considerable efforts at automation have been made at the Indian Supreme Court[26] which has both improved performance and provides a good base for advanced application of information technology.

21. However, experience of regional judicial reform programs supported by ADB suggest that court delays may occur in judicial systems where basic computerization of most subordinate courts is often a distant reality with reliance being mainly on typewriters and handwriting. In such circumstances there is a need for an information technology approach which is carefully phased, coordinated and managed.[27] In terms of phasing, abundant caution and exhaustive preparation is needed to first address the steep training curve. There are also attendant issues of court facilities as well as procedures that need to be addressed before undertaking significant investments in basic court automation, let alone more advanced information technology systems. In addition to ensuring satisfaction of necessary preconditions to the introduction of automation, the introduction of technology itself should also be phased. The cornerstone here is automation of judges' chambers which can become the basis for ultimately producing electronic opinions and electronic cause lists access. As an example, experience has indicated that there should not be a networked environment for judges' chambers until the human and physical resources are in place to support it.

22. In terms of the need for coordination, analysis under regional judicial reform programs suggest that the different tiers of a judiciary often proceed unaware of comparable experiences in other parts of the country and with quite divergent approaches. Such divergent approaches, for example at the Supreme Court and different High Courts, translates into wasteful expenditure of funds without clear plans, needs analysis and compatible systems.

23. Finally, if automation and more advanced information technology application is to contribute meaningfully to reduction of delays in the courts, analysis under regional judicial reform programs suggests that appropriate technology management including the option of outsourcing such technology management

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[26] See Amir Ullah Khan, Pushpa Sharma and Aparna Rajagopal, "*Identification of Bottlenecks in Judicial Procedures*" (New Delhi; Allied Publishers Limited 1997).

[27] See TA 3433-PAK and AJP TA Loan.

needs to be considered. This is particularly so in countries where the necessary automation management experience cannot be afforded with the limits of standard government payrolls.[28]

24. In the Indian context, there appears to be a growing recognition of the potential importance of information technology in reducing repetitive tasks, enhancement of data quality, improvements in information accessibility and transparency and in improving monitoring and performance. This is well illustrated by the efforts of the Indian Supreme Court at automation and the mandate of the Advisory Body for the National Mission for a Technology Enhanced Justice System.[29] However, in addition recent analysis in India appears to align with that of regional judicial reform programs that whilst technology can contribute to delay reduction, there is a need to recognize that technology on its own will not deliver delay reduction and firm trial dates. Thus the National Commission Report notes that a combination of computerization with better management, settlements and more effective use of the Civil Procedure Code is required.[30]

Human Resources

25. A further important contributory factor to the success of judicial reform programs is human resources. Staffing, training and performance standards for such human resources are key issues.

26. Regional judicial reform programs supported by ADB indicate that under staffing of judiciaries is often an important issue. In terms of addressing under staffing of judiciaries, there is a need to fill vacant positions in a time bound manner whilst ensuring merit-based and transparent selection procedures. The determination of numbers of additional judges needs to be undertaken in the context of comparable judge-to-citizen ratios. However, there is often a misperception that simply increasing the number of judges will result in a reduction of delays. In addition to the input of more judges, other inputs to enhance the efficiency and effectiveness of judges is required.

27. One such additional input is training of judges and non judicial staff. In countries such as the US there is substantial investment in training of the

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[28] The analysis under TA 3433-PAK refers to the experience in Chile where the management of the complex MIS system for courts was successfully outsourced to professionals who guided the design and appropriate development leading to the most advanced trial court automation system in Latin America.

[29] See Government Order of 22 November 2002 (3(15)/2002-EGD) establishing the Advisory Body for the National Mission for a Technology Enhanced Justice System under the chairmanship of the Chief Justice of India and including various members of the judiciary and representatives of government.

[30] See National Commission Report, Volume I, paragraph 7.10.1.

judiciary and non judicial staff. As an example, Dayton, Ohio is served by a 13 judge court of general jurisdiction called the Montgomery County Court of Common Pleas. This court has consistently been found to be very successful at managing its civil and criminal caseload. Part of this success has been attributed to its substantial emphasis on education and training. It runs an annual training program for lawyers in Montgomery County on its caseflow management system and provides an extensive orientation program and a variety of professional development programs for all its staff members, including a tuition reimbursement program for those who wish to continue formal education.[31] Yet, in addition to training for judges and lawyers, there is substantial emphasis in the US on training for court managers. Thus the National Association for Court Management curriculum assumes that courts cannot operate efficiently unless there are competent, well trained court managers.[32]

28. By contrast, regional judicial reform programs supported by ADB show that in developing countries there is often inadequate and non compulsory judicial training and virtually no non judicial staff training. For the superior judiciary, there are not only issues of the sporadic nature of training but also attitudinal barriers to continuing legal education and training. This is often symbolized by the inadequate filling of vacancies at judicial academies that have been established. Yet without judicial education and training there can be no meaningful application of judicial reform initiatives for purposes of delay reduction, no rigorous mentoring program which would enable subordinate court judges to reduce delays. Regional judicial reform program analysis also indicates that in countries where subordinate court judges are appointed at early age with less experience, there is an added need for concerted in service training. For judicial training to have an appropriate bearing on performance and thereby help reduce delay, it needs to be mandatory evolving to a system where promotions are linked in part to examinations.[33]

29. Performance incentives for judges often focus on the issue of inadequate judicial compensation. Analysis under regional judicial reform programs supported by the ADB conclude that, contrary to received wisdom, raising of judicial salaries in and of itself has no positive impact on reducing delays and increasing case

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31 See William Hewitt et al., "*Courts That Succeed*" (1990).

32 See Steelman, Goerdt and McMillan, "*Caseflow Management : The Heart of Court Management in the New Millenium*" (2000), page 102.

33 See TA 3433-PAK and AJP TA Loan. French and Spanish civil service judges' promotions are based on examinations, work evaluations and productivity records. Regional judicial program reform analysis under TA 3433-PAK has suggested that a similar system might be developed under the aegis of the Federal Judicial Academy in Pakistan.

disposals. However, the raising of salaries, in particular of subordinate judges, can, indirectly together with other performance evaluation standards lead to a better pool of suitably qualified candidates and enhance integrity.

30. Regional judicial reform programs supported by ADB indicate that performance evaluation systems for judges are a potentially important factor in reducing judicial delays but that certain evaluation systems can often create perverse incentives. For example, if an evaluation system allows judges considerable discretion in choosing which cases it can process to fill a monthly quota, judges can simply choose the easiest cases with a more serious backlog persisting for the more difficult and economically significant commercial and property cases. There need to be uniform, consistent and objective standards of performance evaluation which can be measured through statistics published in annual report on the relative performance of different courts. Systems like this exist not just in the US but also regionally in Singapore and the Philippines.

31. Again emerging Indian judicial reform analysis appears to align with comparative international and regional judicial reform program emphasis away from a mere focus on judge strength to judicial education and evaluation. Thus the recent National Commission Report has noted, "*One of the reasons for [judicial] delay is often said to be the inadequate judge strength ... According to an eminent member of the Bar, the best solution to tackle the arrears is 'to appoint less number of judges and more competent judges.' This was the view of the Report of the Arrears Committee ... The competence of the judges in terms of quality and quantity of disposals should be assessed by the superior court judges and reputed senior advocates ... To maintain their competence it is necessary to have continuing education for the judges. Some national judicial institutions have to be properly structured to give such training ....*"[34]

Physical Infrastructure

32. Regional judicial reform programs supported by ADB have also identified inadequate physical infrastructure of courts as a serious impediment to effective administration of justice. Overcrowded court facilities, especially in key urban areas, not only overwhelm court facilities; the deficiencies in the facilities such as the lack of a central coordination point for the activities of the court, lack of storage space for court records, lack of space for witnesses, lawyers and the public, and lack of signage and public information booths all result in inefficiencies.

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[34] See National Commission Report, Volume I, paragraph 7.10.1.

33. Comparative experience indicates that adequate physical infrastructure is a surprisingly important incentive for improved performance. Thus, when judicial budgets are increased not merely for operational costs but in terns of capital costs for physical infrastructure, then the amount of case disposals increases significantly. For example, in Singapore when the capital budget for the judiciary increased significantly in 1991, by 1993 there was a 39 % decrease in the number of pending cases. Similarly in Panama when the capital budget increased in 1992-1993, by 1994 the number of pending cases decreased by 70 %.[35]

34. Regional judicial reform programs supported by ADB have tried to foster uniform minimum criteria to select, phase and prioritize the construction of new court facilities through a national authority of administration of justice in consultation with courts and judicial ombudsmen type judges.

35. The recent Indian analysis of judicial reforms needed to address court delays also stresses the importance of infrastructure facilities stating, "*The Government should ensure basic infrastructure needed [for] all courts and arrange to ensure that courts are not handicapped for want of infrastructural facilities.*"[36]

Budget resources

36. Regional judicial reform programs supported by ADB indicate that careful analysis is needed to determine the extent of budgetary inadequacies affecting efficient delivery of justice. Inadequate budgets affecting levels of physical infrastructure, compensation and equipment, and inadequately planned and advocated budgets will adversely affect the ability of the judiciary to deliver efficient and timely justice.

37. Analysis of court budgets suggest that particular attention should be paid to certain key criteria/indicators for budget adequacy including (i) amounts of non salary budgets as support for judicial efforts at delay reduction; (ii) extent of in house management and administrative capability of courts to prepare budgets and conduct an assessment of financial and personnel needs; (iii) extent of line items for automation, support staff and an effective in house secretariat; and (iv) the extent of pay differential between judges.

38. Analysis of the lack budgetary resources of courts has also led to an examination of different options to raise financial resources for the judiciary in order to

[35] See TA 3433-PAK.

[36] See National Commission Report, Volume I, paragraph 7.10.4.

reduce judicial delays. A variety of budget and self revenue generating options need to be considered, including (i) fixing a percentage of the annual budget to be earmarked for the judiciary; (ii) raising filing fees for fast track systems; (iii) allowing earnings from court deposits to accrue to the judiciary; (iv) providing a statute to award court costs for adjournments; (v) allowing penalties and fines to go to the judiciary; and (vi) user/automation fees.

39. The issue of raising self-revenue generating budgetary resources for the courts is one which typically raises a series of counterarguments. It is argued by some that access to justice should be free of cost to the public and that expenses related to the courts should be borne by the state. However, such a judgment assumes ample state resources. Given the current level of public financial resources in developing countries, this would not appear to reflect budgetary reality. In addition, in the civil litigation context it would seem unduly onerous to have the main burden of litigation costs related to the parties be borne by all citizens who have nothing to do with the litigation in question.

40. It is also argued that court fees need to be waived for the poor to ensure access to justice, including civil justice. Targeted waivers based on indigency are justified, but blank court fee exemptions below a certain fixed value threshold are likely to lead to an encouragement of frivolous suits that are never pursued but are designed to harass.

41. It is further argued that there may be an issue of the judiciary acting in its own cause in allocation of penalties and fines to courts, but it should be noted that quasi-judicial authorities like securities regulators often do this.

42. The importance of examining adequate budgetary resources for the courts, including self-revenue generating resources, is that it illustrates the linkage between different elements of an integrated judicial reform program. Thus without adequate budgetary resources, the financial autonomy of the courts is undermined and improvements in terms of professional court management, information technology, human resources and physical infrastructure is unsustainable. Without professional court management, enhanced budgetary resources could inadvertently induce financial discipline or misuse. Without appropriate information technology the ability to efficiently analyze on an ongoing basis the total expenditure between different courts, law departments and process serving establishments, and the types and relative contributions of various revenue receipts would be compromised. Failure to do so would lead to an inability to provide a basis for calculation of non salary recurrent expenditure requirements and would lead to an inability to make a reasoned,

supportable case for budget increases for courts taking into account efficiency and performance gains.

