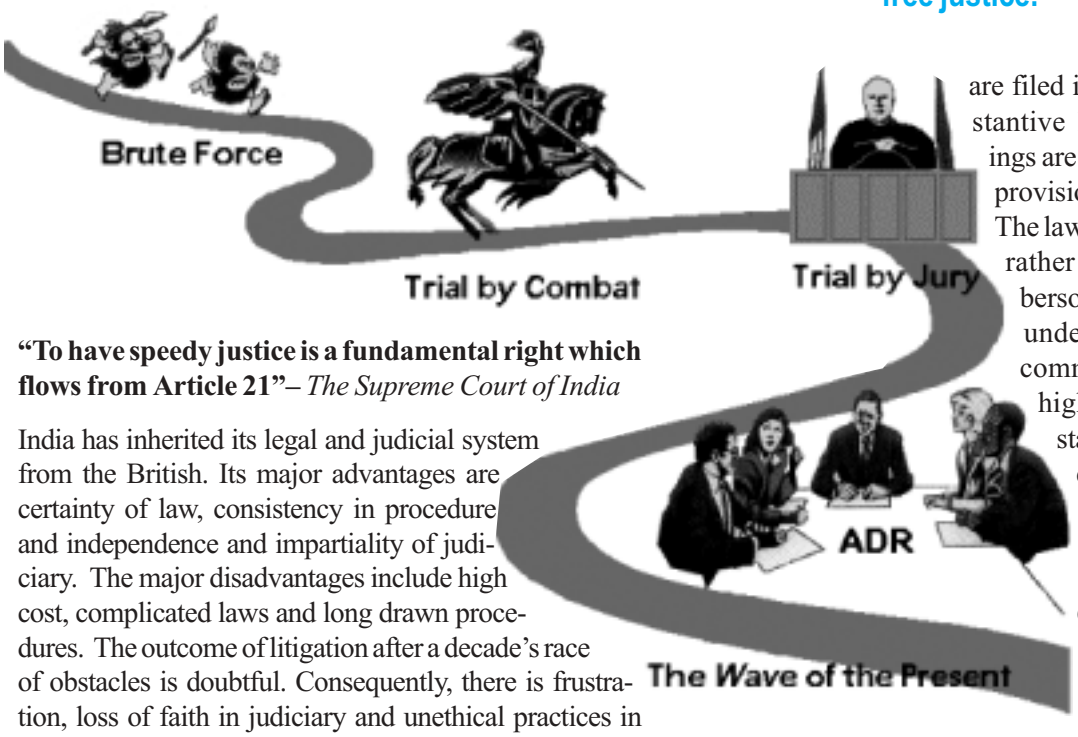
Legal reforms & ADR methods in India

In a welcome move, the Code of Civil Procedure, 1908 (CPC) has recently been amended for expeditious disposal of cases and giving a boost to ADR methods. This article briefly puts in perspective the drawbacks of the legislative and regulatory framework of civil justice, examine the role of ADR methods with a few practical suggestions to facilitate speedy, economic and hassle free justice.

—Naresh Kumar



"To have speedy justice is a fundamental right which flows from Article 21"– *The Supreme Court of India*

India has inherited its legal and judicial system from the British. Its major advantages are certainty of law, consistency in procedure and independence and impartiality of judiciary. The major disadvantages include high cost, complicated laws and long drawn procedures. The outcome of litigation after a decade's race of obstacles is doubtful. Consequently, there is frustration, loss of faith in judiciary and unethical practices in society. The common feeling is "justice delayed is justice denied." On the other hand, Alternative Dispute Resolution (ADR) methods for settlement of disputes outside the court are flexible, speedy, efficient and economical. In a welcome move, the Code of Civil Procedure, 1908 (CPC) has recently been amended for expeditious disposal of cases and giving a boost to ADR methods.

