EVERY BANE HAS AN ANTIDOTE

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ABSTRACT

When we talk about 'justice' in India,it is sadly a term quite foreign to the majority of the population. While it may be possible for people with a high level of economic and social stability to strive towards some semblance of justice, it is a very sorry sight to behold the complete and absolute helplessness of the rest. Our Indian societies which are full of evils of all kinds,even the justice could not stay untouched. But nonetheless like every bane has an antidote, in the same way every problem has a remedy. The paper talks about some of the major problems which our Justice system faces and also suggests some remedies for the same.

The paper also deals with some major problems in our justice system like flaws in our laws itself, the well-known "corruption'', speedy trials etc. The researcherstried talking about the entire general and common problem which every individual in our society faces from our system. But the researchers also tried pointing out some rare issues and troubles of our system who nobody generally talks about. These rare issues are very peculiar and thus form the entire basics of the system. Use of ADR in criminal cases is a controversial issue. Malicious prosecution balances the rights of both the parties in criminal cases. Its application needs an overhaul for protecting the innocents from the victimization.

The paper as a whole comprises of all the smallest to the largest problem of the justice system and their remedies. The researchers have tried bringing out all the worse truths of our system, but with a cure in them.

INTRODUCTION

"Justice" the word sounds familiar? This very word is something India is struggling to achieve. We as Indians find ourselves strangled into chains of injustice. Where we are struggling to just get out of it, but the chains of injustice are so strong that we are helpless.

Let's just understand what do we mean by justice and injustice outside the literally world. Suryavalli rape case, Jessica Lal murder case- what is common in all these cases? Yes! All of them got justice but at the cost of what? At the cost of their families, and their struggle to 'achieve' that so-called justice for what 10 years and so?! Is it really worth it? When we Indians quote justice in cases like this, we should know, "Justice delayed is justice denied".

This is just one of the flaws of the justice system. There are several other flaws which either stay unnoticed or not bothered about. All we do is criticise our justice system as "corrupt", "delayed", "for no use", and"influential".

India comes under one of those countries whose justice system is always doubted. It is because of the flaws in our justice system that it is not trusted. But like all the diseases, this disease also has cures, the only thing is that the judiciary needs to inculcate these cures to aspire for a better justice system.

One could do nothing if he doesn't know the root of the problem; to cure a disease, one needs to know the root of the disease first. Diagnosis is the first stepping stone for curing. In the same way to provide remedies for our justice system one needs to know the root of the problem first. The researchers have tried figuring out some important problems in our justice system and the remedies for the same.

ALTERNATIVE DISPUTE RESOLUTION IN CRIMINAL CASES

Settlement of disputes outside the purview of the highly formal and technical judiciary is not new to Indian justice system. Ancient Indian civilizations, marked with the presence of a king, were usually monarchy. In earlier times, disputes were peacefully decided by intervention of *kulas* (family or clan assemblies), *srenis* (guilds of men following the same occupation), *parishads* (assemblies of learned men who knew law) before the king came to adjudicate on disputes.[1]

Litigation in India is very expensive. It bankrupts both the parties. Unnecessary delays in decisions, for whatsoever reason, is essentially destroying the very reason for approaching the court. Justice delayed is justice denied. Poorly written laws are a gold mine for lawyers. Article 14 of Indian Constitution envisages equality before law. However laws are not

[1]http://shodhganga.inflibnet.ac.in/bitstream/10603/10373/8/08_chapter%202.pdf

equally applied in India. Poor and needy are paranoid of judiciary. A staggering level of case backlogs coupled with acute shortage of judges has made the situation worse. All this has considerably eroded the faith of the common man in judiciary[2]. Promotion of justice is a directive principle of the state[3].

