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ACCESS TO JUSTICE: A CRITICAL ANALYSIS OF ALTERNATE DISPUTE RESOLUTION MECHANISMS IN INDIA

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ABSTRACT: *The notion of justice evokes the cognition of the rule of law, of the resolution of conflicts, of institutions that make law and of those who enforce it. The dispute resolution mechanism chosen by a society reflects the concept of justice in that society. Access to justice, in its widest sense of the effective resolution of disputes whether through court-based litigation or alternative dispute resolution processes, is an essential aspect of ensuring the realisation of the fundamental rights recognised and given protection by the Constitution. With the emergence of the welfare state, the right to access to justice has become an effective right wherein not only the right to litigate or defend a claim, but also the right to access such forums and have parity of power with the other litigants. This article seeks to critically analyze the alternative methods of access to justice and suggest an alternative model of access to justice to suit the needs of Indian society.*

Keywords: *access to justice, courts, litigation, alternate dispute resolution, Lok Adalat.*

I. INTRODUCTION

The term "access to justice" cannot be given any precise meaning. Its meaning is intricately intertwined with the meaning of the term "justice." On its turn, the definition of justice depends on the context it is being used. For every society the term has a different significance. For some it may be fairness whereas others might term it as advantage of the stronger. The notion of justice evokes the cognition of the rule of law, of the resolution of conflicts, of institutions that make law and of those who enforce it; it expresses fairness and the implicit recognition of the principle of equality.[1] However, a concept common to all definitions of justice is its intrinsic nexus with the dispute resolution. The primary goal of a dispute resolution mechanism is to do justice, yet dispute resolution and justice cannot be used interchangeably[2]. The dispute resolution mechanism chosen by a society reflects the concept of justice in that society.

In the common parlance, the term "access to justice" is used synonymously with the access to dispute resolution mechanisms provided by the State. Earlier, a right of access to judicial protection meant essentially the aggrieved individual's formal right to litigate or defend a claim.[3] The rationale given for such narrow approach to access to justice was that though access to justice was a natural right, natural rights did not require affirmative state action[4]. However, in the recent theories, with the emergence of the welfare state, the right to access to justice has gained grounds. Thus from a passive right, the right to access to justice has become an effective right wherein not only the right to litigate or defend a claim, but also the right to access such forums and have parity of power with the other litigants. However one should not confuse access to justice with access to courts only. First, that it is the police and other public officials who are seen as the face of justice rather than the courts. For most people, access to justice is not the same as access to courts. For small disputes and disturbances people are likely to seek settlement from the police in the first instance. If we are to talk seriously about access to justice we must discuss access to an entire justice system – police, prisons, prosecution, service of process, adjudication, ADR, and enforcement of judgments – that is fair and efficient. This article seeks to

[1] Rawl, J., *A Theory of Justice*, Cambridge, Cambridge University press, Edition 1997, at 11.

[2] The best example elucidating the difference between the concept of justice and dispute resolution is found in the Indian Constitution. The Preamble of the Constitution seeks to secure justice, social, economic and political for all the citizens. This justice is not confined to the court-room justice but the State has to secure it by various policies as enshrined in Directive Principles of State Policy given in Part IV of the Constitution. Article 39-A specifically deals with justice in legal system, wherein it makes it incumbent on the State to secure that the operation of the legal system promotes justice, on basis of equal opportunity, to provide legal aid and to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

[3] Cappilletti, M. & Garth, B., *Access to Justice*, Vol. I, The Florence Access to Justice Project, Sijthoff and Noordoff, Milan, 1978, at 7.

[4] Since these rights were considered to be pre-existing the State, the only condition was that the State should not allow these rights to be infringed.