Legislative and Regulatory Framework

India has a plethora of civil laws, rules and regulations, besides the Code of Civil Procedure, 1908 (CPC). Cases are filed in courts under substantive laws, and proceedings are conducted as per the provisions of the CPC. The laws and procedures are rather complicated, cumbersome and beyond the understanding of the common man. Further, high courts of various states, under the powers delegated to them, have made amendments in the CPC. As a result, CPC is overloaded with various judicial pronouncements and interpretations of laws and procedures, enabling lawyers to file interim applications and delay the main issues for years. The important flaws and shortcomings of the civil judicial system include:

Inadequate Funds: India spends only 0.2% of its Gross National Product (GNP) on its judiciary, compared to 4.3% by the UK. Moreover, half of India's 0.2% of GNP funding is itself generated by the court system through court fees and fines. The present annual expenditure of Rs.2 per citizen on justice system is abysmal.

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Shortage of Judges: India ranks among the lowest in the world in the ratio of judges to population. There are only 10.5 judges per million Indians as compared to 113 in the US. The Law Commission had suggested 50 judges per million. Presently, out of a total strength of 749 judges in 21 high courts, there are about 100 vacancies. A judge has about 70 cases on the list every day whereas he can reasonably handle 30 cases a day.

Pending Cases: As on October 2001, there were 2.4 crore civil and criminal cases pending in 8000 courts – which included 2,03,25,756 in district and subordinate courts, 35,57,637 in high courts and 21,995 in the Supreme Court. At current the rate of disposal, it would take about 324 years to clear the backlog of cases. The Allahabad High Court has recently directed that all courts in UP should categorise the cases according to their pendency, and put them in respective file-covers of red, green and yellow. Courts should give top priority to red-cover cases more than ten years old, followed by priority to cases in green and yellow covers.

Delay in Justice: The final disposal of civil cases in the lower courts takes about 5 to 10 years, in high court 10 to 15 years and in the Supreme Court 20 years and more. Over 16 per cent of the pending cares are more than 10 years old.

Inadequate Infrastructure: The available infrastructure in courts is old and inadequate, particularly in states, which require urgent computerization facilities. The modernization of the judicial system is a tricky proposition, as decades of 'all-thought-and-no-action' proves. The worthwhile recommendations and reports of expert commissions and committees continue to be under the consideration of the Government without implementation.

Role of Bar Council: The general impression is that there is laxity on the part of Bar Councils while judging the misconduct of lawyers and in taking appropriate disciplinary proceedings against them. The Supreme Court pulled up the Bar Council of India in a case where a lawyer from Andhra Pradesh cheated his client in 1996. The Apex Court remarked: "It is sad that the Bar Council of India, which is the highest body to monitor the probity of the legal profession in the country, choose to trivialize and treat a very grave professional misconduct lightly". Secondly, so far Bar Councils have not devised any effective system to impart periodic information and update the knowledge of their members on the emerging legal scenario.

Concentration of Legal Work: The present legal system promotes concentration of work with limited number of established law firms and advocates, who charge exorbitant fees more for their names rather than work. The system lacks fair allocation of work amongst advocates. Consequently, there is a tendency on the part of busy and senior advocates seeking adjournments at their convenience. They care little about the need for expeditious justice and interest of litigants.

Expensive Justice: The general impression of litigants is that justice is rather expensive. Invariably commercial interest of lawyers supersedes their civil responsibility.

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Recent CPC amendments

The CPC has also been amended with effect from 01-07-2002 for expeditious disposal of cases by streamlining the procedures and making the ADR methods an integral part of the judicial process. The newly inserted Section 89(1) in the CPC deals with the settlement of disputes outside the court. The section provides that where there is possibility of settlement between the parties, the Court should formulate the terms of settlement and give them to the parties for their observations. The Court may, after receiving the observations of the parties, reformulate the terms of a possible settlement and refer the same for –

(a) Arbitration;

(b) Conciliation;
(c) Judicial settlement including settlement through Lok Adalat; or
(d) Mediation.