ADR or Alternative Dispute Resolution is a mechanism of avoiding the formal, cumbersome, technical, expensive, distant and inaccessible judiciary by resorting to mediation, conciliation, counselling, LokAdalats, NyayPanchayat and other allied mechanisms[4]. It is neither possible nor desirable to captivate the ADR in the walls of a definition. There is a lot of controversy as to the use of word "Alternative" in ADR. Arguments are put forth that ADR only supplants what already exists in the form of formal court of law rather than creating a parallel and alternative justice system. So the correct terms would be "Additional Dispute Resolution. However all this controversy is only semantic in nature. Where on one hand words used are important but on the other hand larger object of ADR shall not be defeated by the nitty-gritties of the language.

ADR in its present day form started developing in 1970s but not without severe criticism. Many jurists started viewing ADR as privatisation of justice. Supporters of ADR were so vociferous and influential that the valid points of their dissidents were left unheard. Settlement of cases where a poor is the victim and rich is the offender is often marred by biasness because poor is in the immediate need of money and has no money for litigation. This may force the victim to reach to a settlement which is less than what he deserved.[5]

With a backlog of 31.3 million cases Indian judiciary has a mountain to climb[6]. Judiciary crippled with vacancy of judges, negligible digitalisation, vague laws, limited resources and repetitive appeals is unlikely to be able to ensure justice to everyone. ADR is an effective tool to address the conflicts which are capable of being solved without litigation. This will significantly reduce the burden on judiciary and it can direct its limited time, resource and manpower towards more important issues incapable of being solved without litigation. Cases by way of ADR can be settled faster and without exorbitant court and lawyer's fees. ADR promotes the dialogue between the parties and tries to amicably settle the issue.

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[2] The Hindu, The Patchy Indian Judicial Record, V.R. Krishna Iyer, Dated September 6, 2007

[3] Article 39A, The Constitution of India, 1949

[4] Alternative Dispute Resolution in India A study on concepts, techniques, provisions, problems in implementation and solutions by NishitaMedha, LokSatta

[5] Against Settlement, Owen M. Fiss, The Yale Law Journal, Volume 93, dated May 6, 1984

[6] Hindustan Times, Citing Supreme Court and Parliamentary Q&A, Dated September 4, 2014

Use of ADR is fairly recognised in settling civil suits[7] like dispute between labour and management[8], disputes relating to marriage and family affairs[9], consumers' grievances[10]. Institutionalised arbitrations are gaining popularity these days[11]. Unlike *ad hoc* arbitrations, institutionalised arbitration panels comprise of expert arbitrators using standardised procedures and charging fixed fee. The great success which ADR has shown in civil cases has prompted the need to ponder upon the prospective of introducing it in the criminal cases also.

Theoretically criminal and civil cases are very different. Civil wrongs are against private individuals and crimes are against the society[12]. If a criminal matter is settled through ADR by the common settlement between victim and offender then only victim gets justice and the society is left unaddressed. Also ADR is usually highly emotionally charged. For the success of ADR it is necessary that ego-clash between both the parties is solved first. ADR is successful in cases where the parties have an on-going relation which usually is not the case in crimes. Also ADR is capable of solving only minor to moderate level of conflict. In civil cases where restorative justice is the object, ADR can be efficiently used to mutually settle the disputes by undoing what is done by the offender. ADR allows free dialogue and solution based discussion between the parties. Unlike in civil cases, the object in criminal cases is punishment or retributive justice to create a deterrence on the wrongdoers. However concept of restorative justice is not an alien to criminal cases[13]. Sec 357 of Code of Criminal Procedure Act, 1973 envisages the conditions when part of the fine recovered in criminal cases can be given to the victim.

Concept of restorative justice is being increasingly applied in criminal cases especially those involving minor offences, juveniles or first time offenders. Theory of retribution, restoration and rehabitation are wisely balanced while giving judgements in criminal cases. Face-to-face free dissemination of the feeling of the victim and offender helps both the parties to understand each other and show compassion, repentance and forgiveness. Dispute is settled in such a manner as to ensure that the victim is compensated and offender is punished leaving a scope for his rehabitation.