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II. CONVENTIONAL METHODS OF ACCESS TO JUSTICE

The conventional method of access to justice is the recourse to formal adjudication mechanisms as provided by the State, i.e. approaching the courts. The present model of legal system in India is of British import. Initially confined to the four presidencies, the system started expanding with the inclusion of Indian states in the British Empire. Since the primary concern of the Colonial masters was draining the economic resources of the country to Britain, little thought was given to developing a *sui generis* legal model which could suit the need of Indian society[5]. The community justice system as well as inquisitorial litigation model as prevalent in India prior to the advent of British was alien to the English legal system. Thus the legal system based on common law was imposed on India. A consequence of such imposition was that the bodies of justice administration which earlier existed in India were thrown in cold oblivion and their place was taken by the court type adjudication of disputes. This model of litigation is also known as the adversarial model of litigation. In this model, the State acts an uninterested umpire of the dispute between the private parties. If it is a criminal case, then the proceedings are launched by the State, whereas in civil cases the onus of initiating the proceedings is on the private individuals. It is a known fact that multitude of cases that reach the courts are of civil nature. Thus for a breach of contract or deprivation of a right, which would have happened due to the State's fault, still the proceedings are to be launched by the private individuals. It is pertinent to mention that in British period, no fundamental rights were recognized and thus if any violation of fundamental rights took place, still the State was not liable.

However, with the Constitution of India coming into force, the fundamental policy choice of the nation changed. The people of India, through their representatives in Constituent Assembly, resolved to secure for all its citizens Justice- social, economic and political.[6] Apart from this solemn affirmation in the preamble, Article 14 of the Constitution makes it incumbent on the State not to deny to any person equality before law or equal protection of law. Thus the State is under a duty to ensure that every person is given equal protection of laws and breach of this duty will be a violation of the mandate in Article 14. In addition, Article 256 casts a duty on the State governments to ensure compliance with every law made by the Parliament and every existing law. Thus under the Constitution, a strict duty is cast on the State to ensure that there is a compliance with every law. Violation of a private right is undoubtedly a breach of law and as such if such a breach occurs, the presumption is that the State has failed in its duty of ensuring compliance with every law and giving equal protection of laws to every person. Thus it should be incumbent on the State to initiate proceedings against the faulting party and follow the principle of *restitutio in integrum.*[7]

Thus as per the Constitutional scheme, adversarial model, wherein the Courts perform the role of an arbiter and are not interested in ascertaining truth, has been discarded and impliedly an inquisitorial model has been chosen. Under this model, the Court itself, with help of the officers appointed for this purpose, undertakes investigation, determines which issues are to be taken up during the proceedings and the judge has substantial discretion in doing away with the procedural technicalities.

However, the aforementioned constitutional scheme has not seen the light of the day in practical working. The colonial hang-over is still haunting our legal system insomuch so that we are still following the adversarial model of litigation. Following this alien model has lead to a lot of problems. Some of them are enumerated below:

1. Awareness

The general lack of awareness of legal rights and remedies acts as a formidable barrier to accessing the formal adjudication machinery.

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[5] In fact most of the Procedure Codes today existing in India are of British origin, i.e., they are of pre constitution origin. A pertinent fact regarding these procedure codes is that during the British Period, they were enacted not as well thought scheme of creating justice administration machinery but were more or less of curative nature and were enacted only when need was felt for the same. Another distinguishing feature of these procedural codes is that they were a deliberate hurdle put in the way of access to justice, so much so that a strict entry fee was imposed over those who accessed the British justice administration machinery. E.g. the Court fee Act.

[6] *See* Preamble to the Constitution of India, 1950.

[7] *Restitutio in integrum* means to restore the parties to their original position or status. It means to put the party into the condition they would otherwise have been but for the non-performance of the State executive powers.

2. Mystification

The language of the law, invariably in very difficult and complicated English, makes it unintelligible even to the literate or educated person. And this is the language that courts and lawyers are comfortable with. Very little attempt has been made at vernacularising the language of the law and making it simpler and easily comprehensible to the person engaging with the FLS. This is the second major barrier.

