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**ALTERNATE TO ALTERNATIVES  
CRITICAL REVIEW OF THE CLAIMS OF ADR**

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# ALTERNATE TO ALTERNATIVES: CRITICAL REVIEW OF THE CLAIMS OF ADR

Jasmine Joseph<sup>1</sup>

Discords are bound to arise in society and ingenious human minds have always devised ways and means for resolution of conflicts. The phenomenon, law, itself can be seen as a result of the quest to address potential problems. Nature has endowed people with rationality and they have constantly attempted to discover methods of establishing a cohesive society. Dispute resolution is one of the major functions of a stable society. Through the medium of the State, norms and institutions are created to secure social order and to attain the ends of justice or the least to establish dispute resolution processes. States function through different organs and the judiciary is one that is directly responsible for the administration of justice. In commonplace perception judiciary is the tangible delivery point of justice. Resolving disputes is fundamental to the peaceful existence of society. Therefore, effective and efficient systems<sup>2</sup> for determination of disputes become an obvious appendage.

This working paper, to begin with, offers a macro understanding of the dispute resolution methods existing in India. The emerging trend of Alternative Dispute Resolution (ADR) will be the focus of the next section of the paper. The rationale of the ADR movement will be critically explored to assess its usefulness in terms of realising the ends of justice in the last part.

## I

### Archetypes of disputes determination

As diverse are the causes of disputes, varied are the models of resolving them. They are categorised mainly into four: rights-based, power-based, interest-based and legislative.<sup>3</sup> These models promise results either on a win-lose or win-win proposition.

The rights-based approach is one that is adopted in litigation or adjudication. Parties to the dispute contest on claims of 'rights' and the final decision is considered to be a vindication of the right agitated. This model creates winners and losers.

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<sup>2</sup>The effectiveness and efficiency depends on many variables like; accessibility, time involved, expenditure, nature of proceeding etc. The inputs that go into the system are also important to study the efficiency of the system. Few examples of inputs are infrastructure, number and quality of judges and financial lay out for judicial institution.

<sup>3</sup> STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 3-6 (2d ed. 1992) Beyond these mentioned, there are other models such as, Relational, Distributive, Integrative. See, WILLIAM J. PAMMER & JERRI KILLIAN, HANDBOOK OF CONFLICT MANAGEGEMENT 108 (2003), Bobette Wolski, *The Model Dispute Resolution Procedure For Australian Workplace Agreements: A Dispute Systems Design Perspective*, (1998) 10 BOND LR 6, 13-16, available at [http://www.bond.edu.au/study-areas/law/publications/BLR/vol10-1/Wolski10\\_1.pdf](http://www.bond.edu.au/study-areas/law/publications/BLR/vol10-1/Wolski10_1.pdf)

Disputes could get settled within power structures, which are social, political or economic. When one party is domineeringly situated over the other, the relative positions determine the outcome of the dispute. This is referred to as the power-based model. This also creates a win-lose situation.<sup>4</sup> This model is used either independently or in combination with litigation.

The interest-based approach is the one that is accommodative of the interests of the parties to a dispute. Rather than an endorsement of one's right through adjudication, the conflict is sought to be resolved by varied methods of intercession. This method is designed to bring out a win-win situation. This model is based on a consensual scheme where disputants themselves will be responsible for the result.

In the legislative model, rules or laws will be made by the competent authority to solve an impasse. These rules could either provide a process by which disputes could be settled or could determine the issue itself.<sup>5</sup> This also would result in winner - loser situation or both the parties may find themselves at the losing end.

Litigation is the well-acclaimed process through which dispute settlement is sought in independent India.<sup>6</sup> It is a general perception that people tend to trust institutionalised mechanisms, especially those established in the public sphere for dispute resolution. On the other hand, it is also argued that the faith in the present day justice administration system is gradually being eroded.<sup>7</sup> There exists a widespread feeling that the judicial system is on the verge of collapse.<sup>8</sup> The existing crisis in the judicial system, for some, is

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<sup>4</sup> To illustrate; in a claim for workmen compensation it will be easy for the defendant to force a settlement for a lesser sum due to the weaker financial position of the claimant. It is also possible to dissuade a person even from filing a claim by the threat of loss of employment.

<sup>5</sup> Example could be enactment of a validation Act when competency to tax is challenged by the assessee, or when ownership of land is disputed, the state making a law acquiring the land or ceasing the land. An attempt to stop a dispute and controversy at least temporarily was done in Ayodhya by bringing the Acquisition of Certain Area at Ayodhya Act, 1993

<sup>6</sup> MARC GALANTER, *Fifty Years on, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA* 57, 57 (B.N. Kirpal et al. eds., 2000)

<sup>7</sup> REDDY K. JAYACHANDRA, *Alternate Dispute Resolution, in ALTERNATE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS* 79, 79 (P.C. Rao & William Sheffield eds., 1997) See also, *Report of the International Conference On ADR, Conciliation, Mediation And Case Management*, [http://www.isdls.org/reports\\_india\\_may2003.html](http://www.isdls.org/reports_india_may2003.html). The reasons for delay as suggested by both the works are backlog and delay in the resolution of disputes. It is argued that these reasons erode public trust and confidence in legal institutions and act as significant barriers to India's goals of social justice and economic development.

<sup>8</sup> Backlog of cases and reported delays in some urban areas in excess of 24 years currently undermine the effective enforcement of substantive civil and commercial rights. See, K. D Raju, *Alternate Dispute Resolution System: A Prudent Mechanism of Speedy Redress in India*, Paper presented at a seminar organised by the USEFI at the Dhenkanal Law College, Orissa (Dec. 15, 2007), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1080602](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1080602). The statistics given are as follows; 'the backlog in Supreme Court of India at the end of July 2007 is 43,580, which was 1,50,000 in 1990.' 'More than 40 lakh cases are pending in High Courts up to 31st January, 2007. In the lower courts it is 2.5 crores. There are almost a 2.5 lakh under-trials languishing in jails across the country. It has been found that over a quarter of all pending high court cases are at Allahabad. The Allahabad High Court had some 10.09 lakh pending cases, with over eight out of every 10 cases being civil cases at the end of 2006. Madras High Court (4,06,958 pending cases) and Bombay High Court (3,62,949) were the others with a large number of pending cases. Sikkim is the lowest with just 51 pending cases. In subordinate courts, Uttar Pradesh again

the justification for seeking alternatives.<sup>9</sup> When litigation is the mainstream and ADR, as the acronym suggests, the alternative,<sup>10</sup> the legitimacy of the existence of alternatives needs to be validly established. Here, alternative is sought to remedy the problems existing in the conventional. It therefore becomes interesting and essential to conceptualise ADR as currently understood to understand its character. This will lead to the subsequent parts of the paper where the justifications for ADR is mapped and critically analysed.