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[7] Section 89 of Code of Civil Procedure, 1908
[8] Section 12, Industrial Disputes Act, 1947
[9] The Family Courts Act, 1984
[10] Consumer Protection Act, 1986
[11] IndianCouncil of Arbitration and the International Centre for Alternative Dispute Resolution
[12] http://criminal.findlaw.com/criminal-law-basics/the-differences-between-a-criminal-case-and-a-civil-case.html
[13] Section 265E(a) of Code of Criminal Procedure, 1973 provides for the compensation under plea bargaining.

ADR was first used in criminal cases in Ontario, Canada in late 1970s. Use of ADR in criminal cases is at its initial phase in some western countries and Australia. ADR in criminal jurisprudence includes victim-offender mediation program, family group conferencing, victim assistance program, Plea Bargaining[14], ex-offender assistance, victim offender-panels community crime prevention programs; sentencing circles; community service; plea bargaining; school programs etc.[15].

In victim-offender mediation program both the parties come together and share their experience. This sympathises both the parties towards each other. In family group conferencing not only the victim and offender but also their family members sit together. Family members usually behave more rationally. Offender also realises the problem which his family is facing because of his guilt. In plea bargaining there is an informal understanding between the prosecutor and the offender that if the latter changes his plea from no-guilt to guilt then the former will demand for less punishment[16]. Plea Bargaining is incorporated in The Code of Criminal Procedure, 1973 u/s 265A-265L of chapter XXI A.[17] Community Dispute Resolution Programmes are used to solve minor offences. Role of the community ensure that justice is given to not only victim but also the entire society.

Use of ADR will enable the criminal cases to be settled easily, quickly, amicably and without formalities, delays and exorbitant fees. When disputes are settled by mutual consent in ADR rather than by order in courts of law then the chances of appeals will also fall. This will reduce the burden of workload on higher judiciary.

Going by the success and criticism in the use of ADR in criminal cases it is suggested that a balancing act needs to be done wherein ADR shall be used in criminal cases but not without any limitations. All the criminal cases shall not be decided by ADRs. Only those cases which are capable of being settled through ADR and which are of minor to moderate offence can be referred to ADR. Factors like age of the offender, family background and financial conditions of both the parties, criminal history of the offender, gravity of the actual damage to the victim, motive of the crime etc. should be considered before referring a case to the ADR. The objective yardstick comes from the existing proviso in Cr.P.C. itself.

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[14] 142nd Law Commission Report

[15] Applicability Of Adr In Criminal Cases, Anoop Kumar, Manupatra

[16] 154th report of Law Commission of India on The Code of Criminal Procedure, 1973

[17] Criminal Law (Amendment) Act, 2005

Section 320 of Code of Criminal Procedure, 1973 envisages the conditions when an offence can be compounded. The rationale behind this section is that in cases of minor offences victim shall be allowed to settle the case outside the purview of formal court. This can reduce the burden of criminal courts and also enables both the parties to enter into an amicable solution. Since all these reasoning also holdsgoodfor the introduction of ADR in criminal cases it is suggested that the compoundable offences shall be allowed to be disposed outside the court through ADR.

The following recommendation shall be incorporated in the Code of Criminal Procedure, 1973-

1. Any criminal case for an offence under the sections of Indian Penal Code, 1860 listed in the first column of the Table in section 320(a) of Code of Criminal Procedure, 1973 shall be referred to an institutional arbitration penal or any *ad hoc* arbitrator as found suitable by the formal court after seeking the opinion of both the parties unless the court is of the opinion that it could highly endanger the national security, public order, administration of justice or the case is of such a unique nature that the court finds the arbitrators to be incompetent to deliver the judgement.

2. Cases for an offence under the sections of Indian Penal Code, 1860 listed in the first column of the Table in section 320(b) of Code of Criminal Procedure, 1973 shall be referred or not referred to an institutional arbitration penal or any *ad hoc* arbitrator as found suitable by the formal court, keeping in mind the consent or dissent of the parties concerned and for such purpose the following provisions shall be used-

   a) If both the concerned parties consented for the settlement outside the formal court then courts shall apply the same provisions as for the offences in section 320(a).

   b) If the party listed in third column agrees but any other concerned party disagrees for the transfer of case to the arbitrator then the case should be referred for the arbitration only to the extent of hearing the case and admission of the evidence but the final judgement shall be made by the formal court only after considering the observations of the

arbitrator(s). Such reference to the arbitrator may be denied on the same grounds as for denial in cases listed in 320(a)

c) If the party listed in third column does not agree with the reference of the case to the arbitrator then, irrespective of the consent of any other concerned party, such case shall not be in any manner transferred to any institution other than the formal court of law.