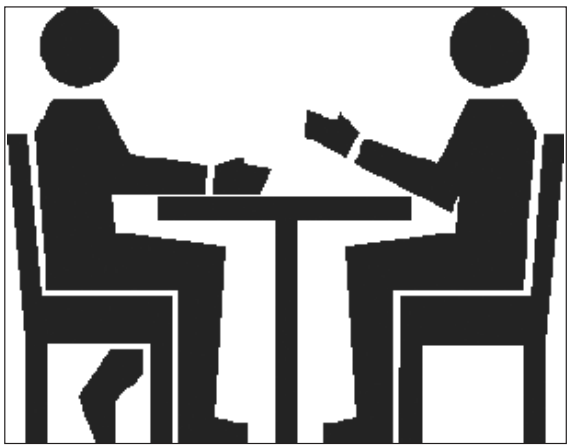
Sub-section (2) of Section 89 deals with the application of specific legislation in respect of arbitration, conciliation, judicial settlement or mediation as indicated below:

(a) Arbitration or Conciliation - The provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the dispute is referred for settlement under the provisions of that Act.

(b) Lok Adalat – The Court shall refer the dispute to the Lok Adalat in accordance with the provisions of sub-section 20 of the Legal Services Authority Act, 1987, and, the provisions of that Act apply.

(c) Judicial Settlement – The Court shall refer the dispute to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply.

(d) Mediation – The Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.



Enabling provisions have also been made by inserting Rules 1, 1A, 1B and 1C under Order X of the CPC, which state as under:

Rule 1 – Examination of Parties by the Court

Rule 1 provides that at the first hearing of the suit, the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of facts as are made in the plaint or written statement, which are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denial.

Rule 1A- Direction of Court to opt for any one mode of alternative dispute resolution: Rules 1A provides that after recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement under sub-section1 (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

Rule 1B - Appearance before the conciliatory forum or authority: Rule 1B provides that where a suit is referred under rule 1A above, the parties shall appear before such forum or authority for conciliation of the suit.

Rule 1C - Appearance before Court consequent to failure of efforts of conciliation: Rule 1C provides that where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority feels that it would not be proper in the interest of justice to proceed with the matter further, he shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.

In the event of resolution of dispute under section 89(2), the court fee paid on the suit or proceeding shall be refunded in accordance with the provisions of the Court Fee Act, 1870.

The Supreme Court of India has appointed a five-member panel headed by a sitting Supreme Court judge to devise a "model case management formula" and rules and regulations for the trial and high courts to select cases to be referred to arbitration, conciliation, mediation and judicial settlement for the out of court settlement. The underlying objective is to ensure that the new provisions are made effective resulting in quicker dispensation of justice.

The Government has, as a part of economic liberalization process, aligned Arbitration and Conciliation Act, 1996 (Act) with Model Law of United Nations Commission on International Trade Law.

ADR System

The ADR system is a holistic concept of a "consensus-oriented approach" to deal with potential and actual disputes. The concept encompasses conflict avoidance, conflict management and conflict resolution. In the traditional justice

dispensing system of India, judges do not resolve disputes, but decide and adjudicate on disputes. The ADR methods, on the other hand, aim at resolving disputes through consensual interaction between the disputants. The fundamental difference between approach of a judge and a conciliator lies in deciding a dispute versus resolving a dispute. A judge has wide powers under the law to decide the dispute brought before court, whereas a conciliator has to use his knowledge and skills to facilitate resolution of the disputes by the parties themselves.

The ADR system provides fair and workable alternatives to the traditional judicial system. The methods give better and qualitative results than the adversarial system. The underlying object of ADR system is to empower individuals to resolve their own disputes with minimum outside help. The ADR methods, by amicably and promptly resolving almost all commercial disputes and contentious matters, offer a viable alternative option to litigation.

The ADR methods are used extensively to resolve all contrac-

The checks and balances are in place in ADR process. The judiciary intervenes in cases of non-appointment of arbitrator, wrong choice of arbitrator or arbitrators adopting wrong procedure or giving wrong award. The intervention of courts is, however, kept minimum.

tual, commercial, family and property disputes. The endeavour is to decongest and avoid recourse to courts by focusing on substantive issues rather than procedural rules.