3. Delay

Due to the adversarial model, the expediency of the litigatory process has been sacrificed. In an average, a civil case takes 20 years to settle.[8] This problem of delay is due to the extended role of advocates in the litigation process. Despite being officers of the Court, they do not have any accountability towards expedient disposal of cases. Similarly there is no accountability of the judges to dispose off cases as early as possible. With huge influx of cases on a daily basis and substantial amount of arrears[9], the problem of arrears is taking a gargantuan shape[10]. In this regards, the remarks of eminent jurist, Nani A. Palkiwala can be referred:[11]

"...legal redress is time consuming enough to make infinity, intelligible. A lawsuit once started in India is the nearest thing to eternal life ever seen on this earth.....

I am not aware of any country in the world where litigation goes on for as long a period as in India. Our cases drag over a length of time which makes eternity intelligible. The law may or may not be an ass, but in India it is certainly a snail and our cases proceed at a pace which would be regarded as unduly slow in a community of snails. Justice has to be blind, but I see no reason why it should be also lame: here it just hobbles along, barely able to walk."

4. Costs

The cost of litigation in India is very high. This is also a repercussion of the adoption of adversarial model of litigation. Since the court cases drag on for years, the costs increases manifolds. In a country like India, where a substantial proportion of population still lives below the poverty line, the adverse cost benefit of taking recourse to the courts is very low. In fact the entire adjudicatory mechanism being alien to the Indian society, there is a lack of faith on the judiciary. It aggravates due to the fact that justice seems to be illusory in India.[12]

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[8] In contrast, the speed of the French justice administration machinery is quite remarkable. In France, the small claims court (Tribunal d'instance) settles the cases within 4-5 months. Same is true for cases brought before the commercial courts (Tribunal de Commerce). Large claims (brought before the Tribunale de grande instance) take slightly longer 10 months on an average , whereas the appellate proceedings before the Courts of Appeals take 14 months, and the Supreme Judicial Court(Cour de Cassation) take nearly 27 months to hand over its decisions.

[9] In France, the then Minister of Justice, Robert Badinter, under Francois Mitterand, managed to get the judges to put down their pens and look in their cupboards at the pile of cases to be judged and judgements to be drafted, so as to better organize their work taking into account work flow and practicing time management. *See* for details Lariviere, Daniel S., "Overview of Problems of French Civil Procedure", *45 The American Journal of Comparative Law*, 1997, at 747.

[10] India is a country where there are an estimated 38 million cases pending in various courts, 20 million in District Courts, High Courts and Supreme Court and 18 million in lower courts. 13.4 million of these are criminal cases. 12 million Indians await trial in criminal cases throughout the country. On an average, it takes twenty years for a dispute to be resolved, unless real estate or land is involved, in which case it can take longer. The Thorat case in Pune took 761 years to be settled, it was started in 1205 and ended in 1966. If present rates of disposal continue and there are absolutely no new cases, it will take 324 years for us to clear the present backlog. *See* for details Debroy, B., *In the Dock: Absurdities of Indian Law*, Delhi, Konark Publishers Pvt. Ltd., 2000.

[11] Palkhivala Nani A., *We the nation – lost decade*, New Delhi, UBS Publications 1994, at 215.

[12] In comparison, France has one of the cheapest judicial systems in the world. There is an absence of the notion of discovery, common to legal systems based English Law, also the fact that witnesses do not appear in person before the judges, and the fact, that even in major cases, a civil court hearing simply consists of the hearing of a brief statement of pleadings, all contribute to considerably reduce the time spent by lawyers on a case, their fees, and hence the costs of the case. It is significant that even in cases involving the largest amounts of money, such as when a Court of Appeals rules on a decision handed down by the French Competition Council (Coseil de la Concurrence) or the French Securities and Exchange Commission (Commission des operations de Bourse), a hearing rarely lasts longer than four hours, even if tens of millions of dollars are at stake. As for the preparatory phase prior to the hearing, this is particularly short in this type of case, usually lasting only six months. *See* Lariviere, Daniel S., "Overview of Problems of French Civil Procedure", *45 The American Journal of Comparative Law*, 1997, at 747.

5. Geographical location

This is an aspect that has not merited the attention it deserves. We need to audit the physical accessibility of courts from the point of view of user friendliness. And this need not involve additional costs. For instance, we have not yet designed our courtrooms and buildings to account for the needs of differently-abled people.