3. Factors like age of the offender, family background and financial conditions of both the parties, criminal history of the offender, gravity of the actual damage to the victim, motive of the crime etc. shall be considered before the transfer of the case under 1, 2(a) and2(b).

ADR other than arbitration shall be promoted and once they become institutionalised and legally developed then in phasic manner they should be incorporated in Cr.P.C.

Formal courts may in starting be paranoid of transferring the cases to ADR but in the years to come ADR will become an integral part of criminal justice system. Use of ADR should go a long way in future and it shall cover an increasing ambit of criminal cases.

CORRUPTION; THE DELAYED JUSTICE.

Corruption the monster which is eating our country from inside. Corruption not only has become a pervasive aspect of Indian politics but also has become an increasingly important factor in Indian elections. The extensive role of the Indian state in providing services and promoting economic development has always created the opportunity for using public resources for private benefit.

As government regulation of business was extended in the 1960s and corporate donations were banned in 1969, trading economic favours for under-the-table contributions to political parties became an increasingly widespread political practice. During the 1980s and 1990s, corruption became associated with the occupants of the highest echelons of India's political system.

Rajiv Gandhi's government was rocked by scandals, as was the government of P.V. NarasimhaRao. Politicians have become so closely identified with corruption in the public eye that a Times of India poll of 1,554 adults in six metropolitan cities found that 98 percent

of the public is convinced that politicians and ministers are corrupt, with 85 percent observing that corruption is on the increase.[18]

Corruption in simple terms may be described as 'an act of bribery'. Corruption is defined as the use of public office for private gains in a way that constitutes a breach of law or a deviation from the norms of society. Scales of corruption can be grand, middling or petty and payment of bribes can be due to collusion between the bribe taker and the bribe giver, due to coercion or even anticipatory.

This corruption has affected our judicial system very badly. People have lost their hopes on the justice system of our country as well. Cases like Jessica lal murder case[19] where a model in New Delhi who was working as a celebrity barmaid at a crowded socialite party when she was shot dead at around 2 am on 30 April 1999. Dozens of witnesses pointed to SiddharthVashisht, also known as Manu Sharma the son of Venod Sharma, a wealthy and influential Congress-nominated Member of Parliament from Haryana as the murderer. But later due the political influence most of them walked backed and some just vanished therefore could not appear to be the witness. The prosecution had been affected by 32 of their witnesses becoming "hostile". In the trial all the accused were acquitted. But later due the intense media pressure, the prosecution appealed to the Delhi high court where the accused were held liable. The High court also believed that it was quite evident during the trial that the witnesses were influenced. They also question the services of the trial court Judge who was so neglected of this *prima facie* evidence. This strong and deep is the roots of corruption in our justice system. This made Jessica struggle for 12 years before she could attain "JUSTICE". Exactly the same political influence in Suryanelli rape case[20] where the victim was rape for 40 days by innumerable men. But the victim was given justice after 8 years.

There is no point of justice which is given after years of struggling. The justice which biased and filled the filthy blood of corruption..!!!

It's high time that all this should be stopped and to stop this we have to make sure that anyone who is a sitting Member of Parliament should not have any criminal cases pending against him. Recently Transparency International India (TII) sent a letter to the PM which says, "We demand special courts which should be fast tracked, be set up for dealing with

[18] Articles.economictimes.indiatimes.com
[19] En.wikipedia.org/wiki/Muder_of_Jessica_Lal
[20] www.ndtv.com/topic/suryanelli-rape-case

all politicians especially legislators, charged with heinous offence against women, including rape and molestation".[21] This demand is still under consideration. Though earlier it was criticise under article 14 of the Indian constitution, for right to equality. But this criticism is also criticised because MP and MLA are basically the leaders and to run a smooth government and country it is important that we shouldn't have faulty rulers. Therefore, in order to make the justice system free from political influence only those members should be given a chance that doesn't have a pending criminal case against them. All the members of parliament who have any pending cases against them should be treated under speedy trials which make us as common man clear as to where our political leaders stand. Though all these actions should be taken only once a charge sheet is admitted in any competent court of law against the leader because anyone could take undue advantage of this power and can also file a false complain and so in order to avoid this any action against the minister should be taken only after the filing of the charge sheet.

