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# Indigenous Legal System: Its Relevancy

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## **Introduction:**

“In India more than 70% of disputes were resolved by village Panchayats, comprising selected (by disputants) members of village. It means the role of Ordinary Law Courts in India is that of a small tip of ice berg”. Shivaraj S. Huchhanavar writes in Vol.7 No.1 NALSAR Law Review 2013 an article titled “In Search of True Alternative to Existing Justice Dispensing System in India”:

It is true that, even now more than 70% cases are resolved locally by panchayat, caste groups, trade guilds etc.

The following passage in Complete Works of Sri Aurobindo, Vol. 20 Pages 391-392 is relevant

“A greater sovereign than the king was the Dharma, the religious, ethical, social, political, juridic and customary law organically governing the life of the people. This impersonal authority was considered sacred and eternal in its spirit and the totality of its body, always characteristically the same, the changes organically and spontaneously brought about in its actual form by the evolution of the society being constantly incorporated in it, regional, family and other customs forming a sort of attendant and subordinate body capable of change only from within, — and with the Dharma no secular authority had any right of autocratic interference. The king was the only guardian, executor and servant of the Dharma, charged to see to its observance and to prevent offences, serious irregularities and breaches. He himself was bound the first to obey it and observe the rigorous rule it laid on his personal life and action and, on the province, powers and duties of his regal authority and office.”

## **Let us be frank to admit that Adversarial (English) legal system failed:**

Government of India, Ministry of Home Affairs by its order dated 24 November 2000, under Chairmanship of V.S. Malimath and the said Committee submitted its report in March 2003 and in it, it is stated that at Page 24:

2.4. “There are two major systems in the world. There are adversarial systems which have borrowed from the inquisitorial system and vice versa.”

It is astonishing that the Committee on Reforms of Criminal Justice System, Government of India, appointed by the Ministry of Home Affairs could find two systems in the world. It has not acknowledged ‘our own system’ i.e. Dharmic / Indigenous legal system.

## **The Committee further goes on to say:**

“2.2. The system followed in India for dispensation of criminal justice is the adversarial system of common law inherited from the British Colonial Rulers. .... In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before a neutral judge. The judge acts like an umpire to see whether the prosecution has been able to prove the case beyond reasonable doubt and gives the benefit of doubt to the accused..... The judge in his anxiety to maintain his position of neutrality never takes any initiative to discover truth. He does not correct the aberrations in the investigation or in the matter of production of evidence before court. As the adversarial system does not impose a positive duty on the judge to discover truth, he plays a passive role.”

Shivaraj S. Huchhanavar writes in Vol.7 No.1 NALSAR Law Review 2013 an article titled “In Search of True Alternative to Existing Justice Dispensing System in India”:

“Around 1970’s the situation in US was not totally different from other developed and developing countries of the world it had suffered all sort of defects for the reason of adopting English system of justice administration. Edward Bennet Williams, as appeared in U.S. News and World Report of September 21, 1970,

: The Legal System isn’t working. It is like scarecrow in the field that doesn’t scare the Crows anymore because it is too beaten and tattered-and the crows are sitting on the arms and cawing their contemptuous defiance.”

In the same manner Earn Warren in his Speech at Johns Hopkins University as Reported in San Francisco Examiner and Chronicle of Nov. 15, 1970,

“The greatest weakness of our judicial system is that it has become clogged and does not function in a fluent fashion resulting in prompt determination of guilt or innocence of those charged with crime. Considering the delay in resolving the dispute Abraham Lincoln has once said: “Discourage litigation. Persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time.”

When regular judicial mechanism virtually sinking, we adopted Alternative Disputes Resolution (ADR), which has not delivered the results.

“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.

“Mandatory process of ADRs requires the parties to negotiate, conciliate, mediate or arbitrate, prior to court action. ADR processes may also be required as part of prior contractual agreement between parties. Whereas, in voluntary processes, submission of dispute to the ADR process depends entirely on the will of the parties.” Shivaraj S. Huchhanavar writes further: “Most commonly used forms of ADRs are Mediation, Conciliation, Arbitration and Lok Adalats. Let us have an eye bird view on these aspects of ADRs.”

**After elaborate discussion he concludes:**

#### **On Mediation:**

“Panchayat system of ancient India can be an example, where we can find the efficacy of mediation as tool of dispute resolution but fundamental distinction lies between both is that Panchayat system is backed by popular support of the whole community and is relatively conclusive and widely respected by the people, that sense of popularity not lies with mediation. Ancient Panchayat system was so efficient because they were not worried about convenience of parties to the dispute, it is the ‘Dharma’ that binds both disputant party and Pancha (mediators). Pancha(s) not only represent the parties to the dispute but they represent the whole community in

which they live. That they no more oblige to settle individual interest but community interest is of greater importance to them, henceforth their decision gains popular support to which every member of that community feels obliged. For this reason, Mediations seems to be toothless and less effective and it is already falling into disused (that has already happened in USA).”

#### **On Conciliation:**

“Tough conciliation acquired statutory recognition in India, their efficacy in resolving disputes or arriving at the settlement is negligible. Nothing significant has been achieved by giving statutory recognition to this mechanism, rather a waste of State resources and hurdle to the disputant parties in the way of choosing appropriate forum of redressal.

“For the failure of this mechanism there are several reasons,

- (a) Lack of proper personnel, inadequate training and low status enjoyed by conciliation officer and too frequent transfer.
- (b) Undue emphasis on legal and formal requirements.
- (c) Considerable delay in conclusion of conciliation proceedings.
- (d) Lack of adjudicating authority with conciliator.
- (e) Failure of conciliation had much impact as failure leads to reference of dispute to Labour Courts and Tribunals.
- (f) Failure to magnetize people as there are little differences in environ of Courts and Conciliation Board(s).”

#### **On Arbitration:**

“Even though all procedural innovation is made adversarial character of this mechanism cannot be undermine arbitrator is adjudicator unlike Mediator and Conciliator. For several reasons arbitration fail to gain much efficacy in Indian Legal system, this system is widely in use at international level.” and On Lok Adalats:

“The Authority or Committee organizing Lok Adalat may, on application from any party to a dispute, refer the said dispute to Lok Adalat, after giving a reasonable opportunity for hearing to all the parties. Lok Adalat shall proceed to dispose of a case referred to it expeditiously. - Shall be guided by principles of law, justice, equity and fair play. - Shall yearn to reach a settlement or compromise between parties. - When no compromise or settlement is accomplished, the case is to be returned to the court which referred it. Then the case will proceed in the court from the stage immediately before the reference.” 