The common ADR methods of resolving disputes outside the court are arbitration, conciliation, mediation, consumer forums and Lok Adalats. The ADR methods - arbitration, conciliation and mediation - provide for settlement of "business-to-business" disputes. Lok Adalats, on the other hand, redress grievances and resolves disputes of public against various statutory authorities.

Arbitration: Arbitration is the supreme method for resolving and adjudicating commercial disputes. Time is of essence in business transactions. In the present scenario of liberalization and globalization, business community cannot afford to lose time in prolonged litigation and, therefore, prefer to resolve disputes by arbitration. The main objects of arbitration are speed, economy, convenience, and simplicity of procedures, secrecy and encouragement to healthy relationship between the parties. Moreover, the basic principles of arbitration are almost universally acceptable for the simple reason that the practice of business is much the same. In fact, arbitration is the creation of business community itself all over the world.

The Government of India has, as a part of economic liberalization process, aligned the Arbitration and Conciliation Act, 1996 (Act) with the Model Law of the United Nations Commission on International Trade Law (UNCITRAL). It is a bold initiative that promises an efficient and effective alternative system of dispute resolution. The object is to promote arbitration and conciliation methods for resolving civil and commercial disputes and make the Indian law and procedure at par with the developed countries.

The Act is a self-contained code. Its underlying object is to restore the `party autonomy' – right of user parties to appoint arbitrators of their choice. It gives freedom to arbitrators decide their own procedure and jurisdiction. There are checks and balances. The judiciary intervenes in cases of non-appointment of arbitrator, wrong choice of arbitrator or the arbitrators adopting wrong procedure or giving wrong award. The intervention of courts is, however, kept minimum. An arbitral award is by itself enforceable as a decree of court. There is no need to file the award in a court and then obtain a decree in terms thereof. Further, the grounds of challenging the award have been substantially narrowed down.

The functioning of the Act has brought to light certain shortcomings and delays in completing arbitration proceedings. To remove these shortcomings, the Government of India has introduced the Arbitration and Conciliation (Amendment) Bill, 2003, which is pending before the Parliament.

Conciliation: The Act makes express provisions for conciliation from sections 61 to 81 under Part III by agreement of the parties. The parties to the dispute, if so desire, can appoint a sole conciliator or tribunal of conciliators. In case of tri-

The Legal Services Committee in resolution of disputes should promote arbitration, conciliation and mediation. The advocates are ready and willing to assist Legal Services Committees and participate in Lok Adalats if aforesaid amendments are made in Legal Services Act.

bunal of conciliators, each party can appoint one conciliator and may agree on the name of the third conciliator to act a presiding conciliator to facilitate resolution of dispute.

The conciliator assists the parties in an independent and impartial manner to reach an amicable settlement of their dispute. He is guided by principles of objectivity, fairness and justice.

The conciliation process allows the parties to be more directly involved in the resolution of their dispute; consequently, in this process the parties retain much more freedom to initiate and reach conciliation.

It may be noted that a conciliator has no power to decide disputes between the parties. He only induces the parties to come to an agreed settlement. The agreement so reached is called "Settlement Agreement" and it has the same status and effect as that of arbitral award.

Mediation: Mediation is a process by which disputants take the help and assistance of a neutral third party to act as a mediator. A mediator is a facilitating intermediary who has no authority to make any binding decisions, but helps them reaching an agreed settlement. A mediator does not impose his views on what should be a fair settlement. With the consent and knowledge of the concerned parties, he tries to bring the parties to negotiation and persuade them to reach a compromise and settlement. Mediation is preferable to arbitration because it is quicker, less expensive, less stressful and more private.

Lok Adalat: Legal and human rights of the disadvantaged sections of the society are at the core of constitutional governance. Accordingly, the main objects of the Legal Services Authorities Act, 1987 (Act) are: to provide free and competent legal services to the weaker sections of the society; to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities; and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunities.