6. Access to Constitutional Courts

This is a matter of concern. In our constitutional framework, petitions for protection and enforcement of fundamental rights can be filed only in the High Courts and the Supreme Court. Thus, for instance, even petitions arising out of issues such as disappearances, custodial violence, encounter killings or instances where the police cannot be activated due to various reasons, have to be sent or filed to the High Court. Invariably, this involves travel to the High Court, engaging a lawyer there and regular follow up. A lot of time and expense is involved in this process. Even habeas corpus petitions can only be filed in the High Court. Thus the division of jurisdiction between High Courts and subordinate courts needs to be re-examined. We have the example of South Africa where even the subordinate courts are empowered to enforce some fundamental rights. The question that we need to address is whether we need to permit the subordinate courts to deal with some of these critical issues, which have a direct bearing on the rights to life and liberty, in order to facilitate access to justice.
Thus it can be fairly concluded that the present method of access to justice is totally unsuitable for the Indian society. An alternative method of access to justice has to be formulated.

III. ALTERNATIVE DISPUTE RESOLUTION METHODS

Equality is the basis of all modern systems of jurisprudence and administration of justice in so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal and laws which are meant for his protection have no meaning and to that extent fail in their purpose.[13] "Alternative dispute resolution" encompasses arbitration, mediation, conciliation, and other methods—short of formal litigation—for resolving disputes. Alternative dispute resolution offers several advantages over a lawsuit. It is less adversarial and in some cases can be faster and less expensive. It can also reduce court workloads. For these reasons its use is being promoted by court reformers in many developing and transition economies.[14] When we adopt a model of alternative dispute resolution, we have to see that there is a parity of power between the parties to the dispute. Thus a good dispute resolution method should be such which minimizes the advantage of money and pelf. In addition, a good alternative dispute resolution mechanism should pass the acid test of conforming to all the bands in the power spectrum as enunciated by Prof. Julius Stone.[15]

ADR today falls into two broad categories: court-annexed options and community-based dispute resolution mechanisms[16]. Court-annexed ADR includes mediation/conciliation—the classic method where a neutral third party assists disputants in reaching a mutually acceptable solution—as well as variations of early neutral evaluation, a summary jury trial, a mini-trial, and other techniques. Supporters argue that such methods decrease the cost and time of litigation, improving access to justice and reducing court backlog, while at the same time preserving important social relationships for disputants.

Some definitions of ADR also include commercial arbitration: private adversarial proceedings in which a neutral third party issues a binding decision. In year 1996, India enacted the Arbitration and Conciliation Act based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, which makes an arbitral award legally binding and grants broad rights to commercial parties choosing arbitration. However, arbitration,

[13] Law Commission of India, 14th Report on *Reform of Judicial Administration*, at 587.

[14] Mnookin, Robert H., *Alternative Dispute Resolution*, in Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law.* vol. 1, London: MacMillan Reference, 1998, at 236.

[15] Stone Julius, *Social Dimensions of Law and Justice.* Stanford: Stanford University Press, 1966**.** The bands are coercion band, ethical band, influence band, interest affected band, head count band and time count band.

[16] Community-based ADR is often designed to be independent of a formal court system that may be biased, expensive, distant, or otherwise inaccessible to a population. New initiatives sometimes build on traditional models of popular justice that relied on elders, religious leaders, or other community figures to help resolve conflict. India embraced Lok Adalat village-level people's courts in the 1980s, where trained mediators sought to resolve common problems that in an earlier period may have gone to the panchayat, a council of village or caste elders. Elsewhere in the region, bilateral donors have recently supported village-based shalish mediation in Bangladesh and nationally established mediation boards in Sri Lanka. In Latin America, there has been a revival of interest in the juece de paz, a legal officer with the power to conciliate or mediate small claims.

once considered an alternative to litigation, is now afflicted by the same problems of cost, delay, complexity, and dependence on legal representation.[17]