43. The importance of thorough budgetary planning and preparation for courts and the need to ensure self revenue generation through adequate costs in civil litigation is recognized in recent administration of justice analysis in India. The National Commission Report has provided detailed recommendations through a Consultation Paper on this subject, taking account of comparative experience in other countries.[37]

V. The "Demand Side" of Judicial Reform : Access to Justice

44. Whilst access to justice may in part be said to be about judicial reform and reduction of court delays so that timely justice can be dispensed to all citizens in terms of delivery/supply, including the disadvantaged and the poor, the term "*access to justice*" implies not only delivery/supply of justice issues. It also addresses the demand side of justice delivery. Regional judicial reform programs supported by ADB have defined "*access to justice*" to mean the reduction of financial, institutional, procedural, physical and informational barriers to enabling greater access to the legal system by citizens, especially the vulnerable sections of the population. Such "*access to justice*" beyond administration of justice reform is particularly relevant in the Indian context given the poor and marginalized in Indian society.

45. Any access to justice program needs to support the public's need to access more information about their legal rights, the judiciary and the legal system. Such access to information not only provides for more informed litigants who can cooperate more fully with courts and the legal profession; it also creates an enabling environment where public institutions like courts become more responsive to and accountable for citizen needs and reduces the interfering influence of middlemen or so called "*touts.*" The components to be considered for such support for public access to information include (i) a freedom of information legal framework to replace official secrets act type frameworks; (ii) publication of orders and judgments; (iii) publication of annual reports on the performance of courts; (iv) legal literacy programs; and (v) customer information booths and kiosks at the courts. Based on litigant and would-be-litigant sample surveys of the population, the question of the extent to which lack of knowledge of legal rights and means of dissemination hampers access to justice, especially by the poor and disadvantaged, can be determined. The use of information

37 See National Commission Report, Volume I, paragraphs 7.7 and 7.11; National Commission Report Consultation Paper on Financial Autonomy of the Indian Judiciary.

technology may be a useful tool in this context, tempered by the constraints on the extent of literacy. This would be supplemented by continuing efforts to support legal aid/public interest litigation.

46. Access to justice programs also need to consider addressing institutional and procedural inadequacies hindering citizen access to the courts, notwithstanding legal aid or public interest litigation. These include the need for internal administrative grievance reviews for government departments, performance of government legal services and court annexed alternate dispute resolution (ADR) as means of reducing the demand burden currently clogging the courts and thereby giving improved access to justice to the poor and disadvantaged. If an analysis of litigation delays in a country contemplating reform for access to justice indicates that government is the major litigant and certain types of cases involving government are unnecessarily clogging the courts, efforts should be considered to improve administrative review mechanisms within government departments. In so doing, government will be in line with public administration reform which seeks to orient government towards its customers and citizen demand. The performance levels of government legal services representing cases where government is actually required to be in court also require examination. Finally, constraints regarding the functioning of existing court annexed mediation will also need to be examined and addressed if access to justice is to be made a reality.

47. Recent judicial reform analysis in India indicates a focus on access to justice beyond the provision of legal aid services in the context of the Legal Services Authorities Act 1987 and Lok Adalats. This is exemplified by both the mandate of the Sixteenth Law Commission of India[38] and the recent National Commission Report seeking to focus on reducing the amount of government litigation, obligatory ADR and analysis of litigation in urban courts involving rent and eviction cases.[39] The very topic of the seminar cohosted by the Supreme Court Advocates on Record Association and UNDP in Delhi in April 2003 on Access to Justice indicates recognition of the importance of the "*demand side*" issue in judicial reform.

VI. Conclusion

48. Faced with the magnitude of the challenge on judicial reform, there can be an understandable tendency to either regard the challenge as being too Herculean

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38 The Sixteenth Law Commission's terms of reference includes consideration of "*all such measures as may be necessary to harness law and the legal process in the service of the poor.*"

39 See National Commission Report, Volume I, paragraphs 7.9, 7.13.2, 7.13.4.

or to wish to proceed speedily in a piecemeal fashion. India appears to have crossed the Rubicon in terms of its commitment to judicial reform through the Tenth Five Year Plan. The thoughtful recent administration of justice analysis in India as exemplified by reports like that of the National Commission to Review the Working of the Constitution indicates alignment with international experiences and regional judicial reform program analysis in favor of an integrated, holistic program as being the only one which is likely to yield meaningful and sustainable results. These represent hopeful signposts of an emergence of a judicial sector which is commensurate with a twenty first century India.

ACCESS TO JUSTICE THROUGH COMPUTERIZATION

by
R. SURENDRAN
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High Court of Kerala

1. JUSTICE-MEANING OF

1.1 Justice is the dictate of right, according to the consent of mankind generally, or of that portion of mankind, who may be associated in one government or who may be governed by the same principle and morals. It is the basis of a state, a same bond of all commerce. Justice is the object of establishment and enforcement of all law. It is a comprehensive term in which are included the three great objects namely the security of life, liberty and the pursuit of happiness. Justice is a written or prescribed law to which one is bound to conform and make it the rule of ones decision whereas equity is a law in our hearts and it conforms to no rule but to circumstances and decides by the consciousness of right and wrong. Justice forbids us doing wrong to anyone and requires us to repair the wrongs to anyone and requires us to repair the wrongs we have done to others.

1.2 The obligation to justice is imperative. The observance of the laws is enforced by a civil power and the breach of them is exposed to punishment. Justice is inflexible, follows one invariable rule which can seldom be deviated from consistently with the general rules and justice may sometimes run counter to equity when the interests of the individual must be sacrificed to those of the community.

1.3 The object of the judicial system is the administration of justice. The redressal of disputes through judicial process, quasi-judicial forum etc. has its own merits and demerits. The hierarchy of courts on different levels established for the purpose of exercising jurisdiction in its original side and appellate side promises complete justice to every citizen and person. Our judicial system is always criticised for its delay. It is said "justice delayed, justice denied". Can computerization totally eradicate the evil of delay from our judicial system?

2. RECORDING ORAL EVIDENCE-TEXT & VOICE

2.1 The day-to-day business of the courts can definitely be improved by computerization. It has a great role in recording of evidence. Even though the Evidence Act stipulates that the evidence recorded by the courts should be read over to the witness, practically a very few courts do it. Many judges dispense with the provision and most of the witnesses are unaware of the provision and hence do not insist for compliance. The lawyers also do not insist for the compliance, as it may appear as a challenge on the sincerity and integrity of the judge and likely to strain the relationship with the judge. The lawyers have been demanding for making provision for recording evidence in voice form can also be accomplished by computerization. This will not only help to find out the mistakes in the evidence recorded by the court but also be helpful to understand the demeanour of the witness when the matter is heard before the appellate court.

3. OBTAINING CERTIFIED COPIES

3.1 Another task of lawyers is to obtain the certified copies of the depositions of witnesses before the case is argued. In most of the cases, such copies are made available after the judgement is pronounced. Many cases are argued before the trial courts without certified copies of depositions. If a certified copy of deposition can be given immediately after the examination of the witness, it will be of great use for the lawyer to prepare his arguments. He can do more justice to his client. Computerization can achieve this object also at no extra cost. Many courts take weeks together for preparation fair copies of judgements. No doubt, computerization of courts can totally change this situation and enables the courts to give copies of judgements on the same day of pronouncing the same.

4. INTERCONNECTIVITY & ONLINE FILING

4.1 On computerization of courts, there is further scope for connecting the lawyers and the courts through internet and intranet. Lawyers can be given limited access to the computer system maintained by the courts, for getting copies of depositions recorded in text and voice format, for getting copies of petitions, pleadings and judgements and also for online filing of petitions counter statements etc. Petitions/memos for bringing up a matter urgently before the bench can be filed online after notice to the other side so that the other side gets sufficient knowledge of the motion. Finding out the counsel/his registered clerk for giving notice on him, can be avoided if there is a communication arrangement through

the system maintained by court. Making of online motion for adjournments also can be thought of.

5. PUBLICATION OF GAZETTE ONLINE

5.1 It is obligatory on the part of the State to publish the official Gazette. If the publication is made also through a well-maintained web site, the general public can have access to the same, gather information and get the benefit of the law, notification, regulation etc. published in the gazette. They need not go in search of public libraries or public offices for taking a Photostat copy. As far as the State is concerned, the publication of official gazette in the internet is not expensive at all.

6. AVOID CONFLICTING JUDGEMENTS

6.1 Article 14 of the Constitution of India guarantees equality and equal protection of law for every person. Citizens do have the right of information also. At the same time, it is the fiction of law that no person can have an excuse of ignorance of law. But how far this fiction can operate against persons and citizens unless the State fulfils its obligation towards the general public to furnish information?

6.2 Recently, courts are known for inconsistent decisions mainly for the reason that certain law/case law was not brought to the notice of the court. On the one hand, it can be argued that in such cases, the lawyer failed to do justice to his clients, by omitting to bring the decision or law to the notice of the court and the judge is not supposed to be the reservoir of all knowledge. When the rule is made applicable to all persons, can it operate excluding the judges who are supposed to be sensible, prudent, intelligence and discharge their duties without fear, fetter or favour? According to me, even when an earlier judgement/decision (standing contrary to the view that the judge is about to take) is not brought to the notice of the court it is imperative on the part of the court to make all efforts to get all available precedents on the point, before coming to a conclusion and adjudicating the matter. According to me, it is also not fair on the part of the courts at a subsequent stage to pass a remark that the earlier decision was made by the court erroneously, since the correct position of law was not brought to the notice of the court. Can the court/ judge ignore his own shortcoming and simply say that the lawyer is guilty? Such practices, no doubt, would only diminish the credibility of the judicial system and all efforts should be made to eradicate such unpleasant situations. Computerization and maintenance of a proper database of judgements of courts of records and adequate retrieval system can

definitely eliminate such conflicting decision.

7. PRESERVATION OF COURT RECORDS

7.1 In the judiciary, at present the filing of pleadings, petitions memorandum of appeal etc. are in the form of paper books. This paper book form has been proved invincible for decades. Only flood or fire can normally destroy such documents, if otherwise preserved free from organic decay. It has been proved reliable to stand for years together from the beginning to the end of the litigation. Therefore, I have no hesitation to say that there is no alternative for filing pleading, petitions, appeals etc. in the paper book form.

7.2 At the same time, it has its own demerits also. It consumes a lot of space and day-to-day attention is required on such records to see that it is free from dust and other external forces likely to destroy it. Moreover, to find out a case record from the record room of a court, it requires some amount of manual power. Needless to say, in certain courts where there is no sufficient space to arrange case records in a particular order will make it hardly possible to find out a particular case record as and when required. In many courts, many records were spoiled by rain water, rodents, termites and in rare cases by fire. Most of the buildings used for preserving records are very old and there are no adequate measures to prevent the destruction of records.

7.3 Of course, all the courts in India do have their own rules regarding destruction of records. But in fact, destruction of records seldom happens because records cannot be destroyed as per the rules when appeals are pending. In most of the cases, when there were no appeals, second appeals or special leave petition or when there is no scope for further appeals, no effective steps are taken to destroy the records after giving notice to the parties. In other words, burdening the court to preserve unwanted papers for many years would cause injustice to the pending litigants, whose records are bound to be preserved. I strongly believe that computerization can minimise the burden of courts in preserving case records, even though it is vulnerable to potential damage.

8. JUDGEMENTS AVAILABLE ONLINE

8.1 Getting the latest judgements of the Supreme Court and the High Courts in book journals is time consuming. If the reportable judgements of the courts are pooled to well-maintained web sites, accessible to all, it will be a blessing to the judiciary, lawyers and the public. Many cases are wrongly

decided by the lower courts only because, the latest position on the point could not be brought to the notice of the court and the journals reported the judgements late. A party entitled to get justice in view of the latest judgement is denied the same and he is constrained to approach the higher courts for justice. This results in multiplicity of proceedings, pendency of many undesirable appeals, and denial of justice due to delay.

8.2 Computerization of courts can have miraculous improvements in speedy disposal of cases, avoid unwanted appeals and achieve the object of administration of justice with minimum delay. At this juncture, I thank and appreciate the role of National Informatics Centre (NIC) in the judgement delivery system, free of cost, though there is some forgettable deficiencies.

9. OBTAINING DOCUMENTS FROM PUBLIC OFFICES

9.1 Most of the cases pending before various courts requires the production of documents from public offices. Many cases are seen wrongly allowed or dismissed for want of evidence. Collection of evidence/documents from public offices is a Herculean task now days. Even though citizens are having freedom of information, the public offices are found inaccessible for ordinary persons, obtaining a copy of documents is time consuming and highly expensive. There are instances where the courts were constrained to summon voluminous documents to the courts for the purpose of admitting a single page of such document in evidence. Had the public office issued a certified copy of the relevant page, such undesirable situation could have been avoided. What about the efforts of the courts to issue process to summon the documents?