The National Legal Services Authority (NALSA) has started legal aid programmes to the needy section of the public, who unable to get justice due to various procedures and bottlenecks in the judicial system. The eligible persons for free legal aid include women and children, SC/ST members, industrial workmen, victims of trafficking in human beings or beggars, persons in custody, victims of mass disaster, ethnic violence, caste atrocities, flood, drought, earthquake, industrial disaster, persons with disabilities and persons whose annual income does not exceed Rs.50,000/- per year.

Legal Services Authorities have been constituted in all states and union territories to provide timely and fair justice to the needy. Legal Services Committees have been set up in from the Supreme Court to Taluk levels.

The Lok Adalats pass awards after motivating the parties to settle their disputes amicably. The procedure followed at Lok Adalats is simple and expense free. Anyone can move a Lok Adalat by an application on a plain paper or the format available with the Legal Services Authorities.

The Act also provides for establishment of Permanent Lok Adalats. The Permanent Lok Adalat, when finds that there is possibility of a settlement between the parties, formulates the terms of a possible settlement and submits it for their consideration. In case the parties reach an agreement on proposed terms, the Permanent Lok Adalat passes an award in terms of the settlement. In case parties to the dispute fail to reach an agreement, the Permanent Lok Adalat decides the dispute on merits.

The Lok Adalats have powers of civil court under the CPC in respect of summoning, recording and examine witnesses on oath; discovery and production of any document and requisition any public record or document from any court or office. The awards passed by them are enforceable like the Decrees of Civil Courts. Moreover, the awards passed by Lok Adalats are final and binding on the parties, from which no appeal lies.

As per official records till 30-06-2004, more than 2.23 lakh Lok Adalats were held and 1,66,41,075 crore cases settled. In 8.09 lakh Motor Vehicle accident claims cases, compensation amounting of Rs.4757.39 crore was awarded. About 66.73 lakh persons have benefited through leval aid and advice programmes.

Some Suggestions

There is a paramount need to overhaul the legal and judicial system for expeditious dispensation of justice at reasonable cost. In this context, following suggestions are made for improving the justice delivery system to restore the confidence of the common man in rule of law:

1. The expenditure on administration of justice should be made Plan expenditure. The judiciary should be given financial and administrative autonomy to expand the number of courts by 30% at various levels. A couple of years back, the Planning Commission agreed in principle to treat upgradation of infrastructure facilities for the judiciary as a Plan Scheme. The Centre also expressed its willingness to share the cost on capital expenditure in the ration of 50:50 with the states. There should be a definite time schedule and budget to increase the number of courts and infrastructure, libraries, computerization and telecommunication facilities in courts. The judiciary needs Rs.5,000 crore budgetary allocation against the present Rs.500 crore for the health growth of society.
2. The vacancies of judges in the SC, high courts and lower courts should be filled up without any delay. The strength of judges has to be increased to 50 judges per million to clear the huge backlog of cases. The Law Commission had recommended to increase the present ratio of 10.5 judges per million to at least 50 judges per million population as back as 1988.
3. The Prime Minister of India, in his inaugural address at the Conference of the Chief Justices and Chief Ministers on 18-09-2004, has emphasized the need to increasing the number of working days and cutting down on long vacations in courts. Justice Malimath Committee had also recommended that the working days in the Supreme Court and High Courts be increased to 206 and 231 working days from the present 185 to 210 respectively.
4. The government, both at the Centre and states, is the largest litigant in India. Most of the cases are against the so-called arbitrary, unreasonable and unjust administrative decisions of the departments and agencies of the government. Many a time to evade responsibility of settling dispute at the lowest level and out of the fear of vigilance department, cases are filed against contractors. It is high time that the bureaucracy should perform its duties in a fair, just and reasonable manner. Secondly, government should use discretion in filing appeal against all adverse rulings. Competent persons to advise on public grievances should man the Law Departments in government agencies.
5. There is an urgent need for supplementing the judiciary by ADR methods for proper administration of justice and lessening the burden of courts. The judiciary should implement in letter and spirit the settlement of disputes outside the courts contained in newly inserted section 89 of the CPC. It is high time that the Chief Justices, according to the provisions of section 89 of the CPC, direct the Legal Services Committee in their respective courts to maintain a panel of arbitrators, conciliators and mediators to settle disputes within the prescribed monetary limits. The judiciary should patronize and help ADR system through the Legal Services Committee in the courts.
6. The interference of judiciary in ADR methods should be the bare minimum to ensure the development of ADR culture as autonomous, parallel and independent avenue of dispute resolution. What the ADR movement needs is not a 'supervisory role' from the courts, but a "supportive role" of assisting ADR mechanism and procedures to function freely and independently. This needs a change of mindset from legal fraternity and courts.
7. There is need to recognize ADR as a distinct academic and professional discipline and to de-link it from legal discipline. To start with, the practice of appointing retired judges and senior litigant lawyers as arbitrators should be kept at the minimum. The majority of arbitrators should be competent, qualified and mature professionals from business world, who should be trained in arbitration and conciliation methods. The reason being obvious – in future commercial disputes relating to information technology, intellectual property rights, investment and securities laws will be highly technical. Exposure to busi-