MALICIOUS PROSECUTION: A WEAPON AGAINST VICTIMIZATION

Courts in India bankrupt both the parties. Exorbitant fees of courts and lawyers have made justice "unaffordable" for the common man. Justice, if at all delivered, goes through a tedious and slow process of appeals, revisions and adjournments. Courts which are a safeguard against harassment have in fact become a platform for harassment. People are misusing the flaws in the justice delivery system to harass people with frivolous complaints. Effect of frivolous and baseless complaints does not end with the "victimization" of an innocent. It proceeds further by unnecessarily burdening the judiciary and thereby effecting the efficiency of judiciary in solving the genuine cases. Malicious Prosecution comes at the rescue in these situations. But its use has failed to deter the people from filing frivolous and vexatious cases. This prompts a need to overhaul the existing laws relating to malicious prosecution.

Malicious Prosecution is a tort of malicious institution against another of the unsuccessful criminal proceedings without reasonable or probable cause.[22]Prosecutors who bring criminal cases without adequate justification may be sued for doing so, and may not be protected by

[21] www.tehelka.com/tii-demands-fast -tracks-for-politicians-involved-rape-molestation-cases

[22] Ratanlal and Dhirajlal, The Law of Torts, 26th Edition by Justice G.P. Singh, LexisNexis ButterworthsWadhwa

prosecutorial immunity if the prosecutors' actions were egregious enough.[23] Malicious Prosecution balances two interests viz. right to bring criminals to justice and protection against false accusations.

For the successful malicious prosecution following elements needs to be proved[24]-

- The defendant begin or continue a criminal legal proceeding
- Without reasonable grounds to believe the allegations of the proceeding
- and with a purpose other than simply getting a judgment in the proceeding
- the defendant has lost the original "false" case he or she brought against the plaintiff, and
- the plaintiff was damaged by the defendant's "false" case.

In malicious prosecution plaintiff must have been prosecuted by the defendant. Prosecution in this sense is not the technical prosecution but the stage which is capable of causing damage.[25] Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead to any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.[26] Judgement of the criminal court cannot be a ground to declare a case to be reasonable or frivolous in civil court.[27] Malicious prosecution requires the malice in fact or express malice or *malus animus* or improper motive. The ulterior object of filing a case should not be to bring justice.[28] The case in the criminal court should be terminated in the favour of the plaintiff.[29] The plaintiff from such unreasonable

[23]http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-offense/suing-for-damages-malicious-prosecution
[24]http://www.alllaw.com/articles/nolo/personal-injury/what-malicious-prosecution-claim.html
[25]Braja Sunder Deb v. Bamderdas, AIR 1944 PC 1
[26]REASONABLE AND PROBABLE CAUSE IN THE LAW OF MALICIOUS PROSECUTION: A REVIEW OF SOUTH AFRICAN AND COMMONWEALTH DECISIONS, Author: C Okpaluba
[27]Gulabchand v. Chunilal, (1907) 9 Bom LR 1134
[28]MadhurLalAhirGayawal v. SahaiPandeDhame, (1900) ILR 27 Cal 532
[29]Osumanyawa Yaw Ewna v. Nana Sur Ofori Atta, AIR 1930 PC 260

and false prosecution must result in some actual damage to reputation, physical health or property of the plaintiff.[30]

These ingredients and their interpretation has deterred many victimized people from claiming damages under Malicious Prosecution. "Plaintiff was prosecuted by the defendant" and "Termination of proceedings in favour of the plaintiff" are the elements which are solved in the criminal court itself and not much pleading is done in the civil court for malicious prosecution.