## The quest for ADR

Throughout the world, ADR (the term is used here in a generic sense), is promoted as an escape route from the exasperating processes of adjudication. The current phase of the ADR movement began in the U.S during early 70's.<sup>11</sup> Problems outwardly similar in nature seem to set the search for alternatives all over the world.<sup>12</sup> ADR comparatively is described as opposite to conventional judicial processes of dispute resolution. Court directed ADR and multi-door systems but pair ADR with adjudication. They are designed to complement the dispute resolution process through adjudication.<sup>13</sup> ADR is considered to be a process in which a dispute is settled in the active presence and involvement of a neutral agent. In its ideal form, ADR is perceived not only as resolving the dispute but also as placing back the relationship of the parties status quo ante the conflict.<sup>14</sup> The Supreme Court of India has also suggested making ADR as 'a part of a package system designed to meet the needs of the consumers of justice'.<sup>15</sup>

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topped the number of pending cases (4.6 million), followed by Maharashtra (4.1 million), Gujarat (3.9 million), West Bengal (1.9 million), Bihar (1.2 million), Karnataka (1.06 million), Rajasthan (1.05 million), Orissa (10 Lakh), Andhra Pradesh (9,00,000)." See Chandrani Banerjee, *Verdict: To Hang*, Outlook India, Mar. 9, 2009 for latest statistics on pending cases in various High Courts.

<sup>9</sup> K.G. Balakrishnan, Chief Justice of India, Law Day Address to the Nation, (Nov. 25, 2008) (transcript available at [http://www.supremecourtindia.nic.in/new\\_links/Law\\_Day\\_Message-As\\_recorded\\_on\\_24\[1\].11.08.pdf](http://www.supremecourtindia.nic.in/new_links/Law_Day_Message-As_recorded_on_24[1].11.08.pdf) Also see Katherine V. W. Stone, *Alternative Dispute Resolution*, (Public Law and Legal Theory Research Paper Series, University of California, School of Law, Research Paper No. 04-30), available at <http://ssrn.com/abstract=631346>

<sup>10</sup> There are different forms of ADR, to cite a few; Arbitration, Mediation, Conciliation, Med-Arb, Mini Trial, Summary Jury Trials, Rent a Judge. See, Stone, *supra* note 8. Some of these ADR processes like summary jury trials, court ordered arbitration are operated within the public tribunal system, whereas some like arbitration is a private form of dispute resolution. See also, Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Calif. L. Rev. 557, 557-558 (1997)

<sup>11</sup> GOLDBERG, *supra* note 2, at 7- 9. The trajectory as per the author is, "[I]nterest increased substantially in the 1970's in what were called for the first time "alternative" methods of dispute resolution... one part of the movement responded to the civil rights strife of the 1960's and 1970s ... at approximately the same time, the courts also became involved. At the 1976 Pound conference, leading jurists and lawyers expressed concern about increased expense and delay for the parties in a crowded justice system ... during this period, lawmakers who supported ADR and added statutory provisions to ensure fairness of ADR outcomes. ... As the 1990's began, the focus of the statutes and commentary seemed to shift from experimentation to institutionalization"

<sup>12</sup> P.C. RAO, *Alternatives to Litigation in India*, in Rao, *supra* note 6, at 24

<sup>13</sup> Examples are the permanent *Lok Adalat* created under the Legal Services Authorities Act, 1987 and the Section 89 reference of the Civil Procedure Code of India,

<sup>14</sup> SARVESH CHANDRA, *ADR: Is Conciliation The Best Choice*, in Rao, *supra* note 6, at 83

<sup>15</sup> FCI v. J Mohinderpal AIR 1989 SC 1263, 1266, Salem Advocates Bar Association v. Union of India (2005) 6 SCC 344, 375- 379

ADR is perceived both as a preventive measure and as a method for channelising disputes outside the formal justice system.<sup>16</sup> The preventive function is achieved by providing facility for pre-litigation counseling and mediating points. The channels to bypass the conventional forms are provided mainly in two ways. It is either by integrating within the statute itself<sup>17</sup> or by providing means of dispute settlement in the shadow of law.<sup>18</sup> Completely informal methods are also prevalent in many societies.<sup>19</sup> Historically speaking, India is considered to have rich experience in informal methods of dispute resolution.<sup>20</sup> The recent attempt of the West Bengal Government to introduce a bill, which eventually failed, to give a legal framework to alternative dispute resolution could be seen as reintroduction of a leaf from the past.<sup>21</sup> The Ministry of Panchayati Raj in India is contemplating the feasibility of reintroduction of *Nyay Panchayats* in villages.<sup>22</sup>

The reasons advanced for the cause of ADR are strikingly similar in most part of the world whether developed or developing.<sup>23</sup> Court congestion, delays, expenses and procedural inconveniences are the usual arguments that seek to justify the search for alternatives.<sup>24</sup> This is augmented by the cultural and access arguments. The compelling

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<sup>16</sup> Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U Chi L Rev 424, 425-426 (1986)

<sup>17</sup> To cite a few examples; Section 89 and Rules 1-A, 1-B, & 1-C in order X of the Code of Civil Procedure, Sections 4 & 10, The Industrial Disputes Act, 1947

<sup>18</sup> See for example Sections 5 & 6 of the Family Courts Act, 1984, which provides for the service of counselors with whose help parties tries to sort out their disputes. As also Order XXIII, R 3 of CPC provides for compromise of a suit. A suit initiated for any cause of action under any statute that does not provide for an alternate dispute resolution mechanism can be compromised and get a decree recording the agreement, compromise or satisfaction. Such a settlement is arrived at out of the court but get an endorsement of the court can be said to be arrived at in the shadow of law. The current reform move that provide multi door court system aimed to be conducive for settlement could also fit into this category. See also, Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 690-700 (2005)

<sup>19</sup> See generally, Law Commission of India, 114<sup>th</sup> Report (1986). China is a nation with *sui generis* system of dispute resolution as a part of its culture. See, Bobby K.Y. Wong, *Dispute Resolution by Officials in Traditional Chinese Legal Culture*, Murdoch University Electronic Journal of Law (2003), available at <http://www.murdoch.edu.au/elaw/issues/v10n2/wong102.html>

<sup>20</sup> CHANDRA, *supra* note 13, at 85

<sup>21</sup> Reference here is made to the *Salesi* Bill. The word *Sales* denotes umpire. This is said to be a practice that was prevalent in undivided Bengal and the practice of solving disputes with the help of a *sales* is still followed in Bangladesh. The Bill was introduced in the West Bengal Legislative Assembly on ..... The Bill was much contested and could not be passed.