1. Negotiation

Negotiation is one of the alternatives to formal dispute resolution mechanisms. In negotiation, one can settle the disputes by discussing it with the opposing parties or discussion can take place through the representatives of the parties to the dispute. The parties to a dispute can, on their own motion start a process of negotiations through correspondence or through one or two mediators with a view to finding a mutually acceptable solution of the problems.[18] Negotiation, by definition, excludes the participation of an authority that has the obligation or the right to apply a particular rule to the issue in dispute. [19] Negotiations are often dependent on the bargaining power of the parties. Often extraneous terms such as maintaining good relations with the opposing party results in compromising legal rights. The advantage of negotiations is that time is saved and thus time count goes in favour of the process of negotiation.

2. Mediation

Mediation is a process by which disputing parties engage the assistance of a neutral third party to act as a mediator. The mediator is a facilitator who may in some models of mediation also provide a non-binding evaluation of the merits of the disputes, if required, but who cannot make any binding adjudicatory decisions. [20] The parties are free to evaluate the law and the facts, even to err in what is law, is fact or is important, and to walk away with no decision if either of them doesn't like the deal that is offered. [21]

Both in negotiation and mediation, parties are free to waive of their rights. Such waiver is against the mandate of the Constitution. The Supreme Court in *Basheshwar Nath v. Commissioner of Income Tax*[22] and in *Olga Tellis v. Bombay Muncipal Corporation* [23] has authoritatively pronounced that there could be no waiver of right conferred by Art 14. Thus the process of negotiation and mediation do not fit the constitutional scheme.

3. Lok Adalat

"Lok Adalat" is defined 'as a forum where voluntary effort aimed at bringing about settlement of disputes between the parties is made through conciliatory and pervasive efforts'.[24] The Legal Services Authority Act, 1987 provides for setting up of Lok Adalats. Lok Adalats are thus an extended form of conciliation wherein the parties are assisted by the judges and are basically meant to avoid the inordinate delays in the formal adjudication mechanisms and to clear the backlog of arrears of cases[25]. One of the lacuna in the present form of Lok Adalats is that a case can be taken to Lok Adalat only when the petitioner/ claimant wants the same, thus it takes a form of conciliatory approach. Moreover, in Lok Adalats there is no *restitutio integrum*. As mentioned above, conciliations are against the Constitutional mandate.

4. Ombudsman

The Ombudsman is a public sector institution, preferably established by the legislative branch of government, to supervise the administrative activity of the executive branch.[26] The traditional ombudsman has the power to investigate complaints from persons that the administrative activities of the government are being conducted in an illegal or unfair manner, make findings whether or not there has been wrong doing based on the results of the investigations, and make recommendations for improvement if improper administrative conduct is

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[17] Brooker, P., "The 'Juridification' of Alternative Dispute Resolution", *28 Anglo-American Law Review* 1, 1999, at 28.

[18] Singh, A.**,** *Law of Arbitration and Conciliation*, Luknow, Eastern Book Co.,2009, at 345

[19] Koch, K. F., *Access to justice,* in Capilletti, M and Garth B., *Access to Justice -A World survey*, *Supra* note 3 at 4.

[20] *See* Singh, *Supra* note 18 at 347.

[21] Rao, P. C. and Sheffield, W., *Alternative Dispute Resolution, What it is and how it works*, Delhi, Universal Law Publishing Co., 1997, at 211.

[22] AIR 1959 SC 149.

[23] (1985)3 SCC 545.

[24] Rao, P. B. S., "Establishment of Permanent Lok Adalats- A ban or boon?" *Indian Bar Review,* vol xxx1, 2003, at 53.

[25] The ambit of the cases being resolved by the Lok Adalat can differ from time to time depending on the purpose for which it is constituted. Most of the cases decided by them are related to accident claims matrimonial relief, small claims for compensation for Land Acquisition claims, Wages claims, Municipal claims, Compoundable offences, traffic offences etc.