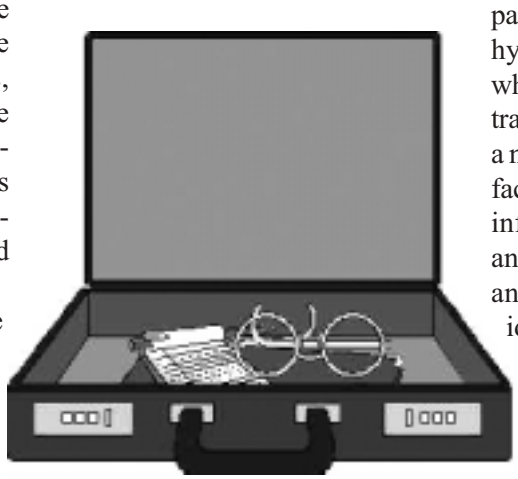
ness operations and understanding of finer technical points will be prerequisites for resolution of these disputes, where role of a `generalist' judge will be minimal and marginal. Otherwise too, Justice Ahmadi, former Chief Justice of India, while inaugurating the International Center for Alternative Dispute Resolution in New Delhi in October, 1995, has aptly remarked that of the total number of cases which go to court, hardly fifty percent require adjudication by a court on a point of law. Most of the cases, almost fifty per cent or more, essentially involve issues of fact, and they can certainly be resolved by people of robust common sense, outside court."

There is a need to tackle the problem of age-old judicial decisions, particularly conflicting rulings and divergent interpretations on important points of law. This is particularly required in corporate and business laws, where old rulings do not fit in present business scenario.

8. It is high time that the ADR institutions and National Legal Services Authority should disseminate information to the public about the benefits of speedy and inexpensive justice through ADR and Lok Adalats. To a large extent, people litigate in courts because they are not aware of other avenues for resolution of their disputes. With the spread of proper information, ADR will become rule and litigation exception. People will appreciate that courts are the last resort.
9. Bar Councils discharge the important function of self-regulating the conduct of advocates in judicial functioning. They should be more responsive to the requirements of litigants and abide by self-regulation in professional conduct. The code of conduct of advocates should also include fees structure for legal services, which should have relevance to the qualification, experience and competence of advocates. The underlying idea is that the clients should get the value for their hard earned money. It is regretted that the Bar Council of India went on strike to protest against the implementation of the Legal Services Authority (Amendment) Act. The Bar Council, rather than resisting change, should have encouraged the legal community to come forward and accept work in ADR.
10. It is suggested that in filling up the vacancies of judges in Lok Adalats, the practice of appointing retired judges and bureaucrats should be eschewed. Secondly, there should be provision for appeal against the orders of Lok Adalats, particularly in cases where the parties contest their claims. Thirdly, the Legal Services Committee in resolution of disputes should promote arbitration, conciliation and mediation. The advocates are ready and willing to assist the Legal Services Committees and participate in Lok Adalats if the aforesaid amendments are made in the Legal Services Act.
11. The code of conduct and self-discipline is of utmost important for the bench and bar. The world over, judges excuse themselves from cases where their relatives are involved in any way. But in India the nexus between judges and lawyer-relatives is rather high. There are 749 judges in 21 high courts across the country. The Bar Council of India has pointed out the names of 131 high court judges whose relations practice in their respective courts. The judges should strictly adherence to code of 16-point 'reinstatement of values' unanimously adopted by all the Supreme Court and High Court judges in 1994.
12. The legal profession occupies a responsible position in smooth functioning of Indian democratic set-up. An honest and competent judiciary is possible if