<sup>22</sup> Prof . Upendra Baxi was appointed by the Ministry of Panchayati Raj to head a Committee on Nyay Panchayat. The committee's proposals were: 1. give jurisdiction to these bodies to settle disputes having a bearing on the villagers 2. *panch* (the five persons) to be elected 3. to use persuasion, conciliation or mediation as methods of dispute resolution. See, V. Kumara Swamy, *Courting Trouble*, The Telegraph, July 11, 2007, available at [http://www.telegraphindia.com/1070711/asp/opinion/story\\_8045818.asp](http://www.telegraphindia.com/1070711/asp/opinion/story_8045818.asp). See also, Upendra Baxi, *Access, Development and Distributive Justice*, 18 JOURNAL OF THE INDIAN LAW INSTITUTE 375 (1976)

<sup>23</sup> For U.S position, see LEONARD L. RISKIN ET AL, DISPUTE RESOLUTION AND LAWYERS, 2 (1987). See also, Rao, *supra* note 11, at 24-25

<sup>24</sup> RAO, *supra* note 11, at 24

claim of the need to facilitate trans-national trade and the resulting demand to legalize the processes of ADR is also gaining momentum in India post liberalization. The adoption of the new Arbitration Act (1996),<sup>25</sup> conspicuously similar to the UNCITRAL model, is a case in point. In the international scenario, one can find a host of documents that pursue the cause of ADR and especially arbitration.<sup>26</sup>

The pressure on the judiciary due to large number of pending cases has always been a matter of concern as that being an obvious cause of delay. The culture of establishment of special courts and tribunals<sup>27</sup> had started early in independent India.<sup>28</sup> The rationale for such an establishment ostensibly was speedy and efficacious disposal of certain types of offences.<sup>29</sup> Tribunals were also set up through statutes to deal with specific issues as alternative to adjudication in regular court.<sup>30</sup> The delay and efficiency reasons were further supplemented by the need to include specialists or persons well versed in the issue, in adjudicatory process as a means of achieving a just end.<sup>31</sup> Such reasons are still mooted as witnessed by the recent entanglement about the qualification of the chairperson and members of Competition Commission. It is pertinent to note here that although special fora were prescribed, the process therein remained more or less adjudicatory.<sup>32</sup>

The trend next followed was the establishment of specialized fora to deal with cases of the same genre. The founding of Labour Courts, Industrial Tribunals, Consumer Forums, Motor Accidents Claims Tribunals, Family Courts etc.<sup>33</sup> are examples of this phase. The justification remained the same but the process of dealing with disputes began to undergo transformation. A mixed process of mediation, adjudication and reduction of procedural content are the highlights of this stage.

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<sup>25</sup> The first Act specifically on the issue was the Indian Arbitration Act, 1899, the Indian Arbitration Act, 1940 followed it. Tracing the legal framework in Indian context in this matter will take one back to the Bengal Regulation Act of 1772 and references in the successive Civil Procedure Codes

<sup>26</sup> The Geneva Protocol on Arbitration Clauses, 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the Agreements under TRIPS and GATS are examples.

<sup>27</sup> *L Chandra Kumar v. Union of India* (1997) 3 SCC 261, 303-305. It has been observed that 'tribunals are set up to meet docket explosion'.

<sup>28</sup> Special Court provided under The Immoral Traffic (Prevention) Act, 1956

<sup>29</sup> They are called special courts because of the distinction they have with related to the subject matter they deal. The reason of the establishment being expeditious disposal of matters. For example: Special Courts set up to deal with offences alleged to have committed during the period of emergency under The Special Courts Act, 1978. For specific discussion, see, S.P.SATHE, *THE TRIBUNAL SYSTEM IN INDIA* 2-5 (1996)

<sup>30</sup> *Id.*, at 1. Author suggests that the tribunals were set up as alternative to achieve 'quicker, economical, less formal' justice and 'possessed expertise in a subject compared to courts.'

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, at 6

<sup>33</sup> It has been said that the nomenclature is very confusing, but the fact remains that court, tribunals and special courts has specific meaning and conceptual identity. See, *Id.*, at 1-2. For an idea about the functioning and the nature of cases handled in *Lok Adalats* see, Jayant Krishnan & Marc Galanter, 'Bread for the Poor: Access to Justice for the Needy in India,' 55 *Hastings Law Journal* 789, (2004)

The next most celebrated and debated move was the introduction of *Lok Adalats*.<sup>34</sup> The Constitutional duty of the State to provide legal aid,<sup>35</sup> prompted by the decisions of the apex court,<sup>36</sup> led to the formation of a Committee for Implementing Legal Aid Schemes (CILAS). This entity mutated into the present Legal Services Authority (LSA). The functioning of *Lok Adalat* is supported by LSA. The legal legitimacy of *Lok Adalat* flows from the Legal Services Authorities Act, 1987.

Establishment of Fast Track Courts is next in this list. The posts of ombudsman for sectors like insurance, banking and *lokayukt*,<sup>37</sup> are also conceived to deal with particular issues, efficiently and expeditiously detouring the regular courts. All these moves bear the brand of reform of the justice administration. Successive Law Commissions have addressed the need for reform and have suggested multifaceted measures to deal with the crisis.<sup>38</sup> It therefore becomes manifest that there are problems in the justice delivery system of the nation that are being consistently attempted to remedy.

The existing milieu - problems of the legal system and the experiences of establishing fora alternate to regular courts - seemed to be perfect for the introduction of ADR as an alternate to the mainstream. In common parlance, ADR is considered as a process that offers an alternative to litigation. ADR processes are generally classified as mediation, conciliation, arbitration and the hybrid and modern versions of these basic forms. The reasons for introduction of ADR, as stated already are: delay, expenses and procedural inconveniences. Looking back at the reform moves in India, one finds that the logic of establishment of bodies from Special Courts to Fast Track Courts endorses the very same causes that called for an alternative. Even the procedural component is tried to be simplified in most of the fora. If that be the case, it becomes logical to call the resultant fora of the reforms as ADR fora. A glance at the type of cases that are claimed to be successfully dealt by an accepted ADR process, the *Lok Adalat*, will reveal that, among others, cases fall in the category of motor accidents, family disputes, bank loans and workmen's compensation.<sup>39</sup> The noticeable position that emerges from this observation is that the cases that get to the alternate process of *Lok Adalat* are flowing from fora that are

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<sup>34</sup> State Bank of Indore v. M/s Balaji Traders, AIR 2003 M.P. 252, 254. In this decision the character of *Lok Adalat* is treated as a forum for conciliation where the source of power emanates from the goodwill and consent of both the parties. In unambiguous term the judgment states that Lok Adalat had been a forum for alternative dispute resolution and the bench of Lok Adalat as having only a conciliatory function and not any adjudicatory function.

<sup>35</sup> INDIA CONST. art. 39A

<sup>36</sup> M.H. Hoskot v. State of Maharashtra, AIR 1978 SC 1548, Hussainara Khatoon v. Home Secretary, State of Bihar AIR 1979 SC 1369

<sup>37</sup> *Lokayukt* is appointed under the Lokayukt Act of 1973, with a mandate to curb corruption. *Lokayukt* has jurisdiction over the elected representatives as well.

<sup>38</sup> Besides the 114<sup>th</sup>, which is specific on the issue, the 14<sup>th</sup>, 76<sup>th</sup>, 77<sup>th</sup>, 124<sup>th</sup> and the 129<sup>th</sup> reports of the Law Commission of India, considers the need for reformation in judiciary.

<sup>39</sup> RAO, *supra* note 11, at 27. "As on 31<sup>st</sup> March 1996, more than 13,000 *Lok Adalats* were organised and over five million cases were settled. These cases related primarily to motor accidents, land acquisitions, family disputes, mutation of land, encroachments on forest land, bank loans, workmen's compensation and compoundable criminal offences". See also R.C. Lahoti, *Envisioning Justice in the 21<sup>st</sup> Century*, Nyaya Deep, (Oct., 2004) at 26, "upto 30<sup>th</sup> June, 2004, 2,23,159 *Lok Adalats* have been held and therein 1,63,31,357 cases have been settled, half of which were motor accident claim cases."

already established as alternatives.<sup>40</sup> Then a crucial question pops up, are we going on creating alternatives to alternatives?