9.2 Why the public offices are reluctant to issue certified copies of public documents even though they are legally bound to issue? They may have their own reasons such as inadequate infrastructure and staff, improper maintenance of records etc. I need say that in order to get justice to every person, computerization of public offices also is very essential. Without improving the infrastructure of the allied systems in India, through computerization, I cannot imagine that the courts will be able to give speedy justice by computerization of courts alone.

10. CONCLUSION

I do not mean that, by computerization every citizen will get justice. At present, every person has to be contented with the outcome of litigations, as if it were 'justice'. Without improving the ability and quality of judges and advocates I cannot say that

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whatever is the outcome of a litigation is justice. Justice should be a reality and accessible to every person. I only expect that injustice caused due to delayed disposal of cases can be avoided by computerization. I do admit that I have not seriously taken into consideration of the fact that all lawyers in India cannot afford the cost of computerization of his office, for interconnectivity with the courts, which also is necessary to achieve the object. However, while computerising the courts, sufficient input/output terminals may be provided at the court premises for accessing the system can I dream a fully computerized justice administration system in India where speedy justice to every citizen and non-citizen is offered?

ACCESS TO JUSTICE AND COMPUTERIZATION

by
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Access to Justice. What it means?

According to Wharton's Law Lexicon (fourteenth edition) Access means approach or the means of approaching and Justice means the virtue by which we give every man what is his due, opposed to injury or wrong.

According to Collins Cobuild English Dictionary for Advanced Learner's (third edition 2001) Justice is the legal system that a country uses in order to deal with people who break the law.

Hence we may say:

Access to Justice means easy accessibility and approachability of all the institutions involved in dispensing Justice to the general masses.

This access involves each and every step in a Judicial and Legal System starting form the creation of Law to its implementation. Access involves participation of general masses in formulation of new laws, amendment of already existing law, easy access to the text of old and such new laws to know their rights and duties, access to appropriate Redressal agencies in the event rights granted by law are infringed and a continued access to know the proceedings of the Redressal agencies. In this entire scheme denial of access to a person at any step results in injustice and computerization of our Judicial System can assure continued access to general masses of this legal cycle.

Computerization. What it means?

According to Collins Cobuild English Dictionary for Advanced Learner's (third edition 2001) Computerization means a system, process or type of work means to arrange for a lot of work to be done by computer.

During the past two decades with the advent of Desktop computer there has been rapid computerization in every imaginable field of human activity. Computer has touched and affected every possible kind of activity through the innumerable

uses it could be put to. In the past decade India has emerged as a global powerhouse of software development and the Indian Computer Professionals are much in demand for their competency all around the world. The computers have touched the field of law and justice to some extent but the judicial system and law is yet to make full and complete use of the benefits the computers offer.

In the succeeding paras I would delve on the benefits the computerization offers to bring Justice to the doorsteps of general masses. To begin with the process it would just be expedient to look at the present prevailing position on use of computers in our Judicial System. The use of computers has started only recently in the Judicial System. For the present it is limited only up to clerical typing work. In a sense computers in our legal system have just been able to replace typewriters. Computers have already been installed at the level of Sessions Divisions in few states but the use for which such computers are being put to are no more than that of a typewriter. The true power of using computers has not been unleashed. In past few years some private publishers of law books have come out with electronic databases of texts of acts and judgments of superior courts and tribunals. But such an activity is largely aimed at lawyers and does no service in improving Access to Justice for common man. The important and pioneering work in this field began with the initiative taken by National Informatics Centre (popularly called NIC) in bringing up a National Information Database. NIC compiled all the central acts in digital format from 1834 onwards and published it as INCODIS (shorter form of INDIA CODE Information System) and it also compiled all the judgments of hon'ble Supreme Court from 1950 onwards and published them as JUDIS (shorter form of JUDGMENT Information System). NIC also made the said Information systems available on its website though presently only for members. With the availability of such information systems the text of all central acts and judgments of hon'ble Supreme Court has became easily accessible 24 hours a day on the Internet to people subscribing to such service. If this service can be extended free of charge to every person the benefit shall accrue to all concerned. In fact government should take an initiative to make these pioneering efforts of NIC up to date and make it accessible free of charge on the internet with facility of weekly updates. In such a manner any person residing in any part of our country, in fact, any part of the world would be able to have access to the law of the land using appropriate apparatus. Besides the government should also make available the entire text of Gazette of India and Gazettes of all the states on the internet with facility of atleast weekly updates. The states should in a similar manner be encouraged to upload the text of law enacted by state legislatures and judgments of their respective High Courts for easy accessibility to public. All these efforts shall have an effect of providing access to Justice

This is as far as the preliminary step of disseminating legal information is concerned. The next use of computerization can be made by interconnecting all the

courts in India through computers and providing facilities to litigants to submit their respective pleadings and submissions before such courts through Internet. I would like to quote an example of how computerization is being used in USA for the benefit of litigants, lawyers and courts. While handling a matrimonial dispute in a court of law in USA I was amazed to find that all the proceedings conducted in a case were available on internet at the website of the said court along with all the laws, forms and procedure necessary for prosecution of the case. Facilities were there to send submissions and pleadings via internet though hard copies on paper were also required to be sent. The litigants and their lawyers were permitted to call the court at a fixed time via telephone and make their respective submissions. In appropriate cases and at appropriate stage court used to give direction for the party to appear in person when ever the appearance was so required. The entire experience of handling the case being conducted thousands of miles away was more satisfying than handling some of the cases in our courts. The entire proceedings of the case were available on the internet and when the judgment was announced the same was also uploaded on the internet within minimum possible time. All this was made possible due to efficient use of computers and large-scale computerization.

Similar steps can be undertaken in India since the benefits such computerization gives are immense. The uses of computers are limited only by our thinking process else its uses are limitless. It is heartening to note that NIC has taken some steps in this direction and it is learnt that NIC is in the process of implementing a network of computers connecting all the District and Sessions Courts in the country. But the pace at which the scheme is being implemented leaves much to be desired. Whatever activity has taken place in this direction has been half hearted and lacking in clear-cut goals about the results of such activity. It is high time that we understand the advantages offered by computerization and work out a comprehensive scheme of computerizing our Judicial System thereby offering to our masses the ease and convenience of enforcing their rights in a court of law thus making Justice truly accessible.

DELAY IN CIVIL LITIGATION

By
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1.0 INTRODUCTION

It is customary for the speakers at such conferences to offer solutions to the age old problem of delay in disposal of civil cases by saying what "should be done". It assumes the form of sermonizing and, therefore, Judges will say what should or should not be done by lawyers and lawyers will say what should or should not be done by Judges. This sermonizing or negative exercise takes us nowhere. I, therefore, propose to give an analysis of the problem from an outsider's point of view because it is difficult to look at the picture when you are inside the frame.

2.0 BASIC PREMISES

2.1 In any civil case at least five persons are involved, the plaintiff, defendant, plaintiff's lawyer, defendant's lawyer and the Judge.

Delay in disposal of civil cases takes place and shall continue to take place so long as delay hurts only one out of the aforesaid five persons. Delay must, therefore, be made to hurt as many as persons as possible. No solution will be effective unless this idea is kept in mind.

2.2 The second idea which must be borne in mind is that most, if not all, persons are self-interested and, therefore, self-interest serves as a better guide than sermonizing. Hence, it is necessary to provide for incentives and disincentives to all the five persons in some form or the other or atleast to consider what they perceive to be their respective interests.

3.0 LITIGANTS

3.1 Attempts are made to reduce the burden on the regular legal system by diverting civil cases to Lok Adalats or to arbitration or mediation. However, these modes of alternative dispute resolution are more successful in case of reasonably honest differences between two reasonably honest persons who

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This Article is based on the speech delivery by the author at the Conference on the subject organized by the Ahmedabad Bar Association in 1998.

are not able to resolve their differences on their own either on account of ignorance or more often on account of their respective egoes.

3.2 However, the above modes do not work at all when the differences between the parties arise more on account of dishonesty of one of them. A large number of civil cases have wittingly or unwittingly accumulated on account of this tendency because the dishonest litigants have nothing at stake except the lawyers' fees which are generally much less than the financial stakes involved. There are no incentives for honesty and reasonableness on the part of a litigant nor are there any disincentives or penalties for dishonesty and/or unreasonableness on the part of the other litigant. Hence, delay must hurt dishonest litigants more than honest litigants. This is different from the delay being caused by a litigant during pendency of the trial by adopting dilatory tactics

3.3 I, therefore, suggest amendments to the provisions of Sections 34 and 35 of the Civil Procedure Code as contained in the Annexure to this Article. I have ventured to suggest the said amendments by drafting these specific provisions because I am of the firm view that as far as amendments to procedural laws are concerned, Judges and lawyers should not shy away from taking the initiative to suggest amendments to procedural laws. It is then for bodies like Law Commission of India to circulate such suggested amendments, with or without modifications, amongst the representatives of the affected parties like Indian Banks Association, Financial Institutions, the concerned Ministries in the Union Government and State Governments, various Chambers of Industries and Commerce at the National level as well as the State levels, Bar Council of India and State Bar Councils etc.

4.0 LAWYERS

4.1 It is customary for Judges as well as litigants to criticize lawyers for seeking adjournments. An analysis of the problem, however, reveals that the matter is not as simple as that. Even if no lawyer were to seek adjournments in any matter listed before the Court on a particular day, looking to the number of cases being listed in a cause list every day, it is physically impossible for any learned Judge to take up all the cases notified for hearing on that particular day.

4.2 A further analysis would reveal that adjournments are sought more often in old cases than in new cases. Here again, it is customary to pass an innuendo against the lawyers, by saying that the lawyers have already got fees for the old cases and for the new cases they might have got only the part payment

and, therefore, adjournments are sought in old cases rather than in new cases. Without making any attempt to defend the lawyers and without denying the aforesaid hard reality of life, there are two more reasons for this state of affairs. In a new case, the lawyer is in a hurry to either obtain urgent orders of stay regarding possession of a property or stay against demolition of a property or stay against termination of services. Looking to the fact that the Courts are more willing to grant prohibitory interim injunctions and are reluctant to grant mandatory interim injunctions, the lawyers can ill afford to leave the Court/s taking up urgent matters for the purpose of attending to old cases. Therefore, their reasoning is that the litigant who has waited for 10 years to get back the possession of his house may as well wait for another 10 days.

Another reason why lawyers seek more adjournments in old cases than in new cases is that the new cases seem to have a sense of relevance whereas the old cases are being treated as stale cases which do not excite any interest in the lawyers. It is like reading one year old newspapers as compared to reading today's newspapers.

4.3 In view of the above analysis, I would suggest that we may not put lawyers in a dilemma whether to conduct old cases or new cases. We may have two separate sessions, one for conducting old cases and another for conducting new cases and in the session meant for hearing old cases, the Court can get ruthless in enforcing the presence of the lawyers. The advantage of this formula would be that fixed timings will be available for hearing old cases. Even the first part of the day can be reserved for such old cases. It may cause inconvenience to lawyers having a large number of old cases. It may, therefore, require them to delegate more cases to other lawyers or to their junior colleagues. This will also make the lawyers cut down the time being wasted by them for raising frivolous arguments on account of shortage of time even for urgent cases, as the time for such cases will be limited. Hence, they will have to do more home work in the office.

5.0 JUDGES

5.1 Delay does not hurt the Presiding Officer of the Court because somehow disposal is not considered to be one of the major parameters for judging the efficiency of a Judge. As an Administrative Judge, I have seen District Judges giving overall "good" gradings to trial Court Judges even though their disposals are "poor". Even in the matter of promotion, disposal is not given adequate weightage. For instance, for promotion to many judicial posts, only 5% marks are earmarked for disposal of cases.

5.2 However, before giving greater weightage to disposal of cases in matters of promotion, the norms for disposal themselves are required to be revised or they deserve to be given atleast a fresh look. For instance for the cadre of Assistant District Judges, for deciding cases under the Prevention of Atrocities Act, a Judge gets credit of six days' work, although in most such cases, the trial is over in less than an hour because more often than not, for all practical purposes parties settle their disputes outside the Court. Similarly, for deciding certain other categories of criminal cases, the Judge gets much higher rate of disposal with the result that he is tempted to ignore old civil appeals or even compensation cases under the Motor Vehicles Act.