[26] Reif, L. C., *The Ombudsman, Good governance and International Human Rights System*, Martinus Nijhoff Publisher, 2004, at 1.

found. Typically, the ombudsman has no power to make decisions that are binding on the government. Rather, ombudsman uses persuasions to attempt to obtain implementation of the recommendations made for change in administrative conduct. In addition the ombudsman may also have the authority to recommend changes in laws and regulations. In addition, the ombudsman can use publicity to highlight problematic administrative activity through the medium of annual, and sometime special, reports to the legislature.[27]

A few ombudsmen are authorized to engage in Alternative Dispute Resolution during the investigation, for example the Saskatchewan Ombudsman, South Africa Public Protector, Human Rights ombudsmen etc.[28] Unfortunately, in India, the experience does not seem to be encouraging. At Centre, the office of ombudsman known as *Lokpal* is still to see the light of the day. The office of ombudsman, known and called *Lokayukta* has started functioning in some states but is still in nascent phase with no real teeth being given to the said office. [29] The efficacy of the office of ombudsman is still to be seen in India. Since India has no explored this option in the real sense, it will be too early to comment on its constitutionality. However, if the ombudsman functions as an authority under the inquisitorial system, it can prove to be fruitful.

5. Nyaya Panchayat

Nyaya Panchayats in India are an attempt to bring justice nearer to the people. It is an extension of the panchayat systems prevalent in India before the British regime. Since Article 50 of the Constitution directs the state to take steps to separate the judiciary from the executive, *Nyaya panchayats* can be seen as a fulfillment of this directive. *Nyaya Panchayat* usually covers an area covering 7 to 10 villages and a population of over 14,000 to 15,000. It is an elected body which is elected by the Gram Panchayat which on its turn is also an elected body[30].

The essential features of the adjudication procedure of *Nyaya Panchayats* are:

a. simplicity of procedures and flexibility of functioning
b. principles of natural justice to be followed in the proceedings and no other technical procedural laws are followed;
c. laws of the limitation and evidence are not binding;
d. complaints may be made orally or in writing;
e. No legal representation is allowed, although in some civil matters parties may be represented by an "agent".
f. At the stage of reaching a decision, parties are asked to absent themselves; *panchas* confer among themselves and arrive at a decision, which is pronounced in open court.
g. A judgment is written which, after being readout in open court is signed by the parties signifying the communication of judgment to them. Witnesses, if any, are examined on oath or solemn affirmation.[31]

Depersonalization of power appears to arise from the observed psychological fact that readiness of an individual to submit to authority is increased by awareness of similar submission by others, and decreased by awareness their resistance.[32] Thus the non-submission by the majority of the people to the decision of *Nyaya Panchayat* will reduce the tendency of submission of others as well. Then there will be no depersonalized power as well.

A study in Uttar Pradesh indicates that factions within villages can influence the *Nyaya Panchayat* substantially in favour of the powerful fraction, at the expense of justice values.[33] Thus here, even though *Nyaya Panchayat* is an institutionalized system, the power is not depersonalized or transpersonalised. It is personalized power. In fact, the law commission in its fourteenth report reveals that nominated *panchas* may not command the complete confidence of the villagers; nominated *panchas* may be impartial, but the nominating officer may lack first-hand knowledge of local conditions. In that event the freely expressed will of the villagers, in substance would be replaced by untrustworthy recommendations of sub-ordinate officials.

Thus there is violation of Article 14 of the Constitution of India, because there is no protection of laws because this arbitrariness of *Nyaya Panchayats.* Thus Supreme Court in *E P Royappa v State of Tamil Nadu*[34] was right in stating "equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a Republic, while the other, to the whim and caprice of an absolute monarch".