## II

### Legitimization of ADR

On a philosophical note, it is said that litigation that turns out winners and losers gains nothing, not even the judgment holder.<sup>41</sup> The reasons that support the search for alternatives can be viewed at two levels. The indeterminacy in result, lack of finality due to the appellate process, delay, expenses, vexatious character, stress involved in litigation and accessibility as one; loss of social harmony as the other. The promise of ADR is that it is less expensive, simple, quick and accessible.<sup>42</sup> The latent but more germane rationale is its capacity to have a flexible and responsive process, the possibility of achieving results that suit the society, social harmony and the possibility of autonomy.<sup>43</sup> Causes like docket explosion, backlog of cases are the restated reasons for the promotion of ADR.<sup>44</sup> The experience of success of ADR globally is also a persuading point to many to advance ADR.<sup>45</sup> The hope of recreating the success story is of course appealing and tempting. These being the reasons for the advocacy of ADR, it will be a worthwhile exercise to critically analyse each argument to verify its grounds.

The common argument that is undisputedly accepted due to its deceptively obvious nature is **over crowding of litigation and backlog of cases**. In reality this argument may well be true. Authentication is necessary for this argument to become a valid justification for an alternative course. The best possible data would be the number of cases filed, the number of pending cases and the average disposal rate all over the nation. Data of average duration of litigation will also help us arrive at a clearer picture. These data need to be analysed in the light of per capita filing ratio considering the increasing amount of population as also directly matched with the adult population who are the major potential litigants. This information again will have to be appreciated in the light of increase in the number of courts and fora that offer resolution of disputes. Unfortunately we lack comprehensive figures that will vouch the veracity of the argument based on above mentioned statistical analysis but for the number of cases pending in each strata of

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<sup>40</sup> GALANTER, *supra* note 5, at 60-63

<sup>41</sup> The oft-quoted statement of Abraham Lincoln, convey the message to “discourage litigation, persuade your neighbours to compromise whenever you can. Point- out to them how the normal winner is often a loser in fees, expenses, cost and time” is the beginning point of many discussions on ADR.

<sup>42</sup> For a general overview of the merits and limitations of ADR, see, Lynn A. Kerbeshian, *ADR: To Be Or ...?*, 70 N. Dak. L. Rev. 381 (1994)

<sup>43</sup> GOLDBERG, *supra* note 2 , at 6-9

<sup>44</sup> Many argue that the current position of litigation is such that our courts are bursting in its seams that it calls for a spring cleaning. See, MILON K. BANERJI, *ADR: Is Conciliation The Best Choice*, in Rao, *supra* note 6, at 62. RAO, *supra* note 11, at 24

<sup>45</sup> Lahoti, *supra* note 38, at 26. To quote, “ in California, where the systems of mediation, conciliation and pre-trial settlement have been introduced only two decades ago, it has been found that 94% of cases are referred for settlement through one or the other ADR systems and 46% of such cases are settled without contest. The result is that California has been able to achieve the goal of final decision in civil cases within a period of less than 2 years from the date of institution”

courts.<sup>46</sup> A reliable reference on this aspect is by a former Chief Justice of India who gave a picture of comparative reduction in the backlog of cases with regard to the Apex Court.<sup>47</sup> The reasons attributed to the decline are the steps taken to modernize case management system and other innovative measures.<sup>48</sup>

This gives a clear indication as to the direction bound to be taken at all levels of the judiciary to address the problem of delay and backlog of cases. A glance at the financial allocation to the judicial sector in successive planning commissions also becomes relevant as it indicate only a negligible increase.<sup>49</sup> The development of infrastructural and other supportive facilities are also crucial to the efficiency of the judiciary, especially in the lower rung where the number of filings are higher and is the most accessible point. The pyramid structure of our judiciary creates bottlenecks at different levels. This calls for maintaining a systematic ratio of appellate courts to subordinate courts. At a higher level of judiciary, increasing the number of benches, at least in the minimum, filling up of existing vacancies<sup>50</sup> will go a long way in addressing the problem in deliberation.<sup>51</sup> Aspect of selection and training of judicial officers of all levels should also be an integral part of the move to reduce the backlog and enhancement of quality and efficiency. Judiciary themselves point out abuse of the process of litigation<sup>52</sup> and the lack of clarity in decisions as reasons for backlog.<sup>53</sup> The suggestion therefore, is reinforcement of the existing system, as it is not the institution that is at fault, but the administration of which that needs change. This argument stands vindicated by the previous discussion that the creation of alternate fora in itself does not solve the problem as revealed by the data that shows the nature of disputes that gets settled in *Lok Adalat*, an alternate forum.

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<sup>46</sup> On the contrary some studies conducted in certain States of India shows a declining trend in litigation. This also cannot be accepted and extended from particular to general due to the varied conditions of life in different parts of India and as also it is not shown whether it had taken into consideration the impact of already existing alternate means. See , GALANTER, *supra* note 5, at 58

<sup>47</sup> Lahoti, *supra* note 38, at 27. “The pendency of cases in Supreme Court was more than 1,06,000 in the year 1993 stood reduced to a mere 19,032 in the year 1997.”

<sup>48</sup> *Id.*, “This was made possible by computerization, certain innovative steps such as grouping of cases, modernizing the case management system and allocation of needed funds by the central government... [T]he system of law Clerks or research assistants, one each being attached with every judge so as to assist in research work which will improve the quality of judgments and also accelerate the decision making process”

<sup>49</sup> *Id.*, at 22. During the Tenth Plan (2002-2007), the allocation is Rs. 700 crores which is 0.078% of the total plan outlay of Rs. 8,93,183 crores. The 11<sup>th</sup> plan notes that out of the allocated sum Rs. 519 crore were spent. The ninth plan shows an allocation of 0.071% of the total outlay. See also, Press release dated 18-04-2002 of the Ministry of Law, Justice and Company Affaires, Government of India, available at <http://pib.nic.in/archieve/lreng/lyr2002/rapr2002/18042002/r180420022.html>. The 11<sup>th</sup> plan makes an outlay of Rs. 1470 crore to the Department of Justice. Of this, Rs 740 crore is being assigned for computerizing and networking of district and subordinate courts and for establishing e-courts and video-conferencing facilities in courts and jails, and Rs 700 crore for capacity building and infrastructure for Judiciary. Eleventh Five Year Plan 2007- 12, Vol 1, available at [http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11\\_v1/11th\\_vol1.pdf](http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11th_vol1.pdf)

<sup>50</sup> Lahoti, *supra* note 38, at 27, It has been noted that 228 posts of High Courts judges remain vacant.