5.3 Of course, quality of judgments is also important and, therefore, mere quantity may not suffice. However, the Judicial Officers have to be sensitized to the need for writing judgments which are not unnecessarily lengthy and verbose. It is only in highly contested matters with heavy stakes that very lengthy judgments may be required, otherwise short orders should suffice. There is something to be learnt about the art of writing judgments/orders. Our orders need not be as brief or cryptic as those of executive officers, but there is some thing called the sense of proportion which judges must keep in mind, since for writing a perfect judgment in the open Court in one case, we may not ask the other litigants to wait endlessly.

6.0 These are some of the few suggestions I have in my mind. Before collecting more suggestions, let us start implementing at least some of them.

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PROPOSED AMENDMENTS TO THE CODE OF CIVIL PROCEDURE

The following may be added in Section 34A :-

Sec. 34A – Rate of Interest may vary with pendency of the suit.

(1) Without prejudice to the generality of the foregoing provisions, but subject to the provisions of sub-section

(2) of this Section, the rate of pendente lite interest may be awarded by the Court in accordance with the following formula:-

Pendency The Period during which the suit has remained pending from the date of service of summons on the defendant		Rate of interest on the amount awarded
(i)	within 1 year	6%
(ii)	more than 1 year but upto 2 years	8%
(iii)	more than 2 years but upto 3 years	10%
(iv)	more than 3 years but upto 4 years	12%
(v)	more than 4 years but upto 5 years	14%
(vi)	more than 5 years but upto 6 years	16%
(vii)	more than 6 years but upto 7 years	18%
(viii)	more than 7 years but upto 8 years	20%
(ix)	more than 8 years	22%
(x)	more than 10 years	24%

(2) The period for which the case was adjourned at the instance of the plaintiff or his advocate shall be excluded while computing the period for determining the rate of interest under sub-section (1) of this Section.

The following may be added in Section 35C :-

Sec. 35C – Exemplary costs may vary with pendency of the suit.

(1) Without prejudice to the generality of the foregoing provisions, but subject to the provisions of sub-section (2) of this Section, where, the

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Court finds that the plaintiff's claim or a substantial part thereof or the defendant's claim or a substantial part thereof was false, frivolous or vexatious, the Court may direct the plaintiff or the defendant, as the case may be, to pay the other side the costs of the proceedings as under :-

Pendency

	The period during which the suit has remained pending from the date of service of summons on the defendant/s	Cost in terms of percentage of suit claim or Rs. (whichever is higher)
(i)	within 1 year	5% or Rs.2000/-
(ii)	more than 1 year but upto 2 years	10%or Rs.4000/-
(iii)	more than 2 years but upto 3 years	15%or Rs.6000/-
(iv)	more than 3 years but upto 4 years	20% or Rs.8000/-
(v)	more than 4 years but upto 5 years	25% or Rs.10000/-
(vi)	more than 5 years but upto 6 years	30% or Rs.12000/-
(vii)	more than 6 years but upto 7 years	35% or Rs.14000/-
(viii)	more than 7 years but upto 8 years	40% or Rs.16000/-
(ix)	more than 8 years but upto 9 years	45% or Rs.18000/-
(x)	more than 9 years but upto 10 years	50% or Rs.20000/-

(2) The period for which the case was adjourned at the instance of the party in whose favour the order under sub-section (1) is being passed or of his advocate/s shall be excluded while computing the period for determining the amount of costs under sub-section (1) of this Section.

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ACCESS TO JUSTICE AND DELAY IN DISPOSAL OF CASES

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Indian Judiciary has an impressive record. Its success on the constitutional front is without a parallel. The theory of basic structure has helped to preserve the values underlying the Constitution. Its contribution in enlarging and enforcing human rights is widely appreciated. Its handling of public interest litigation has brought the institution closer to the have nots. Among the three wings of the State, the Judiciary undoubtedly enjoys maximum credibility. However, when it comes to the disposal of cases, the delay is disquieting. Justice delayed is justice denied. The Court spelt out the right to speedy trial from Article 21[1] but is unable to ensure quick disposal of cases. The extent of delay is exasperating in all Courts and Tribunals except the Supreme Court where it is not that bad. The situation in subordinate courts and in High Courts is unmanageable indeed. In spite of the courts doing their best, they are unable to provide timely relief to the needy litigants. Unable to withstand the agony of unending litigation, some litigants reluctantly agree to go before Lok Adalats and are prepared to forego part of their genuine claims and accept whatever is offered by the Government or the public sector undertaking. They feel that a bird in hand is worth two in the bush.

Access to justice means having recourse to an affordable, quick and satisfactory settlement of disputes from a creditable forum. Arbitration is a well-known method of alternative dispute resolution. Of late, it has become time-consuming and expensive in many cases. The post-arbitration litigation is tiresome. Only the corporate sector can afford the luxury of high level arbitration. The new Arbitration and Conciliation Act, 1996 is not yielding the expected results. The Law Commission of India has suggested extensive amendments to make it more effective and satisfactory. The amendments made to the Civil Procedure Code in 2002 contain some well meaning provisions but a few of these have met with resistance from the Bar. Mediation and conciliation mentioned in Section 89(1) are yet to catch the imagination of the litigating public. None of these alternative methods of dispute resolution provided by law enjoy the confidence of the litigant public in the same measure as settlement of disputes by regular courts of law. It is, therefore, necessary to reform the system with the object of providing maximum satisfaction to the consumers of justice. The problem needs to be tackled within the framework of

existing judicial structure with necessary modifications, procedural and substantive.

The efforts made by the Government, acting on the suggestion made by the 11th Finance Commission, to establish fast track courts, have in some States encountered rough weather. The idea of appointing retired Judges is good, but has met with resistance. In Rajasthan, for instance, when fast track courts were sanctioned at two levels as recommended by the High Court after making an assessment of the needs at the level of District & Sessions Courts and Courts of Chief Judicial Magistrates / Civil Judges (Senior Division), the judicial officers of the State challenged creation of courts at the level of Chief Judicial Magistrate / Civil Judges (Senior Division) claiming that all fast track courts should be created only at the level of District Courts.

Shift System

Establishment of additional courts at any level involves enormous expenditure – capital as well as recurring. Appointment of whole-time staff - judicial and administrative, to new courts involves considerable recurring expenditure. On the other hand, if the existing courts could be made to function in two shifts, with the same infrastructure, utilising the services of retired Judges and judicial officers, reputed for their integrity and ability who are physically and mentally fit, it would ease the situation considerably and provide immense relief to the litigants. The accumulated arrears can be liquidated quickly and smoothly. The Law Commission in its 125th report dated May 11, 1988 had recommended, inter alia, introducing shift system in the Supreme Court to clear the backlog of cases by deploying retired judges. On November 5, 1999 the Union Law Minister (Mr. Ram Jethmalani) proposed introducing shift system in all courts where the backlog of arrears was high. This proposal merits serious consideration. Shift system has been in vogue in industrial establishments since long. It has been introduced subsequently in educational institutions to cope up with increased demand. It is time that it is introduced in Courts as well. As the then Law Minister rightly pointed out, the advantage of the shift system is that with minimum expenditure there can be maximum output. The existing court buildings, furniture, library and other infrastructure and equipment could be used for the second shift. Re-employment of retired judges, judicial officers and administrative staff would be far less burdensome to the exchequer, as they would be paid only the difference between the salaries and emoluments payable to serving judges and officers of the same rank and their pension. The induction of experienced judicial personnel who enjoy high reputation for their integrity and ability will add to the credibility of the judicial system as a whole. With their rich experience they will be able to dispose of cases quickly and clear the arrears fast. For this reason, the duration of the second shift could be less than the first one.

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The prospect of re-employment after retirement of the most upright and efficient judges and judicial officers will act as an incentive to serving judges and judicial officers to remain honest and discharge their duties to the satisfaction of all concerned. The reservoir of judicial experience readily available in the shape of retired judges and judicial officers is a precious human resource which is being wasted now. They can be easily persuaded to accept re-employment in public interest for running the second shift in courts, assuring them of their pre-retirement seniority inter se. To them, to be Judges in the second shift would be more dignified and satisfying than looking upto the Executive for discretionary assignments. The rule of law will lose its vitality if the justice-delivery system continues to move at a snail's pace. One of the contributory causes for the growing crime rate and low rate of convictions is undue delay in criminal trials. Chronic problems warrant radical solutions.

Justice of Quality

People not only want quick relief but also want justice of quality from all courts. There was a time when nobody could dare complain of corruption in the Judiciary. The reputation of the Judges was so high that even if there were some isolated complaints, people would dismiss them as motivated. Times have changed. Now there are complaints questioning the integrity of judicial officers and Judges of superior courts in some parts of the country. Successive Chief Justices have in the recent past frankly admitted that there is corruption, mostly at the lower levels of the Judiciary. The recent probings into allegations of corruption and moral turpitude on the part of certain Judges by different in-house committees constituted by the Chief Justice of India and the action that followed in the case of some of the judges involved have to some extent confirmed the suspicion that all is not well with the Judiciary. The institution of Judiciary cannot afford to tolerate corruption even to a limited extent. Experience shows that it is impossible to combat corruption through Prevention of Corruption Acts. The 1947 Act miserably failed to prevent corruption. Far from prevention, during the four decades that it was in operation, corruption spread like a virulent disease and assumed alarming proportions. The 1988 Act has cast its net wider, with an enlarged definition of 'public servant' which received liberal interpretation from the Supreme Court in P.V. Narasimha Rao v. State[2] so as to bring within its fold Members of Parliament and of States Legislatures. Even though the Act did not specify the authority competent to sanction prosecution of MPs, MLCs and MLAs, the Supreme Court going out of its way supplied the omission by empowering the presiding officers of the respective Houses to sanction prosecution. There is no evidence that this has helped in checking corruption at the political level. The dismal rate of conviction under the Act shows that the malady of corruption cannot be checked through criminal prosecutions alone in the prevailing set up.

In the case of judicial officers who are subject to the control of the High Courts, it is not at all difficult to amend the rules governing their conditions of service and make a provision for compulsory retirement of officers of doubtful integrity, at any time, on payment of some compensation, depending upon the length of service put in. Fundamental Rule 56 provides for premature retirement in public interest, but only after a person has attained the age of 50 years or has put in a qualifying service of 25 years or so. This provision is inadequate. This should be substituted by a provision to facilitate retirement of a public servant of doubtful integrity or who is considered deadwood at any time irrespective of his length of service or age, as such a person has no place in public employment and more so in the Judiciary. The observations of the Supreme Court in O.P. Bhandari v. ITDC Ltd.[3] suggest that such a provision will not be unconstitutional. Without such an enabling provision, it is not possible to weed out the corrupt elements from the system and purify the streams of justice. To ease out Judges of High Courts and the Supreme Court on the same ground, the Constitution needs to be amended. The power to retire will have to be lodged in safe hands to maintain the independence of the Judiciary.

Getting rid of rotten apples is not enough. Their replacement by most deserving young men and women by amending the rules of recruitment is equally important. Now there are five national law school universities functioning at Bangalore, Hyderabad, Bhopal, Calcutta, and Jodhpur. In addition, there are a number of law schools with five-year degree course and some of them like those in Pune are imparting legal education of a high quality. They are able to attract bright students. In order to tone up the quality of justice, it is necessary to provide an opening for outstanding candidates at the entry level of the Judiciary, as is being done, in the case of All-India Services like IAS, IFS, IPS etc. Young law graduates who have done well in the five-year degree course could be recruited as Civil Judges/ Magistrates straightaway and given intensive in-service training for atleast one or two years at the National Judicial Academy before posting them as judicial officers. A provision for fast track promotions at reasonable intervals, depending upon their overall performance, merit and integrity, would act as an incentive and encourage them to opt for the judicial career.

Prior to Independence and for several years thereafter, the practice was to appoint the most competent lawyers as law officers, public prosecutors and government pleaders and, in due course, consider the most deserving among them for elevation to the High Court Bench of the Province. Since a few decades, political considerations came to prevail over considerations of merit and ability in the matter of appointment of government counsel. There have been several instances of appointment of undeserving persons as High Court judges because of their proximity to the powers that be. As a consequence, public interest has suffered and the quality of justice deteriorated. The assumption of exclusive power of selection for

appointment of Judges by the Judiciary has not made as much difference as was expected. It is, therefore, necessary to revert back to the old practice to improve the standards. In the matter of public employment, particularly appointment of law officers etc. and Judges of High Courts or the Supreme Court merit and merit alone should be the overriding consideration. A minimum tenure of not less than five years on the Bench is necessary for a Judge to make his contribution. Seniority should be considered only when merit and ability are equal.