lawyers are upright. The quality of a court depends on the quality of advocates, who bring to the notice of judges the facts and laws of their cases for proper adjudication. The recruitment to the Bench is from the bar starting from the subordinate judiciary to the higher judiciary. Advocates, being essentially knowledge workers, should be self-motivated to keep themselves abreast of the latest developments in their respective field of practice and specialization.

13. There is a need to tackle the problem of age-old judicial decisions, particularly conflicting rulings and divergent interpretations and viewpoints on important point of law. The Law Commission should periodically review enactments in the light of judicial rulings and suggest amendments in law so that ruling prior to 10 years become redundant and inapplicable. This is particularly required in corporate and business laws, where old rulings do not fit into the present business scenario. The fast changes in socio-economic policies also demand removal of antiquated laws from the statute book. There is need for simplification and streamlining of old laws to fit into the modern times. It is high time to review and amend all enactments so that the judicial rulings prior to 1990 could be made inapplicable for the cases filed after 2000.
14. Increasing use of information technology in judiciary and case management has become indispensable. The constitution of a National Mission for a Technology Enhanced Justice System is a welcome development.
15. In the fast changing global legal scenario, there is urgent need to promote specialization



amongst the judges and lawyers in their respective areas of laws to expedite disposal of pending cases.

Interestingly, Mr. Fali Nariman, eminent advocate and nominated Rajya Sabha member, has drafted 'The Judicial Statistic Bill, 2004'. The statement of objects and reasons of the Bill states that empirical data would help to assess the performance of judicial institutions and suggest remedies for judicial backlog. It provides for the constitution of a judicial statistical authority at the national level and state levels, to collect and publish judicial statistics concerning all courts, including the Supreme Court of India. This is in line with the system in the United States and United Kingdom, where judicial statistics reports are published and made available to the public. It ensures greater transparency, analysis of backlog of cases and remedial measures required.

Conclusion

The ADR methods and techniques are well developed on scientific lines in the US, UK, Canada, Australia, Hong Kong, South Africa, New Zealand, Japan, China and Singapore. In Asian countries, particularly China and Japan, use of hybrid system is quite common, which combines the practice of arbitration and conciliation. In practice, a neutral person assists the parties in fact finding and gathering relevant information, conducting dialogue and negotiations, clarifying issues and narrowing areas of dispute, identifying possible solutions and selecting the acceptable one.

The ADR methods have a number of inherent advantages. First, the methods can be used at any stage of dispute – before or during adjudication. Second, the methods are economical, flexible and effective. Third, the methods are private and help parties appreciate each other's viewpoint better. Fourth, the methods empower parties to decide their disputes without advocates. Fifth, ADR methods provide amicable solution to disputes. In fact, the "consensus-oriented approach" is the essence of ADR methods.

India has to improve its justice delivery system in line with other countries. The recommendations made by various commissions and expert bodies need to be implemented without delay. It is high time in India to modernize its legal infrastructure and promote ADR methods of dispute resolution. Legal infrastructure is no less important than physical infrastructure for India to emerge economically strong and attract higher level of foreign direct investment. ■