<sup>51</sup> All India Judge’s Association V. Union of India (2002) 4 SCC 247, 268-269

<sup>52</sup> East India Hotel Ltd. v. Syndicate Bank 1992 Supp (2) SCC 29, 53

<sup>53</sup> The Supreme Court has observed that ‘the clarity and promptness in decision making are the need of the hour. That would go a long way to reduce the docket explosion.’ Govind Potti v. Kesavan Govindan (1987) 3 SCC 668, 672

**The indeterminacy in result, lack of finality due to the appellate process and the vexatious character of litigation** are the next important aspects to be dealt with to see whether this argument is a justification for introducing ADR. The element of lack of participation in the adversarial nature of litigation that will create winners and losers coupled with the evergreen argument of uncertainty in law is a ground stated for searching new avenues to sort discords. How compelling these reasons are to bypass judicial scrutiny of cases needs to be critically analyzed. Even the ardent supporters of ADR will consent that all kinds of disputes are not fit for diversion to the process of ADR.<sup>54</sup> Cases that involve questions of law, constitutional issues and matters involving public interest need to go through the watchful eye of judiciary, is an accepted proposition.<sup>55</sup> The issue here is how does one determine which warrants judicial attention or otherwise. It can be seen that the question of discrimination can arise in a deceptively simple matter of property rights or an issue relating to employment. The right of a Hindu female in the ancestral agricultural property is a contested matter but could be settled at the entry level at the *munsiff*'s/ sub- court itself by virtue of Section 89 of CPC, if it is felt that there is a possibility of settlement. The benevolence of the parties might enable them to come to a settlement at the initial stage, which will bar judicial introspection into the issue of inequity of the law. Such a settlement without doubt will be beneficial for the parties but will not be the same for the development of law and for the ends of justice. Then the only hope is that such issues of wider magnitude will attract judicial notice and will not be referred for settlement. At the same time this hope will have to be reflected with the existing scenario where the judges are overtly concerned about the disposal targets.

Though, the issue of uncertainty in law and thereby in results causes concern, the fact remains that application of judicial wisdom can bring justice that could be experienced.<sup>56</sup> The dispute before the court some times would just be a cause for the court to lay down a

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<sup>54</sup> RAO, *supra* note 11, at 25. For a discussion on these aspect, see, Kirk W. Schuler, *ADR's Biggest Compromise*, 54 Drake L. Rev. 751, 752-753, 789 (2006), Simon Roberts, *Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship*, 56 (3) MLR 452, 452-453, 455 (1993) Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 949-954 (2000) All seems to suggest that some genres of cases are better suited for ADR methods than others. Rueben also argues that "the incorporation of constitutional values into seemingly private ADR is achievable, necessary, and desirable."

<sup>55</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075, 1085 (1984). It is argued that the ADR proponents mistook the courts role only as a dispute resolver, whereas it contribute more to the society in the process of decision making than just solving the dispute between two parties.

<sup>56</sup> This argument can be further supported by reverting to the judgment in *Mary Roy v. State of Kerala* (1986) 2 SCC 209) which is considered radical as far as the emancipation of women is concerned. The issue in *Visakha v. State of Rajasthan* (1997) 6 SCC 241 could have been mere matters of disciplinary action of employment, had judicial notice not befallen on them. The counter argument here could be that such high profile cases directly reach the Supreme Court which is sensitive enough to understand the magnitude of the issues. But it should not be forgotten that the access to Supreme Court even after widening the net of *locus standi* in PIL cases remains inaccessible to too many. Over and above, access to justice is an element highlighted for the fulfillment of the promise of justice in the Preamble of Indian Constitution that calls for justice at the local level and not reserved only at the higher echelon of judiciary.

principle or to set sail the development of law.<sup>57</sup> The parties may also not directly be responsible for the development of law but will be the causal factor. This position definitely needs a rider that the idea here is not to debase the beneficial impact a settlement can create for the parties to the litigation. It is not necessary that every potential issue reach the higher courts, as appeal is totally at the discretion of the parties. The fact remains, that changes in law due to judicial decisions, ultimately depends on the party, who is free to choose to fight it out in appeal courts, which in turn depends on whether the party has sufficient reasons and resources to do so. Otherwise, such issues could well be dormant in dockets. Moreover, settlement of an issue can happen at any stage of the progress of the litigation that will take away the suit from judicial consideration. The discussion therefore is to point out a probable positive aspect of litigation, which in no sense is an insignificant one.

The provisions for appellate recourse are well defined to meet the ends of justice that calls for revisiting certain areas to ensure that justice is not miscarried.<sup>58</sup> The logic of recourse to higher judiciary lies in the acceptance that none is infallible and the party to a proceeding should not be punished for the oversight of a deciding authority.<sup>59</sup> The provisions in procedural laws as well as the Constitution of India with regard to appellate, revision and review possibilities are explicit enough as to when such a course of action could be entertained.<sup>60</sup> Appeals primarily, except in specified circumstances have to go through admission procedure or should obtain a certificate from the High Court that endorses the eligibility for such a course. An adjudicatory process that produce dissatisfaction to either or both the parties, the option to approach a higher forum is well justified.

The bar to appeal from a decision that is reached by a consensual process in an ADR<sup>61</sup> is logically justified because of the fact that the decision is reached at the instance of the parties, where they give their free consent and is responsible for the outcome.<sup>62</sup> This logic

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<sup>57</sup> Recently, Indian Supreme Court had taken note of the need for change in the law relating to adverse possession and held the present position of law is unjust as it rewards the wrongdoer. The court also recommended to Government of India to make suitable changes in the law of adverse possession. Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan AIR 2009 SC 103, 109-110

<sup>58</sup> The fallibility of the institution of the judiciary is well entrenched in the provisions for appellate recourses. One of the rationales of appellate action is to undo the mistake that might have been committed by the lower courts. The punch line that “[w]e are not final because we are infallible, but we are infallible only because we are final” by judge Robert H. Jackson is worth remembering.

<sup>59</sup> The development of the concept of curative petition itself shows the necessity to revisit even the final decision of the Apex Court, by creating scope for fining ‘curative petitions.’ See, Rupa Ashok Hurra v. Ashok Hurra (2002) 4 SCC 388

<sup>60</sup> The Supreme Court has cautioned that ‘the amplitude of Article 136 is meant for exceptional circumstances than to serve as a hospitable basket to receive all challenges...’ See, Dhakeswari Cotton Mills Ltd. v. CIT AIR 1955 SC 65, 69 ; Straw Board v. Workmen (1977) 2 SCC 329, 333; Ashok Nagar Welfare Society v. R.K. Sharma (2002) 1 SCC 749, 756-757

<sup>61</sup> Section 21, The Legal Services Authorities Act, 1987. It is explicitly provided that the award of the *Lok Adalat* is deemed to be a decree of a civil court and treated final, also that no appeal shall lie to any court against the award. See also, P.T Thomas v. Thomas Job AIR 2005 SC 3575, 3579; Punjab National Bank v. Lakshmidhand Rah AIR 2000 M.P 301,304;

<sup>62</sup> It has been held that ‘just as a decree passed on compromise cannot be challenged in a regular appeal, the award of Lok Adalat being akin to the same, cannot be challenged by any regular remedies available under law including invoking Article 226 of the Constitution of India challenging the correctness of the

holds well till the moment the assumption of free will stands. In a society like India, where most of its populace are disadvantaged due to social, economic and political reasons such an assumption may not be universal.<sup>63</sup> Let us envision a real life situation in a lower court where there is a permanent weekly *adalat*. Those cases that have a potential of settlement will be referred to the *adalat* with the consent of the parties as per the law. In case the matter does not get settled therein, it will revert back to the litigation process. A Judge/*munsiff* who shows displeasure at every such reverted case is sufficient to rule out free consent due to the relative positioning of the parties and judges in the power structure. It is true that aberrations cannot prescribe the rule but similar is the reality that things do not work under test conditions all the while.<sup>64</sup> This argument is only to sensitize about the existing drawbacks<sup>65</sup> to those who eulogize ADR. Such an understanding will help to make the system of ADR more justice oriented as it should be.