Settlement at threshold through non-partisan approach:

The Civil Procedure Code, 1908, as amended in 1976, inserted Rule 5B in Order XXVII casting a duty on the court in suits against the Government or a public officer to assist in arriving at a settlement in the first instance. The potential of this provision does not appear to have been tapped fully. The reason is obvious. Unless the Government or the public officer or their lawyer is prepared to settle the dispute at that stage the trial court can do nothing. It is necessary to extend this duty of the court, namely, to assist in arriving at a settlement, not only in suits against the Government or public officers, but in every suit. If the trial judge makes sincere efforts and the members of the Bar too assist in settling disputes, the litigants will have immediate relief. Settlement of disputes in the court of first instance will leave no scope for any appeal or revision. Even if it requires two or three sittings involving a couple of adjournments the settlement would be worth the trouble. A similar provision can be made requiring the appellate and revisional courts also to endeavour to bring about settlement of disputes pending before them to the extent possible. Unless the legal profession switches over to a non-combative and conciliatory approach, such provisions cannot bear fruit. The Bar Councils and Bar Associations should come forward to promote change of attitude on the part of advocates by impressing upon them that speedy resolution of disputes will result in more and not less work for lawyers, as the volume of litigation will go up as more and more aggrieved citizens will rush to courts.

Saving Judicial time

Section 80 of the Civil Procedure Code is not being utilised at all by government departments for settling cases out of court as no one wants to take responsibility for the decision. Moreover, governments tend to prefer appeals and revisions against adverse orders as a matter of course instead of implementing just orders. Government counsel appointed on considerations other than merit add to the owes of Governments. The tendency to raise all technical pleas to defeat just claims of citizens is widely prevalent notwithstanding the admonition of the Supreme Court in Madras Port Trust v. Hymanshu International[4] that in all morality and justice a public authority should not take up a technical plea to defeat a just claim of the

citizen. "It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens."

Of late, there is a tendency on the part of the governments and their instrumentalities to evade or delay implementation of judicial writs and orders giving rise to a large volume of contempt petitions which consume precious judicial time. This could be saved if public authorities are sensitive to their duty to obey the orders and injunctions of courts promptly and the same could be utilised for disposal of pending cases. Independent of Article 144 of the Constitution which mandates all authorities, civil and judicial, in the territory of India, to act in aid of the Supreme Court, it is the duty of every party to abide by the decree or order. Rule of law requires respectful compliance with court orders.

Legal Aid

Art. 39A mandates the State to provide legal aid. Right to legal aid is part of the right to life and personal liberty guaranteed by Article 21.[5] The Legal Services Authorities Act, 1987 provides for the constitution of the National Legal Services Authority, the State Legal Services Authorities and the District Authorities. It also provides for establishment of National Legal Aid Fund, State Legal Aid Fund and District Legal Aid Fund. There is a provision for organisation of Lok Adalats and for enforcement of awards of Lok Adalats like decrees of regular courts. Although sustained efforts are being made by the judges incharge of Legal Aid Committees at all levels, legal aid is yet to develop as an effective means of securing justice to the indigent litigants. Unless leading members of the Bar, both junior and senior are involved in a big way and they extend whole-hearted co-operation it would be difficult to make the legal aid schemes a success. The petitions filed by Legal Aid Committees are mostly time-barred. Filing within time is an exception. Lawyers associated with legal aid schemes should be public-spirited with a firm commitment to and concern for the indigent litigants. Rule 46 of the Rules of Conduct made by the Bar Council of India says: "free legal assistance to the indigent and oppressed is one of the highest obligations an Advocate owes to Society.". The observations of the Expert Committee on legal aid headed by Justice V.R. Krishna Iyer are profound: "The finest hour of the Indian Bar arrives not when a fancied few draw astronomical incomes but when the profession as a whole with a lively sense of internal distributive justice agrees to be geared to a scheme of legal service at once competent, cheap and socially promising."

Footnotes

1. A.R. Antulay v. R.S. Nayak, (1992) 1 SCC 225
2. (1998) 4 SCC 626
3. (1986) 4 SCC 337, 344
4. (1979) 4 SCC 176
5. M.H. Hoscot v. State of Maharashtra (1979) 1 SCR 192 = (1978) 3 SCC 544.

DELAY IN DISPOSAL OF CASES , ITS MEANING , ITS CAUSES AND HOW TO BE REGULATED

by
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Delay in disposal of the cases for quite some time has become a matter of concern, particularly to the members of this Institution namely the litigants, Lawyers, Arbitrators and Judges. Various Seminars are held all over the World and suggest methods for quick, quicker and quickest disposal of the cases. While deliberating on this topic generally it is the litigant who is most anxious to get an early final decision in his dispute. In the Seminars held generally it is the judiciary / the judicial institution which is a concern of attention or is targeted, as delay is on the part of this Institution in deciding the cases as in the Constitution this responsibility is of the judiciary which is one of the pillar on which the Constitution stand. We all know the speed of the life on the earth has become faster than it used to be earlier and is getting accelerated. Nobody knows what will be the fastest/maximum speed. It will change with the change in the pattern of the life and its definition will also change.

What will not change is, that there will be 60 seconds in a minute, 60 minutes in an hour and 24 hours in a day and night after the day and day after the night. A child is born, it takes the natural time to grow and attain maturity. What will not change is that a child will take its own time as fixed by nature to grow and will become major on its attaining 18th year of the age unless either the judiciary or legislature decides keeping in view the accelerated fertility period / maturity the child gain in today's scenario of vast informative exposure, that instead of 18th year, a child must be treated or deemed as major at 15th year, 16th year or 17th year as the age of majority is fixed by legislation e.g. Indian Majority Act, 1875. Exceptions are every where but the majority age is determined by objective criteria and no relaxation is made in favour of the exceptions. It does not matter how mature or intelligent a child may be but legal rights available to a major can be exercised by him only after attaining the age of majority as per law.

What I mean to emphasize over a question ; Can it be said, there is delay or undue delay in disposal of cases. We have to give the natural time required by average method for deciding case. We know, with the change in life style of human

being, more and more rights are created, as the number of human being (population) has increased, the rights have also been crystallized in different forms i.e. rights of a embryo in womb, right of infant, right of child, right of minor, right of major, right of girl, right of boy, right of woman, right of man, right of Eunuch and so on . When so many rights are created, clash amongst these rights is a natural phenomenon and therefore the need for an adjudicatory machinery arises and the same is created but the numbers remain inadequate.

Earlier in the Panchayat system, the cases used to be disposed of very quickly as the Judges (Panchas), litigant and the witnesses were all used to be available at hours notice and that too on the oral summoning. To the Panchas or the Judges at that time all the relevant material for decision of the case was immediately available then and there and the decision used to be ready within a day or two or some time even then and there. This speed of decision of the case cannot be achieved in the present life style or circumstances even in Rural areas and even in today's Panchayat System. Therefore what will be called as delay in decision of the cases is yet to be defined. But one thing is sure that natural time taken keeping in view the change in the life style for any reason cannot be said to be a delay in the decision of a case. Of late in, 2002 after 84 years we amended the CPC which in my view should have been repealed and the procedure permitted to be followed by law, ought to have been only the "FAIR PROCEDURE" and not the same procedure for deciding the frivolous as well as the genuine litigation. This should have been left at the discretion of the judge what would be the "FAIR PROCEDURE". More and more Benches or Circuit Benches of the High Court should be available to a litigant at a maximum distance of 150 to 200 k.m. from his residence to enable the High Court to exercise the power of Superintendence Under Article 226 and 227 of the Constitution of India in view of the deterioration at the grass root level of this institution.

Undoubtedly with the more and more categorization of litigation, more and more FORUMS have been created for the adjudication of the disputes but with this the expectation of litigant has also increased manifolds. The ambition of the members of all level of Society has increased and the patience has decreased which has resulted in the increase of the litigation. Bulk of the litigation is against the authority or person in / with power as expectation of people are manifold. National resources and additions thereto are not tuned to the requirement.

In view of this overall scenario the quantity of the litigation is bound to increase with its different manifestation and with the limited resources, the reasonable number of adjudicators required are not available. Therefore, we have entered in a transition phase where settling, of course will take time. There is no way out except to deliberate upon, think upon and act upon and wait for the outcome. It is a proverb that there are no short cut in forest.

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Today we are deliberating in a Seminar which is titled as "Access To Justice". Undoubtedly number of people having access to justice has increased manifold as compared to past, but justice or in other words the decision is delayed to them on account of the factor that there are working hours in a day and we have not created night shifts of the Court as the working hours cannot be adjusted in the day.

In the limited working hour fixed as per the nature's rule (after the day there is evening and night) how much cases a Judge (Human being) can dispose of. Certainly it cannot be directly proportionate to the cases filed in the Court. With the acceleration of speed, chances of accident increase and risk in the accurate driving and reaching the destination also increase. Any wrong decision on fact and affirmed upto the High Court is not considered by the Apex Court as a case fit for its attention as it does not have the time to look into the factual details of the case which according to a litigant is a wrong decision on fact which may some time result into serious injustice, may be a small house but have far reaching devastating effect on his family. Therefore, the litigant's fate meet with the accident. This can be explained by an hypothetical explanation that out of hundred wrong decisions some attain finality at the district level, some at High Court level and very little reaches upto the Apex Court because of the incapacity of the aggrieved person to challenge the same and a person who dare to challenge in the Apex Court, he is told this is not a fit case for interference. This in any case give a wrong impression about this august institution. Therefore, 'it is said better late than never. I suggest that a little change can be made in the format of the Special Leave Petition requiring a paragraph to indicate as to how the petitioner shall suffer injustice on facts in case the judgement impugned is not interfered. These should be the parameter. It is said better late then never but late should not bring the never. Undoubtedly the judiciary has shown its concern and has laid down certain parameters where certain types of cases i.e. cases of persons above 65 years of age or cases older than 7 years have to be given priority but here again that priority is shadowed by the cases which are certainly of urgent nature. For example disputes involving financial claims which can have direct or indirect impact on national economy/project, matrimonial dispute and right of custody and welfare of the minor. This again happens because of change in social fabric and as well as low temperament and less patience and no attention towards spiritualism, therefore too short of endurance resulting into litigation. More the population less the adjustment more the litigation. Therefore, delay in disposal of cases is a factor which also depends upon the attitude of the members of the Society / size of population and national resources. It is not only a legal phenomenon but a social phenomenon as well. Delay in disposal of the cases has also to be considered from this angle. We cannot put the entire blame on one institution. It is the legislature who claims to be superior of all the three Constitutional Authority but what they have done to tackle this grave problem, my perception is, very little as the judiciary now also has to play its role even in controlling the

passions, temptations of the legislature including the diversion of national resources to the personal property of these so called legislature and bureaucrats, subject of course to the exception, but what is their say or pressure on the former.

Of Course, the debate on the subject like this should continue and media should give due coverage as the message goes to the public that the members of the judicial institution who are the movers and shakers of the society have in their mind the problems which affect their life and liberty and they should hope that a day will come when this problem will be solved and the quality of their life and liberty will improve.

I will request the organizers of this Seminar of great utility and concern and particularly Shri .P.H.Parekh to organize other Seminars for deliberating as to how the Access of the litigant to the Court can be reduced in order to reduce the delay in disposal of the cases by reducing the litigation by Socio Legal means.

I would like to thank Shri .P.H.Parekh, the president of Supreme Court Advocates on Record Association, who has given me this opportunity.