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[27] Reif, L. C., *The International Ombudsman Anthology*, London, Kluwar Law International,), at xxiii.
[28] Reif, L. C., *Supra* note 26, at 16.
[29] Bhatt, J. N., "Ombudsman- An effective ADR?" *AIR 2001 Journal*, at 146.
[30] However in some states the members are also nominated as in the case of Uttar Pradesh.
[31] Bhakshi, U. and Galanter, M., *Panchayat Justice: An Indian Experiment in Legal Access*, in M. Capelletti and Bryant Garth, *Access to Justice – A world Survey*, Sijhoff and Noordhpff, Milan, 1978, at 365.
[32] Stone, J., *Legal System and Lawyer's Reasoning*, New Delhi, Universal Law Publishing Co., 1999, at 604.
[33] Study team Report, *Nyaya Panchayat Road to justice*, Government of India, 1963, at 65, 72.
[34] AIR 1974 SC 555.

Thus one can say that the effectiveness of the present from of Alternate Dispute Resolution System can be questioned. From Lok Adalats to Arbitration, from Conciliation to Nyaya Panchayats, none of the present mechanisms have been able to fulfill the need of the hour and do not fit in the Indian legal system while some ADR processes such as conciliation and mediation are not effective because of a mediator or a conciliator has no power to order a party to appear and defend a claim. Nor can a mediator or conciliator compel the losing side to comply with a decision. Sometimes the desire to remain on good terms with the other party or to preserve one's reputation provides the incentive to submit to an ADR process and waive their rights. This as mentioned above is against the mandate of the Constitution.

IV. NEW ACCESS TO JUSTICE APPROACH

The discussion on the operating model of access to justice has made it clear that it doesn't answer the requirement of justice. Any model of access to justice has to address the issue of parity of powers. Extra-legal play of power affects the content and effectiveness of legal rules. Judicial process has to take into consideration of these power factors if it considers substantive equality as part of justice. The Alternate Dispute Resolution Mechanisms have been mere window dressing and have not been able to answer the basic realities of the difference of capabilities between the parties. Perfect equality may be impossible but still attempts can be made to build a system of access to justice based on principles on parity of powers.

The present dispute resolution mechanism is a manifestation of private contest of power between two unequal sides. As already pointed out that the adversarial system entails play of extra legal power play and doesn't guarantee decision based on pure legal merit. Therefore the adversarial system needs to be given up. The Inquisitorial system followed in France, Germany, Italy and other Continental countries is more efficient and has been held as a better alternative to the adversarial system. In the inquisitorial system, power to investigate offences rests primarily with the judicial police officers (Police/ Judiciary). The judicial police is required to gather evidence for and against the accused in a neutral and objective manner as it is their duty to assist the investigation and the prosecution in discovering truth. In case of civil matters Stuttgart model[35] will be of great help. It provides that the complainant is to only make a report to the court. The entire responsibility of exchanging, collecting relevant documents and other relevant information is on the court. In India such inquisitorial method will go to a large extend in reducing the litigation costs. The courts will collect the documents from the relevant public offices and so on. The courts will not rely on the information or documents provided by the parties but will be engaged in collection all information regarding to the matter in issue. In this case the whole burden will lie on the State to justify its action. The Indian Civil Procedure Code has to be amended to remove the provisions relating to sending of summons, producing documentary evidences and sending notices. Section 80 of the Code should be deleted. It requires sending of notice to the concerned government department before bringing a suit by the Plaintiff. Time limits for the disposal of cases should be fixed. The Code states that any issue not raised in the trial will not be allowed to be raised in appeal. This provision will automatically stand deleted because the whole burden of investigation of the truth is on the court. Thus inquisitorial mode eliminates advocacy all together. The State stands for the victim and makes administrative inquiry into the matter.

Inquisitorial method alone guarantees parity of arms and disposal of matters on pure legal basis. Individuals cannot overcome disability created due to unequal power balances created due to personal qualification, legal knowledge, and finance and so on. These factors of power play can only be eliminated through inquisitorial method. Mere introduction of inquisitorial system is not enough. It should be coupled with personal liability of the court officers for the failure to discharge duty or for improper performance of their duty. The appellate court should take note of the unreasoned order and hold the officers of the lower court liable for it. While reversing the orders the higher courts should also take note of the failures of duty committed by the officers of the subordinate courts. This will help in identifying the extra legal power factors which have influenced the performance of the duty of the officers and thereby determining the effective implementation of laws. Wherever, the lower courts have acted under influence of extra legal power play they should be made answerable for it.