The argument that ADR is better than litigation because it hands out a conclusive decision without the possibility of appeal, is not always justified, as an appeal is a component of ensuring justice. It is also not a correct position to assume that ADR process does not involve appeal. Though on limited grounds some processes of ADR do design review of the final decision, arbitration for example.<sup>66</sup> Having said this, one must not lose sight of the fact that the appeal possibilities in most of the cases are capable enough to stall delivery of justice. Persons who would like to delay the final decision for obvious reasons use all available dilatory tactics and appeal is one among them. Now the issue to be addressed here is how to strike a balance so as not to detour the course of justice. The argument that one form of process allows more appeal possibilities than the other is not sufficient. If it is the misuse of appeal that is the cause of disquiet, streamlining the appeal process is the answer. Deserving matters should reach higher courts, at the same time, such recourse should not be a tool in the hands of manipulators. The answer to this problem is definitely not by bypassing judiciary but by establishing a vigilant judiciary that uses its discretion with responsibility.

The **vexatious nature of litigation** is a character that needs no substantiation. Anyone who possesses the experience of being a litigant will endorse this statement. It will

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award on any ground.” Board of Trustees of the Port of Visakhapatnam V. Presiding Officer, Permanent Lok Adalat, Visakapaptanam 2000 (5) ALT 577 as cited in P.T Thomas v. Thomas Job, *supra* note 60, 3580.

<sup>63</sup> In a settlement of an insurance claim where an offer of a lesser sum to be given immediately than the amount that would have got if the case is finally adjudicated will be accepted by the petitioner because of the weak financial position. A financially better situated person might opt for adjudication as he could well take the delay. Here even if the person who settles the case himself endorses his free will it can be seen that the will is not as free as we would like it be. In a society where power relationship plays a vital role the presence of free will is a mirage. GALANTER, *supra* note 5, at 60-61.

<sup>64</sup> When the judge adorns the role both as a mediator and adjudicator in the multi door ADR progamme, it raises a conflict. As a mediator judge is expected to be an intervener, whereas in adjudication, judge is the third person empowered to impose a decision. These role changes are neither easy nor advisory. Roberts, *supra* note 53, at 461.

<sup>65</sup> MARC GALANTER & JAYANTH K. KRISHNAN, *Debased Informalism: Lok Adalats and Legal Rights in Modern India*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 96, 126 (Erik G. Jensen & Thomas C. Heller eds., 2003), Also see, Galanter & Krishnan, *supra* note 32.

<sup>66</sup> Section 34. The Arbitration and Conciliation Act, 1996.

definitely be a bonus to have an alternate process that will relieve one from the vexations in the quest for justice. Introspection into the reasons for this well-founded feeling will take one to the expanse of archaic laws both substantive and procedural.<sup>67</sup> The colonial baggage in justice administration that designed the existing complex system is pointed out as a reason and the call for revamping the system is alive for a long while. Coupled with it is the experience of innumerable adjournments, which could be a result of calculated or evasive approach by actors like advocates, judges and clients. Constant efforts are being made to suit laws to the social needs both by civil society groups and official bodies like Law Commission of India and by the judiciary. Legislatures are also trying to cope with the expectation of the society by bringing in new laws, amendments and repeals. It is argued that the problem lies with the complexity created by existing laws. There is no inherent problem in the concept of litigation but the fault line is what goes into it and how it is processed. The shortcomings in laws is what makes the process cumbersome or at least gives chances for those who want to manipulate it for their gains. Therefore the better way out is to directly address the cause than to treat symptoms. This is by no means to suggest, that everything should be State centric, and it is only through the organs of the State that one can obtain justice, but to point out, that the rationale of litigation being entangled for furthering ADR, is not an argument that will make the system efficient, but pretty well keep the system as it is. The focus should equally fall on reformation of laws that will make the process less onerous along with advancing ADR that could make quality difference in access to justice.

The alarming rate at which **the expense involved** in litigation shoots up is a matter of great concern.<sup>68</sup> This argument can be coupled with the accessibility issue also, as cost creates roadblocks for many. In a nation where justice is a right, all efforts to translate the promise into reality is obligatory.

The reasons for escalation of expenses are many. The delay in reaching the final result itself is a causative factor. The location of fora, the time involved which otherwise could have been productively used, statutory expenses like court fees and advocate's fees all add up in the column of expenditure. An alternate forum that will give a toll free route to justice is coveted for sure. A glimpse into how this problem can be addressed is considered desirable as it could point towards remedial measures.

Advocate's fee is pointed out as the first among equals. The way out is two-fold. The fee rates should be prescribed and realistically updated as well as enforced, which might look impossible. The fact remains that avoiding the problem will in no way help to reach the solution. The location and delay issues are addressed earlier in the paper as it calls for the attention of policy makers. The next existing possibility is widening the net of free legal

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<sup>67</sup> To illustrate, legal proceedings for partition of property. The substantive law as well as the process is so cumbersome and the procedure to undergo to convert a preliminary decree into a final decree is insurmountable for many. A simplification of substantive as well as procedural law in this regard will relieve the lower courts from a number of future long pending matters.

<sup>68</sup> Justice P.N. Bhagwati wrote in one of his judgments extending the principle of *locus standi* that "It is only the moneyed who have so far had the golden key to unlock the doors of justice" *People's Union for Democratic Rights v. Union of India* (1982) 3 SCC 235, 242. See also, *Hussainara Khatton (IV) v. Home Secretary, State of Bihar* (1980) 1 SCC 98, 106. Though the development of the jurisprudence of public interest litigation (PIL) has been envious, access to justice through PIL could not be a substitute.

aid, which is already a mandate in Indian Constitution.<sup>69</sup> The constitution of legal Services Authority<sup>70</sup>, the development of *Lok Adalat* system and the activities of LSA are steps towards this end.<sup>71</sup> The respective Legal Services Authorities are expected to offer legal services to indigent persons<sup>72</sup>. These facilities should be extended and efficiently executed. The accessibility issue has one more focus area that is the lack of awareness. The activities of LSA combined with the help of accredited Non- Governmental Organizations<sup>73</sup> can devise and carry out ingenious programmes. Experience shows that a responsive District Judge who is the Ex- Officio Chairman of the DLSA supported by the State Legal Services Authority that is headed by a sitting Judge of the respective High Court could make quality changes in the access to justice component. It is no doubt that an accessible and fair ADR forum will be advantageous to deal with the issue of price escalation of justice.