Thank you very much,

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DELAY IN DISPOSAL OF CASES - POSSIBLE REMEDIES

by
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'Justice delayed amounts to justice denied' is an adage saying in legal circles. However, as far as the Indian judiciary is concerned the situation has come to such a pass that the saying has changed to 'justice delayed amounts to justice refused'. It has almost become an incurable malady for the Indian judicial system. Every person or authority connected with the Indian judiciary repeatedly harps on this malady, but, somehow or the other, there does not appear to be any cure for the disease. As a matter of fact, in seminar after seminar, it is repeatedly emphasised that this insurmountable problem facing the Indian judicial system needs immediate solution, lest the problem goes out of hand. Possible solutions for getting rid of this problem are also suggested, but, more often than not the suggestions are not implemented in actual practice and the malady continues to hit hard the faith of the public in the Indian judicial system. Extra-judicial methods of resolving disputes are invented every day and these methods are implemented in the crudest possible manner. The public faith and confidence in the Indian judicial system is at an all time low. Disputes are being settled on the streets rather than through the judicial process. The Courts of this country have become places where even angels fear to tread. Cases are not decided even after several decades of their institutions and more often than not cases instituted by one generation come to be decided during the life time of the third generation. There have been cases after cases in the recent past where the Courts of law have been mute spectators to disputes being settled outside court rather than through the judicial process. People are not prepared to stand as witnesses in criminal cases or as plaintiffs or petitioners in civil cases only on account of their constant harassment at the hands of the court procedure as well as the parties to the dispute. It is a nagging fear in the minds of the all concerned with the well being of the Indian judicial system that if the situation is not rectified soon, the already crumbling edifice of the Indian judicial system would have crumbled beyond repair. It would indeed be a sad day for the Indian judicial system if such a day comes. It is hoped not!

The questions is, how to rectify the problem? It certainly needs a close look at the reasons for delay in disposal of cases. The main reason for delay in disposal of cases is the numerous adjournments sought by the parties to proceedings,

more often than not without any reasons muchless any valid or cogent reason. The Courts also grant the adjournments without batting an eyelid. A thought is not given to the expenses and troubles taken by the parties and their witnesses to reach the Courts on a particular date fixed. More often than not, cases are adjourned on the ground that the officer manning the Court would not accept the stand of the parties on a particular legal issue. The Courts often unknowingly become parties to what is now popularly known as Bench choosing. No lawyer or party is prepared to face a hostile Court and try and convince it to agree with the submissions of a party or his counsel. Every day a lawyer is faced with the question whether the Court is good enough to get an order in favour of a particular party? If the lawyer answers in the affirmative and then the Court does not pass the order, the lawyer is accused of having deliberately spoiled the case of a particular client. If the lawyer answers in the negative, he is immediately told not to argue the case and get it adjourned or he is asked to suggest a lawyer who can get a particular order from a particular Court. Till a few years back, all this was rampant in the subordinate judiciary only. In the last few years, this problem has percolated to the higher judiciary also and even at the High Court level, a lawyer is faced with this question every day. Does all this augur well for the Indian judicial system? Does it augur well for the future of the sincere hard-working lawyers who have no way out except to bank upon their labour to climb the hard and arduous ladder to the top of the legal family? The answer to both the questions would be an emphatic no! What is the way out? Should it be made mandatory for the courts to refuse to adjourn a case on any ground whatsoever? Should the Bar and the Bench be made more accountable for their conduct inside and outside Court? Should a time frame be prescribed for disposal of cases with the condition that if the time frame is not adhered to, it would lead to a penalty being imposed on the party responsible for the delay, irrespective of the fact whether it is the Bar or the Bench which is responsible for the delay? Through this discussion an attempt is being made to answer these questions and find out a really meaningful solution to this seemingly insurmountable problem.

Before discussing the issue any further, it would not be inappropriate to refer to the observations made by justice U.C. Banerjee in a recent decision of the Apex Court *in Sisir Kumar Mohanty v. State of Orissa; [2002'] 9 SCC 219* which are as follows:

"Judicial process is slow and delay in disposal of matters in this subcontinent is not unknown but that, however, does not warrant protracted litigation to becontinued for more than three decades — unfortunately, the facts presently under consideration depict such a protraction and the delayed process of our justice delivery system. Before we proceed further, we are emboldened to put on record our displeasure as to the method and manner in which this particular litigation

proceeded even before this Court. Blames we do not want to attribute but the fact remains, judicial process has seen probably its saddest and poorest exposure in this matter as regards the time period. Faith, belief and confidence of the people cannot but be termed to be the hallmark of our justice delivery system and if matters proceed like this, there would neither be faith or belief nor confidence in the judiciary — a state of affairs which cannot but imply a total failure and breakdown of the entire constitutional system of the country since the judiciary, the third pillar of the Constitution, stands out to be the guardian angel of the society. It is not that this Court has not been able to deal with matters like the present one but it so happened that the judicial process has taken its own time and thus the toll. In a progressive society the judiciary must be active and should be able to dispense with the justice delivery system in the quickest possible period of time — this is not the requirement presently, but has been the well-recognised principle since the advent of judicial process in the society. On this score, in fine we wish to mention that both the Bench and the Bar alike owe a duty to the people of the country to make available the justice delivery system with utmost promptitude and our conjoint efforts only would be able to bring forth a change."

Almost a year earlier to the above decision, justice K.T. Thomas in the decision in the case of *N.G. Dastane Vs Shrikant S. Shivde;* [2001] 6 SCC 135 made somewhat similar observations. His Lordship observed:

"An advocate abusing the process of court is guilty of misconduct. When witnesses are present in the court for examination the advocate concerned has a duty to see that their examination is conducted. We remind that witnesses who come to the court, on being called by the court, do so as they have no other option, and such witnesses are also responsible citizens who have other work to attend to for eking out a livelihood. They cannot be treated as less respectable to be told to come again and again just to suit the convenience of the advocate concerned. If the advocate has any unavoidable inconvenience it is his duty to make other arrangements for examining the witnesses who are present in the court. Seeking adjournments for postponing the examination of witnesses who are present in court even without making other arrangements for examining such witnesses is a dereliction of an advocate's duty to the court as that would cause much harassment and hardship to the witnesses. Such dereliction if repeated would amount to misconduct of the advocate concerned. Legal profession must be purified from such abuses of the court procedures. Tactics of filibuster, if adopted by an advocate, is also a professional misconduct."

It is clear from the aforesaid observations that the Apex Court is alive to the necessity of putting an end to the inordinate delay in disposal of cases both on the criminal as well as civil side As a matter of fact, the delay in disposal of

any case is not in the interest of anybody, least of all, to the parties to a particular dispute. Even the lawyers who think that delay in disposal of cases would be in their interest and would enable them to enrich their coffers at the expense of a harassed client are wrong. In fact delay in disposal of a case is a sad commentary on the efficiency of the lawyers as well as the Court before which a particular matter is pending. Moreover, it leads to a situation of uncertainty for all concerned. The parties to a dispute cannot settle their affairs on account of the pendency of the litigation. Huge amounts of money invested in projects goes waste due to pendency of litigation. Transactions relating to properties are not finalised due to pendency of litigation. If the delay in disposal of a case is relating to a service matter, the entire career of the employee is ruined if by chance he engages himself into a litigation with his employer. Thus, it is wrong to think that delay in disposal of a case is in the interest of anybody.

The most easy solution to this problem is to ensure that a time frame is provided for disposal of every case, be it civil or criminal. If the time frame is not adhered to, it would lead to penalising, in any form, the person responsible for not adhering to the time frame, irrespective of the fact whether the person responsible is the presiding Officer of the Court. Accountability of the lawyers as well as judges towards the litigants is a must without which the problem cannot be solved. The Bench and the Bar should be made accountable for any delay in disposal of the case. Seeking frequent adjournments on flimsy grounds should be dealt with a heavy hand. The Courts have to be sensitive to any attempt on the part of anybody to delay the disposal of the case. The power to proceed ex-parte against the defaulting party should be enforced rigorously. No party should be permitted to take the Court or a party to a dispute for a ride. Of course if there are cogent reasons for adjournment or there are compelling circumstances, the adjournment can be granted but, on stringent conditions. No party to a dispute should be under the false notion that the moment he would seek an adjournment, it would be granted. The Courts, especially at the grass root level have to be alive to the necessity of disposal of cases rather than pendency of litigation for decades together without any end in sight. What with the multi-tier appeal system in this country, to embroil himself in any sort of litigation has become the nightmare for ordinary people of this country. Every person concerned with the judicial process in this country has to come forward and actively ensure that the delay in disposal of a case is minimised so that the public faith and confidence in the Indian judicial system is restored in its original form failing which, the day would not be far enough where even petty disputes would start being settled on the streets and the Courts of this country would be mute spectators to such a phenomenon. It is hoped that the day does not come.

In this connection, I would like to say a few words with regard to the

present system of appointments to the higher judiciary specially the High Courts. To say the least, the present system does not at all inspire confidence amongst anyone that the best possible talent in the legal field is being trapped. The recent reports of the Judges of the Punjab and Haryana High Court, the Rajasthan High Court and the Karnataka High Court have put a big question mark on the sanctity of appointments being made to the Higher Judiciary. As a matter of fact, talented persons in the legal fraternity are shunning the very idea of adorning the Bench. Leading lawyers are not willing to accept Judgeship. The one quality that should be strictly adhered to in appointments to the higher judiciary is absolute integrity. There should not be any compromise on this quality. Unless people with absolute intregity are appointed to the Bench, the present sorry state of affairs of the Indian judicial system would continue. I do not mean to say that persons of absolute integrity are not adorning the Bench. There are certainly persons of that quality, but of late more fingers have started to be pointed towards the members of the Bench with regard to their integrity. This is a very sorry concept which has started developing in the recent past. Such persons should be dealt with stringently so that the pure stream of justice is not polluted and people's faith and confidence in the Indian judicial system is restored to its original glory. Sadly, nothing much appears to have been done in the recent past towards this end. The National Judicial Commission, if and when set up, may be a giant leap in this direction. It is hoped that immediate steps are taken to deal with the black sheep in the Bench and Bar both who are spoiling the name of the system.

I would end this discussion in the following words of Justice Krishna Iyer as quoted in the book *Justice V.R. Krishna Iyer — A Living Legend by P. Krishnaswamy* in *Chapter Sixteen* entitled *The Tense Story of a Stay Order:-*

"By way of a distressing deviation, I may mention anecdote of a few years ago. A vacation judge was telephoned by an advocate from a five star hotel in Delhi. He mentioned that he was the son of the then Chief Justice and wished to call on the vacation judge. Naturally, since the caller was an advocate, and on top of it, the son of the Chief Justice, the vacation judge allowed him to call on him. The 'gentleman' turned up with another person and unblushingly told the vacation judge that his companion had that day on the list of the vacation judge. He wanted a 'small' favour of an 'Interim stay'. The judge was stunned and politely told the two men to leave the house. Later when the Chief Justice came back to Delhi after the vacation, the victim Judge reported to him about the visit of his some with a client and his 'prayer' for a stay in a pending case made at the home of the Judge. The Chief Justice was not disturbed but dismissed the matter of little consequence. 'After all, he only wanted an interim stay', said the Chief Justice, 'and not a final decision'. This incident reveals the grave dangers of

personal 'visits to judges' residences under innocent pretexts. This is the way functional felony creeps into the judiciary. A swallow does not make a summer may be, but deviances once condoned become inundations resulting in credibility collapse of the institution. Invisible infiltration into the systems swells, by plural processes, into a subversion of the integrity of the institutions. Behold the phenomenon of Indian Corruption Incorporated."

Let us hope that the fear expressed by Justice Krishna Iyer aforesaid is not turned into a reality.

ALTERNATIVE DISPUTE RESOLUTION

by

HON'BLE Mr. JUSTICE K. JAYACHANDRA REDDY

Chairman, Press Council of India
Former judge, Supreme Court of India

In the voyage of maintenance of social peace and harmony, amicable resolution of disputes is an essential element. If we look back we find that from ancient times the task of resolving disputes was significantly fell on the shoulders of powerful ones like kings or tribal chiefs etc., in whom vested legislature, executive and judicial powers; or on the wise ones like the village elders, or panchayats or like authorities. Thus arbitration has been known and acknowledged as an institution for settlement of disputes and practiced in some form or other in all civilized societies from times immemorial. The parties to a dispute willingly used to refer the same to a person of their choice and accept his verdict as binding and such practice was prevalent in ancient and medieval India.