Much of the pleading in Malicious Prosecution is done on the element of "reasonable and probable cause". Since the prosecution is done for a criminal case so it is but natural that this element should be decided in the criminal court itself. While giving the judgement, the criminal court has already observed all the facts of the case in detail and in such circumstances the criminal court should decide whether a case has a reasonable and probable cause or not. This will reduce the burden of civil courts,plaintiff will need to prove less elements in civil courts and the repetition of hearing in criminal and civil court can be avoided. It does not mean that in every case a criminal court should give a judgement on the reasonableness of the prosecution. Cases where the criminal court *prima facie* finds no base the courts should also decide whether there is any want of reasonable and probable cause or not. Accused in a criminal case should have a right to plea on the reasonableness of the case. In such cases the courts shall be bound to decide on it if the accused is proved innocent. The decision of the criminal court shall be binding on the civil court of the same or lower hierarchy. In cases where courts did not see any *prima facie* unreasonableness and the accused also did not plea for it then the civil should have the authority to decide it.

Proof of "express malice" is directly related with the act of filing a case rather than committing a crime. So the logic given for hearing the plea of "reasonable and probable cause" in criminal court does not hold good while pleading for "express malice". Therefore no change in the present law regarding "express malice" is recommended.

The last element malicious prosecution is that the plaintiff should have suffered some damage from the prosecution. The way cases in India are decided makes clear that any innocent person who is prosecuted suffers from some sort of damage. This damage may not be valid in

[30]Sriram Naidu v. KolandaveluMudali, (1916) 20 20 MLT 308

the eyes of law. For example mental harassment and agony not amounting to some recognised mental disease is not a legal damage. There are cases when a plaintiff does not suffer any damage but in reality he has suffered lot of inconvenience by the way of loss of time, mental tension etc. Going by the way justice is delivered in India it can be said that the court spares none and every accused suffers some sort of damage. It is therefore recommended that the element of "damage" should be removed from the malicious prosecution. Malicious Prosecution should become actionable *per se*.

Where on one hand malicious prosecution protects the accused from the frivolous complaints, malicious defence protects the prosecutor from unreasonable and failed defences given by the plaintiff at the time of prosecution with a motive other than bringing justice. Malicious defence is not recognised in India as separate tort. It is recommended that statutory modifications should be made to make malicious defence a tort.

CONCLUSION

Justice system in India is marred by delays, inefficiency and corruption. Politicians and high-profile people try to by-pass the laws by using the loopholes in the law. Huge backlog of cases has made the judiciary cumbersome and inaccessible to the common man. The researchers would now like to point out the diversity of the term 'justice. It is impossible to try and define such a term. It's extremely important for the people to understand, the true meaning of justice and also accept, that the meaning of the same term will have as many interpretations as there are people. There cannot be one notion of justice. What is justice for one, may be injustice to the other. Hence, one should understand, that problems will exist in any judicial system. One can but try to keep striving towards 'justice' or rather, what we *think* is justice. For being a subjective concept, it is not necessary that even our opinions remain constant about the same. What may be justice for a persontoday may not be so five years down the line.

It is concluded that ADR should be used in certain criminal casesand statutory modification should be made in code of criminal procedure, 1973 for the same. MPs and MLAs with charges of heinous crime pending against them and whose chargesheet has been accepted by the courts should be unqualified and should not be allowed to contest elections unless they are acquitted. Malicious Prosecution is a safeguard against frivolous complaints. Changes

should be made in it to make its pleading easier. A separate legislation along with modification in Code of Criminal Procedure, 1973 is recommended. Tort of malicious defence should be statutorily added to protect the victims from unnecessary defences.

Keeping these aspects in mind,a perfect judicial system is a myth. However, with the right will, a good judicial system will never give up its quest for striving towards Justice. Therefore the researchers conclude that our Indian judicial system has many problem but all of them have a remedy with them too. All we have to do is inculcate those remedies and strive to make our justice system better.