The **loss of social harmony** due to litigation and the **success of the process in other nations** are the other compelling reasons to advance the cause of ADR. Processes of ADR that directly address the conflict and brings back the trust between parties to conflict without doubt is desirable. Belief in people is that which will make this end possible.<sup>74</sup> The second position, success of ADR in other nations requires a critical analysis as experience reminds us that the success elsewhere does not guarantee suitability and success everywhere. To repeat the success, the background factors also need to be taken into consideration. Though there could be areas of convergence, divergence makes nations and its cultures unique. Furthermore, dissatisfaction about ADR in its cradle should also not be lost sight of.<sup>75</sup>

### III

This part deals with the next level of argument that how far the existing ADR framework contributed towards the promised outcomes. The functioning of ADR in India is mainly two pronged; arbitration and settlement through *Lok Adalats*. Both are institutionalized and work within the bounds of legislations.<sup>76</sup> This takes out the **character of informality** from both these processes. The mediation and conciliation efforts, be it in labour front, negotiation and conciliation within family courts or tribunals specially appointed for the purpose operate either directly under a legal framework or in the shadow of law. The effectiveness of such processes depends upon the sensibility of persons who employ these processes. A *sui generis* process might give a more informal process as the necessity of the parties being instrumental in creation of the process. The in-built processes of ADR need to be oriented towards the larger aims of informality in proceeding and enhancement of the scope for self-determination of conflicts without sacrificing justice.

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<sup>69</sup> *Supra* notes, 34, 35

<sup>70</sup> See, sections 3-11B, the Legal Services Authorities Act, 1987

<sup>71</sup> *Id.*, Sections 19-22B

<sup>72</sup> *Id.* Sections 4, 7 and 12

<sup>73</sup> *Id.* Section 4 (m), (n)

<sup>74</sup> See, *infra* note 99.

<sup>75</sup> Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Har. L. Rev. 668, 668-672 (1986)

<sup>76</sup> The Arbitration Act, 1996 and The Legal Services Authorities Act, 1987

The argument of ADR being **simple, quick and less expensive** does not prove true in all the processes of ADR. Recourse to arbitration as experience shows, is neither simple nor quick.<sup>77</sup> The expense involved for procuring a specialist in the field of dispute and the fees of advocates who represent the parties are by no means less than litigation. Arbitration clause becoming a part of standard form of contract and compulsory arbitration, where parties do not have any option but to follow the lead of the dominating party also fail the argument of participatory and consensual process.<sup>78</sup> Mediation, conciliation and other forms of ADR are gaining momentum in India but do face similar problems.

The equation that seemingly develops in India is that ADR is equal to arbitration. The importance given to arbitration is quite evident in the literature pertaining to ADR. The use of arbitration in trade related matters is the reason for its hype especially in the post-liberalized India. Many international organizations too promote the cause of ADR<sup>79</sup> that in effect concentrate on commercial arbitration, specifically international commercial arbitration. The development in this field is definitely appreciable. But this poses a question as to what is the real motive in pursuing the cause of ADR, is it a concentrated effort on facilitation of trans-national trade and a spill over interest in the formulation of less expensive, simple, quick, accessible, informal process that brings social cohesion and harmony?

The promotion of arbitration in the field of trade and commerce is not without inherent problems.<sup>80</sup> The development of business litigation resulted in firms and business lawyers being engaged themselves with strategies that will help the interest of the clients.<sup>81</sup> Bryant G Garthy, highlights how the business interests in ADR had subverted the aims of the alternate modes of dispute resolution.<sup>82</sup> It takes away the public eye from issues that can directly affect the people. The parties before an arbitrator campaign only for their interests and the arbitrator is not mandated for more than that. It is said that 'when two traders meet, their topic will be how to hike the prices'. The lack of presence of all stake holders in arbitration process is alarming because of its potential to bring alteration in public life. It is contended that the arbitration component of ADR is becoming an elite club of "judges, retired judges, commercial courts, mediators, and arbitrators who provide tailor-made justice geared specifically to large business disputes- a category that includes the new wave of large class actions. This elite (sic) has its own set of lawyers as

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<sup>77</sup> It takes years even to appoint arbitrators and to commence the proceedings in contested cases.

<sup>78</sup> Bryant G. Garthy, *Tilting The Justice System: From ADR As Idealistic Movement To A Segmented Market In Dispute Resolution*, 18 Ga. St. U.L. Rev. 927, 935-937 (2002)

<sup>79</sup> See Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent With The Rule Of Law? Lessons From Abroad*, 56 De Paul Law Review 569, 572- 577 (2006) gives an elaborate account of exporting of ADR by different organisations.

<sup>80</sup> Garthy, *supra* note 77, 930-933

<sup>81</sup> *Id.*, at 949

<sup>82</sup> To put it in authors own words: "The proliferation of a literature on "winning ADR strategies" helped to fuel the response of ADR advocates asserting that the original aims of ADR were being subverted. ... [T]he elite litigators added a menu of alternatives allowing easy manipulation of the process to the type of claim, the goals of the company, the stakes, and the timing of the dispute. They built a special justice system that allowed them to use elite "neutrals" whose background and the selection process ensured they would be able to understand and handle large business disputes. *Id.*, at 950

well, and this relatively small group dominates the agenda for federal court reform as well as the elite ADR market.”<sup>83</sup> The issue of ‘repeat players’ and their potential influence due to their familiarity of the system is another concern.<sup>84</sup> This discussion points to the fact that there are voices to be heard before glorifying ADR. ADR could be a very strategic move of power play and privatization of justice.

Privatization of justice is a valid concern expressed by scholars.<sup>85</sup> The beneficial situation of repeat players and the transfer of public power to private bodies through ADR is seen as the offshoot of the changing status of states as a regulator.<sup>86</sup> Privatization and informalization of justice could run counter to the claims of rule of law. The major criticisms of this process are as follows<sup>87</sup>

1. Prevents elaboration of development of law and precedent.
2. Public trials and publication of the decision results in protection of individual rights. Most of the ADR processes do not give scope for the same<sup>88</sup>
3. Lack of public accountability
4. Loss of law’s educative function
5. Obscuring unequal social powers using the language of compromise, settlement and relationships<sup>89</sup>
6. Prejudices forming part of the dispute settlement process. Prejudices of the parties are more likely to be apparent in informal proceedings and especially when they are away from public eye
7. Women and other traditionally marginalized sections of societies would be worse off in ADR proceedings

ADR, especially the arbitration component is conceived as private in nature.<sup>90</sup> In the words of Carrie J. Menkel-Meadow, “[a]s we move to private systems of informal and

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<sup>83</sup> *Id.*, at 930

<sup>84</sup> Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc’y Rev. 95 (1974). See, Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio St. J. on Disp. Resol. 19, 20 (1999). Also see, Garthy, *supra* note 77, 932 - 934. The author highlights the relative benefits of repeat players as: 1. their familiarity with arbitrators and their view points helping them in the selection of arbitrators 2. arbitrators interest in pleasing these parties for securing future assignments 3. fostering of unethical practices. The problem is much higher where two parties involved are differentially positioned, ie., one a repeat player and the other a one-shot party.

<sup>85</sup> “[T]hus what is essentially a system of private justice has been established through international commercial arbitration movement in the name of facilitating international trade and business.” B.S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 Leiden Journal of International Law, 1 (2004). In the same work author quotes M. Sornararaja ‘ Globalization and International Law: The Law as an Instrument of Hegemonic Power’ and states that ‘the world of international commercial arbitration is controlled by a club of arbitrators who make law that is favourable to the large commercial conglomerates that straddle the world.’ Also see, Reuben, *supra* note 9. Reuben, *supra* note 53

<sup>86</sup> Reuben, *supra* note 53, at 953.