With the advent of British Rule a legal system was introduced covering Civil and Criminal Justice Systems comprehensively. Adversorial System became prominent. These and other factors and changes in the moral and ethical values resulted in a gradual disappearance of the age old system of Arbitration and other institutions alike. The present adjudicatory system is the legacy of Anglo-Saxon jurisprudence. The inherent shortcomings in this system are its formalities and technicalities. Moreover, the system is time consuming and costly. It is a fact that a large number of cases are pending disposal in various courts at different levels. In many a case, the State is either plaintiff or defendant. In criminal cases, the State would always prosecute the offenders. Long pendency frustrates the litigant public and also shakes their belief in the efficacy of judicial dispensation itself. Consequently, lawlessness will take hold and extra-judicial methods would be resorted to to have the disputes settled outside the courts or outside the process of law. It would be deleterious to the efficacy of, not only judicial adjudication but also maintenance of rule of law. Therefore, every one involved in dispensation of justice needs to give serious thought for expeditious disposal of cases at the minimal cost.

However in the year 1940 the Arbitration Act 1940 was enacted and it dealt with broadly three kinds of arbitration – (1) arbitration without intervention of the Court, (2) arbitration with intervention of a Court where there is no suit pending and (3) Arbitration in suits. This act remained static, and the object underlying for many reasons got frustrated.

The need for enactment of the present 1996 Act had arisen on account of several factors. Though the English Arbitration Act, 1934, on which the 1940 Act was based, had been replaced by the English Arbitration Act, 1950, which in its turn was amended by the Arbitration Act, 1975, and the Arbitration Act, 1979, to keep pace with the developments in the field of arbitration, the Indian Act had remained static. The Indian courts have noted the "widespread abuse of arbitral processes" in recent years and underlined the need for evolving effective safeguards to arrest such abuses. The Supreme Court observed in M/s Guru Nanak Foundation Vs. M/s Rattan Singh & Sons, AIR 1981 SC 2075

> "Interminable, time consuming, complex and expensive court procedures impelled jurist to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 ('Act' for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decision of the Courts been clothed with 'legalese' of unforeseeable complexity."

The need for reform in the law relating to Arbitration became necessary as voiced by several forums.

The Arbitration and conciliation ordinance 1996 was issued which came into effect from 25th January 1996, which satisfies the need of a comprehensive and effective law responsive to both domesting and international requirements. This ordinance was replaced by the present Arbitration and conciliation Act 1996 consolidating and amending the law relating to both domestic and international arbitration and for enforcement of the awards. The act also comprehensively provides for conciliation, which is in the form of the non-litigative dispute resolution process. The new law relating to Alternative Dispute Resolution is thus comprehensive and has acquired a new conceptual meaning. But there is no gain saying its success defends much on the will of the people to work it up in the right spirit and with good faith.

Arbitration, conciliation and mediation have long traditions in several parts of the world. There is a long and old tradition in India of the encouragement of dispute resolution outside the formal legal system. Disputes were quite obviously decided by the intervention of elders or assemblies of learned men and other such bodies. Nyaya Panchayats at the grassroot level were there even before the advent of

British system justice. It is a matter of common knowledge that even today many village level disputes are settled by such methods by the elders of the village. The credibility of such forums by Panchayats arose from the knowledge of the parties and of its uses. However, with the advent of the British Raj these traditional institutions of dispute settlement somehow started withering and the formal legal system introduced by the British began to rule on the basis of the concept of omissions of rule of law and the supremacy of law. It was only after Independence and after realization and the formal legal system will not be in a position to bear the entire burden, it is felt that the system requires drastic changes. The mounting arrears in the courts, inordinate delays in the administration of justice and expenses of litigation have gradually undermined the people's faith in the system. Today, therefore, the issue is to examine and choose a right formal legal system, such as the Alternative Dispute Resolution procedures and to organize the same on more scientific lines.

ADR is not an alternative to the court system but only meant to supplement the same aiming on less lawyering. Experts in the field are of the firm opinion that the Arbitration Act 1940 has long outlived its usefulness and the present enactment will put an end to the hackneyed system of arbitration under 1940 Act. However that remains to be seen.

The Alternative Dispute Resolution mechanism is intended to cover negotiation, mediation, conciliation and arbitration. These techniques are quite ancient and well known. While Arbitration is adjudicatory the result being binding, conciliation is consensual and very helpful in making the parties in settling their disputes mutually with the help of mediation.

Negotiation is a non-binding procedure such negotiations are between the parties for arriving at a settlement, willingness and objectivity necessarily become essential to arrive at a negotiated settlement. If these techniques conciliation is recognized to be a better choice. However, the succession of conciliation depends on the mental attitude of the parties, the skill of the conciliator, and creation of proper environment, which is most essential in matrimonial matters.

Lok Adalat movement is accepted to be one of the components, and has assumed great importance, and attained a statutory recognition. They are not akin to regularly constituted courts but they supplement the existing justice administrative system. They provide for adequate and effective means of dispute – resolution at a reasonable cost. Special status has been assigned to the Lok Adalats under the Legal Services Authorities Act, 1987, which provides the statutory base to the Lok Adalats. They are regularly being organized primarily by the State Legal Aid and Advice Boards with the help of District Legal Aid and Advice Committees some of the Lok Adalats are also being sponsored by Voluntary Legal Aid Agencies. In fact the

whole emphasis in the Lok Adalat proceedings is on conciliation and settlement rather than adjudication. The underlying spirit is 'live' and 'let live', 'give' and 'take'. There is neither a victor nor a loser, thus giving no room for acrimonious rancour or ill will, and as well resolving the conflict in the relationship and bonhomie between the parties.

Ours is a great country with rich heritage and tradition of moral values running into thousands of years. But things are different in the present scenario. The Justice System is being misused, resulting in unnecessary litigation delay, and miscarriage of Justice. All belonging to legal fraternity should begin with a new culture striving to promote the efficacy of the Judicial System in rendering speedy and real justice.

India has a vast rural background. If the disputes in these areas can be settled at the grassroot level it will be of great importance from several points of view. By such settlement rancour and malice will not be there and it will pave the way for peaceful co-existence. It is pertinent to remember if the elders' settlement had been acceded to, the great Kurukshetra Sangram could have been avoided.

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ALTERNATE DISPUTE RESOLUTION — A GLOBAL VIEW

By
HON'BLE Mr. V.A. MOHTA
Former Chief Justice, Orissa High Court
Senior Advocate, Supreme Court

The beginning of modern ADR movement is from U.S. and roughly the period can be traced to 1980s. The following remarks of Chief Justice Warren Burger made on noticing the increase of dockets from 2000 to 5000 in the Supreme Court between the period 1963 to 1982, provide the reasons for this movement.

> "We are moving towards a time when it will be impossible for the Courts to cope up with the dockets. If something is not done, the result will be a production of line of justice that none of us would want to see,"

The figures of arrears in the regular courts in developing countries, particularly in a country like India are much more frightening. It is unrealistic to expect that the courts will ever be able to cope up with the tremendous pressure of dockets in near future.

Widely used ADR procedure are, Negotiations, Early Neutral Evaluation, Conciliations/Mediations, Med-Arb, Medola, Mini-trial Arbitration, Fast-track Arbitration etc. — ADR is by no means a recent phenomenon, though it has been organized on more scientific lines, expressed in more clear terms and employed more widely in dispute resolutions in recent years. The concept of parties settling their disputes by reference to a person or a persons of their choice or private tribunals was well-known to ancient India, medieval Europe, ancient Greece and many more countries.

The broad general principles governing the ADR are not much different. Depending upon the nature of the dispute, its value, importance and location, any one of them or more than one of them can be and have resorted to in different countries.

U.S.A.

Centre for Public Resources (CPR) in New York was a leader in the movement towards ADR. It become the foremost think-tank for the research of innovative ways of resolving disputes other than through traditional courts. Indeed, the term ADR

has been coined by this Organisation. It was assumed that the high cost of the litigation and long time spent were misuse of public resources. It developed a number of ADR techniques which includes mini-trial, but in the recent years, the main focus has been on mediation and dispute avoidance. The greatest success of CPR has been in transforming the way in which the legal community looked at ADR. As soon as it was realized that the business community was developing a preference for ADR, lawyers began to follow the line.

The Courts have also played major role in the promotion of ADR in the U.S. There have been mandatory settlement conferences pertaining to civil litigation. The Court Attache acts as a mediator. Judge Peckham of the Federal District Court in Sanfrancisco conceived of and implements Early Neutral Evaluation.

Since there was change in the attitude towards ADRs in the society even the Law Schools in U.S. began teaching ADRs in theory as well as in practice. Stanford University was one of the leaders in this development. Stanford Centre on conflict and negotiation was formed. Harward Law School pioneered research and teaching of negotiations. It is only in excepetional cases that the law schools in U.S. do not have ADR as a part of its curriculum.

Since the enactment of the Civil Justice Reforms Act, 1990 in U.S., there has been tremendous growth in the creation of ADR programme and their implementation. The American Arbitration Association, a voluntary organization supported by membership fees and by fees charged for services rendered, is a principal source of arbitrators and of information on arbitration. The Federal Mediation and Conciliation Service and a number of state agencies also provide the names of arbitrators who may be selected by those having disputes. It is now mandatory as per the procedural court rules to attempt ADRs before the matter can be set for trial in the Court.

Canada

Arbitration statues of the Canadian provinces are modeled after the English Arbitration Act. Arbitration of controversies arising in commerce between Canadian and American business concerns is promoted by the existence of a private international agency, the Canadian - American Commercial Arbitration Commission. This organization was established jointly by the American Arbitration Association and the Canadian Chamber of Commerce.

U.K. & Europe

Arbitration has a long history in this part of the globe. ICC International Court of Arbitration and the London Court of International Arbitration — the most famous and established arbitral institutions in the world — have their establishments in

this part. Mediation and other forms of ADR are also receiving wider acceptability increasingly in Europe and U.K.

In Europe, one of the best known ADR organizations is the Centre for Dispute Resolution ("CEDR") which is based in London and was established in 1990 with the backing of industrial and professional firms. CEDR is a non-profit making organization that has three main objectives:

- To "preach the gospel" or ADR;
- To provide advice and administrative services to enable mediation and other ADR procedure to be used as a cost effective solution to commercial disputes;
- To provide training for mediators and users of ADR, so as to build up a core of experienced practitioners and to standards for alternative dispute resolutions.

CEDR has an advisory Council consisting of judges, lawyers, businessmen and public servants, whose function is to advise CEDR on its long-term policy and plans for the promotion of ADR.

Netherlands

As a concept, ADR in Netherlands comprises arbitration, binding advice and mediation. Binding advice given by the Conciliation Boards is not a judgement. The binding advice can, if necessary, be made enforceable by recourse to the Court following a marginal, substantive and procedural review. There are Arbitration Institutes (NAI) and Mediation Institutes (NMI) which aim to promote mediation as means of settling disputes. They maintain registers of qualified people who have followed prescribed training courses. This seems to be a good idea.

There is a sharp distinction between the Asian and American way of resolving disputes as observed by the Prime Minister of Singapore. The Chinese or Japanese or Korean or Vietnamese way is the belief that you can resolve all disputes by slamming each other with points and counter-points and you get the truth revealed and everything is resolved. Hence the remarkably few lawyers they have in Japan, as compared to American societies. Japanese basic view is that good people neither trouble nor are troubled by law. To be brought before a Court in a civil or private matter is a source of shame. The mere appearance of a lawyer in a business transaction is an unfriendly action. If there is litigation, the head of the Legal Department will loose face.

UNCITRAL Model Law

The work of UNCITRAL has influenced the development of arbitration law in

Asia. Arbitration has gained acceptability and slowly and steadily mediation the other form of ADR is also gaining attention.

The UNCITRAL Model Law was first promulgated in 1985. More and more countries have adopted the Model Law either wholly or with some variations. After all the Model Law is neither a convention based nor a complete code in itself. The following recommendatory resolution of the General Assembly dated 11th December, 1985 reads as under:

> "All States give due to consideration to the Model Law or international commercial arbitration in view of the desirability of uniformity of arbitral procedure and specific need of international commercial practice."

Professor Gerold Herrmann, the former Secretary of the United Nations Commission on International Trade Law ("UNCITRAL"), has suggested certain general requirements of an acceptable law of commercial arbitration in the following words:

"It should be of good quality with solutions that are both sound and suitable for the specific needs of international arbitration: it should be easily recognizable by the understandable to foreign users; and, building on these two conditions, it should be similar to the law of many other States embodying generally recognized principles."