Section 166[36], of the Indian Penal Code, includes personal liability of the public servants whenever they act in derogation of their duty. Non-performance of duty means disobeying direction of the laws. Section

[35] *See* for details Cappelletti, M. & Weiener, J., *Access to Justice*, Vol. 2, Winchester, Sijthoff and Noordhoff, 1978.

[36] Section 166- Public Servant disobeying law, with intent to cause to any person – whoever, being a public servant, Knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it be likely that he will, by such disobedience, cause injury to any

197[37] of the Criminal Procedure Code which stands as a bar to Section 166 of IPC as it requires prior sanction of the government before prosecuting any government servant should be repealed as it is unconstitutional. It violates the directive under Article 14 of the Indian Constitution. According to the mandate of this Article which is an aspect of the Rule of Law as propounded by Dicey, no man is above the law and every person, whatever is his rank or conditions, is subject to the jurisdiction of ordinary courts.

Justice Marshall defining judicial power said that judicial powers extend to stating authoritatively what the law is. The definition emphasizes on the declaratory character of judicial power. Counter to this opinion is the view of Justice Holmes "the prophesies of what the courts will do in fact and nothing more pretentious are what I mean by the law". The meaning of the statement forcefully indicates that the law for today is to be found in the next case rather than the last. But the Indian Constitution doesn't support the views of Justice Holmes. Article 141 states that only law declared by the Supreme Court shall be binding. This provision eliminates the definition of Justice Holmes and doesn't give scope for law making by the Judiciary. Next it requires the courts to adopt a principle oriented approach rather than precedent oriented approach. It means the courts have to declare the principle of law in unequivocal terms. The principle will enshrine the legal reasoning behind the decision. And then shall apply the principle to the particular fact situation before them in other words would apply deductive reasoning. This will create safeguards against inconsistent, unpredictable and uncertain decisions.

The last but not the least issue of access to justice would be the question of enforcement of rights by the judiciary. Whenever any law or executive action is challenged in the court of law, the court should pass stay orders against the operation of the law or further executive action. As the State is under primary obligation of equality before law and equal protection of laws therefore the State should be called upon to prove that the law or executive action is in conformity with the Constitutional provisions. This is only possible when the courts passes stay orders against the State action. However where the illegal State action has already been consummated then the court should apply the principle of *restitutio in integrum*.

V. CONCLUSION

In the light of above discussion, it can be concluded that the British systems of court adjudication as well as the present methods of alternative dispute resolution have not been effective in India. There are several lacunas in the formal adjudication mechanism which unfortunately is completely alien to the ailments of the Indian society. The legal culture of India has been different from the British culture and as such the British legal system adopted in India has created several new problems. On the other hand, the present alternative methods of access to justice are also not catering to the needs of the people. Arbitration is, undoubtedly, a good method of access to justice. But being based on the UNCITRAL model, it does not specifically deal with the problems faced by the Indians. Another lacuna is that it is based on the adversarial model of litigation which results in delay and high costs. Conciliation and mediation are against the constitutional mandate. Similarly, the present mode of working of Lok-Adalats and *Nyaya Panchayats* has given way to justice being termed as the advantage of the stronger.

There is a much felt need for developing an alternative model of access to justice. Under this model, the judiciary, instead of being a spectator, is involved in the ascertainment of justice and is pro-active. Thus the model that is suggested is an inquisitorial model wherein the judiciary is given the function of investigation and execution also. Not only this, judiciary should be made accountable for any lapse of duty on their part. Under the constitution, it is the State's duty to enforce compliance with every law and also to provide equal protection of law. Thus the Constitution requires a more pro-active role of the state in justice administration. It is high time that the State realizes that the Constitution has envisaged a far bigger role for the State in the Indian Society than what it is being played by it presently. We do not need an alternative method of access to justice, what we need is that the Constitution be enforced in its true spirit. For this an inquisitorial method of access to justice has to be followed.

person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

[37] When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with previous sanction.