<sup>87</sup> Sternlight, *Supra* note 78, 570-571. Kimberlee K. Kovach, *Centennial Reflections on Roscoe Pound's The Causes of Popular Dissatisfaction With The Administration of Justice*, 48 S. Tex. L. Rev. 1003, 2007, 1026- 1042

<sup>88</sup> See *supra* notes 84, 86

<sup>89</sup> See *supra* note 3

private decision-making some have questioned whether settlements are entered into coercively and secretly without the protections of the rule of law, public accountability for decision-making and equalization of economic and psychological or social power imbalances ... Some worry that there will be no way to monitor competence or quality and our legal system will not only fail to produce publicly declared precedents, but will produce "bad" private justice."<sup>91</sup> The matter of concern is that these 'worries of some' are being proved right.

#### IV

The attempts to find answers for the problems existing in the present day legal system could be categorized into two: 1) revivalist- attempting to traditionalize the system<sup>92</sup> 2) approach of fusion - wherein creative syntheses of Indian and Western methodologies are sought.<sup>93</sup> The Institute for the Study and Development of Legal System suggests a three-tier reform action plan.<sup>94</sup> It is an integration of court administration,<sup>95</sup> case management<sup>96</sup> and consensual dispute resolution (CDR).<sup>97</sup> The implementations of these suggestions would be through the Ministry of Law and Justice, Government of India, which is expected to pilot a series of amendments, especially in procedural laws. The proposed picture seems to be very optimistic but needs the right direction. A perusal of the document will reveal that the work has been steered by propulsions post new economic policy.<sup>98</sup> Both the means and ends should be creditable for a process to be justified.

The first two proposals to streamline the judicial system is yesterday's need. The proposal on CDR needs further evaluation to see how pragmatic it could be. The suggestion is, for a court annexed scheme, and making available opportunities for a selection of alternative processes. This tends to be State centric and does not directly provide access, but indirectly facilitates regaining the lost faith of the people by early disposal of the cases. This does not widen the net of the centers of justice delivery. The

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<sup>90</sup> Kirk W. Schuler, *ADR's Biggest Compromise*, 54 Drake L. Rev. 751, 779 (2006)

<sup>91</sup> *Id.*, at 780-781

<sup>92</sup> See Generally, MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA*, Chapter 3 (1997)

<sup>93</sup> *Id.*, at 47. The author comments that such a system is easy to call for, but hard not only to produce, but to portray.

<sup>94</sup> Hiram E. Chodosh et al., *Reform of the Indian Civil Justice System: Limitation and Preservation of the Adversarial Process*, 30 N.Y.U. J. Int'l L. & Pol. 1, 1-78 (1998).

<sup>95</sup> "Court administration," consists of the internal management of the courts, including classification system, monitoring, coordination and case-flow tracking mechanisms. *Id.*, at 59

<sup>96</sup> Case management is said to be an early, managerial intervention by a judicial officer in the parties' preparation of a civil case. The primary features being, early identification of disputed issues of facts and law, establishing a procedural calendar and initiation and coordination of consensual resolution process. *Id.*, at 61

<sup>97</sup> Consensual Dispute Resolution is expected to contain a variety of techniques like, mediation, arbitration etc. to create a variety of options for dispute settlement. *Id.*, at 66

<sup>98</sup> *Id.*, The concerns of a 'new market oriented society' and realizing the legal commitment to 'liberal economic policies' echo in the document. Major portion of the later effort of ISDLS in India has been linked to development of better IPR enforcement mechanism. See, [http://www.isdls.org/projects\\_india\\_history.html](http://www.isdls.org/projects_india_history.html). This should be read coupled with the mounting interests of international players like World Bank and IMF among others in promoting alternate techniques like arbitration in the larger canvas of rule of law.

proposed system needs a comparatively high initial investment, which in the present economic trend will lead to privatisation of justice, escalating the price tag.

The experience of the working of the *Lok Adalats* is also said to be not at optimal level, as infectious delay and backlog is affecting them as well.<sup>99</sup> So, the answer is elsewhere. The search should start from the elemental position; what does one desire? When justice is one's right, access to it becomes an integral part of the right. How does one reach this desired goal? What are the impediments involved? The solution ought to be specific to the existing problems. A revival of the bygone culture would be an idealistic approach and a society ridden by castes and partisan politics does not offer a potential ground. The existing system cannot offer any solution in the present form either. This calls for a structure that is alternate at the same time conducive to the demands of justice.

It is very apparent that having an efficient alternative to litigation that answers the problems of access to justice is the need of the day. The enduring argument then is that creating alternatives should not be to by-pass the problem. It does not rule out the possibility of creating alternatives that can fabricate a structure with accessibility. The problems in the model of litigation need to be addressed at different levels simultaneously, and is a process that cannot be instant. Therefore, it becomes imperative to search for alternatives that go concurrently with moves for reforms in the existing system.

The most compelling reasons to adopt an alternative means, to the author, are dual; access to justice and social harmony. Though the issue of access to justice could be well addressed by way of changes in the existing structure, social harmony is something beyond the perception of litigation that creates winners and losers. Looking through the models of dispute resolution, the one that is most congenial to social harmony and cohesion invariably is the interest-based model. Development of a model that is justice oriented and integrates the need of the respective population should be the pursuit.<sup>100</sup> A fine synchronization of litigation that will respond to the rights of the people along with local level alternative methods of dispute resolution wherein one can be responsible to oneself and to the society will be a model to aspire.

Introspection into what stimulates the expansion of ADR should not lead one to the sole reason of adaptation headed for a 'newly market-oriented society' nor should it be a tradeoff of justice for harmony. But access to justice and social solidarity should be the leadlight for such an endeavour. The citadel of justice should not shut in front of the common person 'Before the Law' as Kafka portrays.

... Yet in his darkness he is now aware of radiance that streams inextinguishably from the gateway of the Law. Now he has not very long years gather themselves in his head to one point, a question

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<sup>99</sup> Chodosh, *supra* note 93, at 42

<sup>100</sup> An experimental project of an NGO who tried to establish a litigation free village could be a pointer. The process was by conducting a series of *Lok Adalats* with the help of the District Legal Services Authority to find solutions to the existing problems. The retreat of the project was done by establishing a harmony committee of selected villagers who were put in charge of maintenance of the litigation free status. Thos village was formally declared as the litigation free village and probably is claimed to be the first of its kind in the Nation. See. <http://www.jananeethi.org/jananeethi/reports/thichurreport.pdf> .

he has not yet asked the doorkeeper. He waves him nearer, since he can no longer raise his stiffening body. The gatekeeper has to bend way down to him, for the difference in height between them has altered much to the man's disadvantage. "What do you want to know now?" asks the doorkeeper; "you are insatiable." "Everyone strives to reach the Law;" says the man, "so how does it happen that for all these many years no one but myself has ever begged for admittance?" The doorkeeper recognizes that the man has reached his end, and to let his failing senses catch the words, roars in his ear: "No one else could ever be admitted here, since this gate was made only for you I am now going to shut it."<sup>101</sup>

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<sup>101</sup> See, Franz Kafka, *Before the Law*, available at <http://records.viu.ca/~johnstoi/kafka/beforethelaw.htm>