India

In order to examine the departure of the new Indian Arbitration Act from the UNCITRAL Model Law it would be necessary to notice the basic broad features of the later which can be stated thus:

"1. *Party Autonomy*: part autonomy cannot be unrestricted by any restrictions should be kept to a minimum. Most prominent among the provisions which seek to enshrine the principle of party autonomy is art. 19(1).

2. *Where there is no agreement, "suppletive" rules and arbitrator discretion*; these are applicable where the parties were unable to agree or did not envision a particular eventuality. This is what Prof. Herrmann calls the "emergency kit" of rules and arbitral discretion that the Model Law offers to the parties.

3. *Detachment from traditional local procedural law*: this is embodied in art. 19 and provides that either the parties or the tribunal will decide on procedure; thus local procedural law is not relevant. This "detachment" ensures that the needs of international arbitration can be met unencumbered by any local law (i.e. adversarial system merely because the place of arbitration is a common law country).

4. *Ensuring fair and just proceedings*: this is a necessary limitation on party autonomy (se arts. 18 and 24). Failure to adhere to those principles can result in the setting aside on an award under art. 34.

5. *Restrictions on court intervention*: the Model Law seeks to minimize court involvement in arbitration recognizing that in selecting arbitration parties have chosen not to go to court for the resolution of their dispute. The most effective device for limiting court involvement is art. 5 which provides. "In matter governed by this Law, no court shall intervene except where so provided in this Law."

6. "*Universal*" recognition and enforcement or arbitration agreements and awards: In a further attempt to minimize the importance of the place of the arbitration or the award, the Model Law treats all agreements and awards the same regardless of place.

Harmonization cannot be permitted to eclipse other considerations of national history, laws, practices, concepts etc. and exactly his was aimed at in making of the Arbitration and Conciliation Act 1996 with some deviations from the Model Law as well as the procedural provisions derived from the UNCITRAL Arbitration Rules 1976. The major deviations can be summarized thus:

- Under S.2(f) of the Indian Act 1996, in respect of the definition of "international commercial arbitration", what is "commercial" is to be determined in accordance with what is "considered as commercial under law in force in India", which has been regard by some as a potentially troublesome deviation in that it derogates from the international accessibility that the Model Law seeks to achieve;

- Section 10(1) requires that the number of arbitrators not be an even number and section 10(2) provides that where the parties cannot agree on the number of arbitrators the tribunal shall consist of a sole arbitrator;

- Under section 13, if a party is successful in its challenge of an arbitrator it may not appeal against that decision to the court. However, after the award is made, the party could challenge the award on the ground that the arbitrator wrongly rejected the challenge. Thus under section 13 if there is a challenge to the arbitral tribunal's jurisdiction, and the tribunal finds that it has jurisdiction, the court can only address this issue in a setting aside proceeding under section 34. There has been some criticism of this lack of immediate recourse to the courts on a jurisdictional challenge (as is provided under art. 16 of the Model Law) with some arguing that the drafters of the new legislation were too zealous in their efforts to ensure the speedy resolution of disputes;

Provisions not found in the Model Law include:

a) S. 31 (7) which contains detailed provisions relating to the award of interest by the arbitral tribunal;

b) S. 31 (7) which deals with those costs of an arbitration;

c) Under s. 34, the three month period provided for the setting aside of an arbitral award may be extended by 30 days under section 34 (3) "if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months..."

d) In respect of the public policy ground for setting aside an award under section 34 (2) (b) (ii), the act specified that "an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 82."

e) Under section 36 where an award is not challenged with in the prescribed period, or where an award has been challenged but the challenge is turned down, the award shall be enforced in the same manner as if it were a decree of the court;

f) S.38 enables the arbitral tribunal to fix the amount of deposit or supplementary deposit, as the case may be, as an advance for the cost of arbitration;

g) Ss. 39-43 make provision for a lien on the arbitral award and deposits as to cost, arbitration agreement not be discharged by death of party thereto, the rights of a party to an arbitration agreement in relation to the proceedings in insolvency of a party thereto, identification of the court which shall have exclusive jurisdiction over the arbitral proceedings and application of the Limitation Act to arbitrations under the 1996 Act.

Recent amendments to the Civil Procedure Code pertaining to reference to Arbitration and other ADRs contained in Section 89 are welcome provisions, and I am sure the courts will do their best to resort to them seriously. This is a system followed in several modern countries and it has considerably reduced the congestion in conventional courts.

Indonesia

Indonesia enacted its first comprehensive arbitration enactment in 1999. It does not make Indonesia a model law jurisdiction but does offer the parties an autonomy in the conduct of arbitral proceedings. Under Article 31/1 of this law, the parties are free to determine their own arbitration procedure, provided they are not

in conflict with the other provisions of the Arbitration Act. In the absence of agreement, the procedure prescribed in the Act governs the conduct of arbitration. Judicial involvement in the arbitral process is only supportive. The Chief Judge of the District Court is the authority to appoint an arbitrator. The ground for setting aside of an award is limited and the court cannot re-examine the award on merits.

Japan

Japan has not adopted UNCITRAL Model Law. The Japanese Arbitration Law is to be found in Book-VIII of the Code of Civil Procedure. It is derived from the 19th Century German Arbitration Law. As far back as in 1988, the Society of Arbitration Studies has proposed a new draft Arbitration Law based on UNCITRAL Model Law which has not yet been enacted. There is no separate statute relating exclusively to international arbitration. Japan, however, is a party to the international treaties including New York Convention.

There were restrictions on foreign lawyers representing parties in Japanese arbitration and there was lack of choice of language in use for the conduct of arbitration. Arbitration has been a long drawn process. Now, amendments have been made in the law regulating the conduct of foreign lawyers. Proceedings can now be conducted in Japanese or in English.

Japan Commercial Arbitration Association (JCAA) has provided for expedited procedure where the amount in controversy is not more than 20 million yen. Japanese Arbitration Law has only 20 Articles. Mostly the arbitration is institutional. Ad-hoc arbitration is an exception. Party autonomy exists and in the absence of specific agreement as to the procedure, the Tribunal determines the procedure. The grounds are similar to that is found in Article 34 of the Model Law. Court intervention in the proceedings is limited.

Korea

Generally the mediation procedure is conducted by a neutral third person, the court cannot interfere in the mediation procedure and the mediator does not have a decision making authority. However, in Korea, even the court can intervene and play a leading role as a mediator. There are three kinds of mediation agencies there. The first is the judge incharge of mediation. The second is the Mediation Committee. The third is the court incharge of the law suit. In other words, Korean civil mediation is not a mediation in the strictest sense, but a special process in which mediation is combined with a non-binding arbitration. It is better described as a kind of transformed Med/Arb.

Malaysia

In Malaysia, the Arbitration Act 1952 governs arbitration. It has not adopted the UNCITRAL Model Law. The Act has created a unitary arbitration regime providing for both international and domestic arbitration. Substantial amount of international arbitration is outside the jurisdiction of the Act.

Taiwan

Arbitration Law in Taiwan has been substantially amended in 1998. The changes are influenced by the UNCITRAL Model though it was not adopted in total.

The Act provides for applying to the Court for interim measure of protection even prior to commencement of arbitration proceedings.

Unlike the Model Law the Taiwanese Law is not restricted in its application to commercial matters. The order has to be made within 6 months subject to a possible three months extension. If award is not made within the given time, the parties are permitted to refer the dispute to the court with the arbitrational proceedings deemed to have been terminated. The Arbitration Law has fused both domestic and international arbitration regimes although it does contain separate provisions for enforcement of domestic award and foreign awards.

Singapore

The Arbitration Ordinance 1809 governed the arbitration in Singapore for nearly 150 years until it was replaced by the Arbitration Ordinance in 1953. It was renamed as the Arbitration Act 1953 on separation from Malaysia in 1965. The 1953 Act was based on the English Arbitration Act, 1950. Both provided for relatively higher level of intervention. This Act had no distinction between the domestic and international arbitration. Major shift took place with the introduction of the International Arbitration Act, 1994 (IAA) after about 40 years. Domestic arbitrations remained regulated by 1953 Act for a further period of 6 years following the introduction of IAA until March, 2002 when the 1953 Act was repealed in favour of the new Arbitration Act, 2001.

Reason for retaining separate regime for domestic arbitration was that

> "A closer involvement by the local courts in domestic arbitration is desirable, both for the development of domestic commercial and legal practice and for a closer supervision of decisions which may affect weaker domestic parties. It is appropriate that the (local) court be able to

reflect public policy considerations and national interests involved in purely domestic disputes."

Hong Kong

Hong Kong had a colonial history. No wonder it followed the Arbitration Law in England. Hong Kong adopted UNCITRAL Model Law in 1990. It has duel regime for arbitration. One part for domestic arbitration and the other for international arbitration conducted in Hong Kong. Many provisions apply to both the domestic and international arbitration regimes. Hong Kong has made several modifications to the original Model Law text. It appears there is a thinking to rewrite the arbitration ordinance so that there is a unitary regime based on the Model Law for both domestic and international arbitration. Mediation is actively promoted in Hong Kong. The Hong Kong International Arbitration Centre (HKIAC) has established a mediation council which performs several activities for promoting mediation including training programme for mediators. After receiving training the trained persons can be placed on a list as accredited mediators. Mediation processes are included in several construction contracts. These contracts require that the parties attempt to settle their disputes through mediation before they are permitted to initiate arbitration or litigation. The new Hong Kong airport required contractors to agree to a four-stage dispute resolution process with mediation as a condition proceeding to any other dispute settlement stage. These procedures were widely regarded as quite successful and statistics have shown that most disputes were settled in the mediation stage of the four stage procedures.

People's Republic of China

Chinese Arbitration Law has been guided by the UNCITRAL Model Law resulting in major steps towards bringing Chinese domestic arbitration in line with the international model while strengthening at the same time the regime for foreign related arbitration. There are many differences between the UNCITRAL Model Law and the Chinese Law.

Australia & New Zealand

Australia and New Zealand have systems of compulsory industrial arbitration initiated by establishment of wage boards. The wage boards concern themselves with interests as opposed to rights. Apparently from 85 to 90 percent of all private employees in Australia are now working under awards from industrial tribunals. Even salaries of workers are determined by arbitration.

Various societies have distinct divisions — rural and urban, literate and illiterate; rich and poor. Disputes arising from these areas/sections materially differ from each other. Some of the features are, no doubt, common to all; but they are few and

far in between. While devising mechanism for resolution of disputes in rural and poor areas, a participatory model would be proper. The model must envisage legally trained judges familiar with rural and poor people and their life. Knowledge of law is not a necessary pre-requisite for adjudication of their disputes. Honest and sincere common sense approach can better find a just solution. After all, life of law is mainly experience. Take for example, the system of a Para-Legal Committee adopted and resorted to in Nepal. It is a committee of local group of women trained in basic human law and human rights as well as mediation skills. They deal with grass root level by grass root methods and are much more successful. What is essential is the training to the members. Nepal follows a training package called "Para Legal Training" for 5 days.

New Arbitration Laws all over are basically based on UNCITRAL model law which is basically meant for the international level arbitration and not for domestic arbitration. In a key-note address given at Bahrain Congress of ICCI this is what Lord Justice Mustill said:

> "If I had any adverse comment to make about the otherwise excellent discussions within UNCITRAL, it would be that most of those taking part were not so much dismissive of the importance of ad hoc arbitrations but unaware that they existed."

Two different regimes, one for international arbitration and the other for domestic arbitration specially in the backward countries like India, Nepal etc. is a necessity. Evaluation of the Court of international awards and domestic awards has also to be on different standards.

No judicial reform, no legislation, no administrative exercise can yield the desired result of public good merely by theoretical changes of policies Ultimate solution lies, with men. Attitudes must change. People incharge — the lawyers, the judges, the arbitrators must be trained and inspired. Inspired and trained people alone should be incharge.

Beginning has to be made from the grass-root level. It is time that our law schools began to take the lead in helping to devise such training and attitude. Harvard University President Mr. Derek Bok has lamented that law schools trained their students more for conflict than for the arts of reconciliation and accommodation and therefore served the profession poorly. Already lawyers devote more time, he said, to negotiating conflicts than they spend in the library or the courtroom, and studies showed that their efforts to negotiate were more productive for their clients. He said:

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