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ADR AND ITS IMPLICATIONS ON ACCESS TO JUSTICE OF THE MARGINALISED COMMUNITIES IN A GLOBALISING WORLD

AUTHORED BY - SHIVANI PS

Abstract

The advent of the welfare state has expanded its scope beyond mere litigation or settlement to include equitable and affordable access to forums that are both socially and individually just. On that note, globalisation, with its far-reaching economic, social, and political transformations, has engendered a complex interplay with rights of the marginalised communities. In a rapidly globalizing world, the promotion and protection of the rights of marginalised communities have become imperative. On one hand, globalization has improved the capacity of civil societies to operate internationally and advocate for the access to justice, a fundamental aspect of human rights, and on the other, it has endowed unanticipated authority to marginalised communities' rights violations with other actors. While in the recent years there has been an increase in the globalisation and popularism in the practice of Alternative Dispute Resolution (ADR), especially in the developing countries, the issue of how evenly ADR is playing its role in the enhancement of the right of access to justice to the marginalised communities is not thoroughly examined. In light of the aforementioned concern combined with the hurdles that are involved in the traditional dispute resolution mechanisms, it is quite necessary to analyse the effect of incorporating non-judicial dispute resolution mechanisms stance in access to justice to the marginalised community. This research paper delves into the multifaceted implications of ADR in advancing the right of access to justice of the marginalised communities within the context of globalization, by highlighting its potential to create a more just and equitable global society. While emphasizing the opportunities presented by ADR in the enhancement of right of access to justice of the marginalised communities, this paper also acknowledges the challenges it may face when addressing complex issues such as enforceability, power dynamics and accountability that might be involved in this aspect.

Keywords: Access to Justice, Alternative Dispute Resolution, Globalisation, Marginalised Communities, Social exclusion

I. Introduction

Globalisation has been widely recognised as a phenomenon rooted in history which has long existed before the rise of European influence.¹ Globalization has had a profound impact on marginalized communities, both positive and negative. On the one hand, it has created opportunities for economic growth, technological advancement, and cultural exchange. However, these benefits have not been evenly distributed, and marginalized communities have often borne the brunt of the negative consequences such as economic inequality and power imbalances, with them remaining mired in poverty, cultural erosion, exploitation of their lands leading to displacement, limited access to healthcare, migration, lack of representation and respect, vulnerability to market fluctuations and more. Globalisation has resulted in marginalized communities being left in an even more vulnerable position², which directly has an impact on their rights, specially access to justice. Additionally, the colonial powers considered the institution of tribunals in the colonies to be an essential component of their endeavours to civilize the region.³ As the world becomes more interconnected, it led to an increased demand for alternatives to dispute resolution mainly due to the challenges that the traditional litigation system is associated with. Having said that, there is less to no literature on ADR mechanisms and its effectiveness over enhancing the rights of the marginalised, specifically, the right of access to justice.

II. Concept of Access to Justice

"We must never forget that justice is not something that can be bought and sold. It is a right that belongs to all people, regardless of their race, religion, or social status." – Nelson Mandela

In order to understand access to justice, one must understand what justice means. Although there is no single definition of justice that is universally accepted, some common concepts include fairness, equality, and proportionality. Upholding the concept of 'Rule of Law', it seeks to ensure that individuals receive their due rights and consequences for their actions, thereby aiming to maintain social order. Justice is multifaceted - in the legal context, it means the fair and equal

¹ Nader L, 'The Globalization of Law: ADR as "Soft" Technology' Proceedings of the Annual Meeting (American Society of International Law), (1999) 93, 304–311. <http://www.jstor.org/stable/25659315>

² Sotomayor C, & Barrero-Castillero, A, 'Globalization and vulnerable populations in times of a pandemic: A Mayan perspective', Philosophy, Ethics, and Humanities in Medicine (2020) 15(1), 1-10. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7734906/>

³ *Id.*

application of a given law and in the social context it means the equity in the distribution of resources and opportunities. Having said that, access to justice is a fundamental principle in legal systems worldwide, encapsulating the idea that every individual, regardless of their background, should have the right to seek and obtain a fair, affordable, and effective resolution to their legal disputes, giving due reference to the above mentioned quote of Nelson Mandela. At its core, access to justice entails several key components. Firstly, it encompasses financial accessibility, ensuring that legal services are affordable and do not create insurmountable barriers for those seeking to enforce their rights. This means that legal aid and support should be available to those who cannot afford it, ensuring that economic disparities do not prevent individuals from accessing the justice system. Moreover, access to justice necessitates physical accessibility, which implies that legal processes and services should be physically reachable and geographically available to all, even in remote or marginalized areas. Cultural and linguistic accessibility is another crucial facet. In essence, access to justice is more than a legal principle; it is a fundamental human right.

III. Marginalised Communities and their Right of Access to Justice

An universally accepted definition of marginalized groups although does not exist, existing definitions consistently acknowledge their precarious status to exclusion and limited access to power. The UN defines social exclusion, a parallel concept to marginalised communities, as “a state in which individuals are unable to participate fully in economic, social, political, and cultural life.”⁴ Marginalisation in the basic sense means a state wherein, due to certain factors, certain set of individuals or groups may be on a higher footing in the realm of discrimination where they are perceived and treated differently from the other set of individuals. The factors such as, but not limited to race, socioeconomic status, affluence, immigration status, age, gender, or sexual orientation are encompassed in this category. A fundamental concept in the definition of marginalization is unequal power: being relegated to a position of insignificance or powerlessness within a group or society. There isn't a single metric that tells how many members of society are exactly marginalized. Social marginalisation, political marginalisation and economic marginalisation are the main three types of marginalisation that individuals face and some examples of marginalised communities are indigenous people, women, racial and ethnic minorities, LGBTQ+ community, refugees and asylum seekers, religious minorities, children,

⁴ United Nations, ‘Identifying Social Exclusion and Inclusion’ <https://www.un.org/esa/socdev/rwss/2016/chapter1.pdf>

disabled, low-income communities, people in conflict zones, etc. However, the particular demographic groups that experience disadvantage differs across locations, as will the extent of the inequity they encounter⁵. For example, black people in the United States face systemic racism and discrimination, while Rohingya Muslims in Myanmar have been subjected to genocide. These specific groups, are those which have been historically disempowered and have been or are a subject of oppression by influential and discriminatory groups, including those who continue to face barriers to civic participation. One aspect to be noted is that while justice ensures that everyone is treated impartially, regardless of their background, wealth, or social status, the way justice is perceived differs for everyone based on their economic and social means. What is to be noted is that variations in the comprehension of rights and the availability of legal systems are not limited to interstate competition, but are also pervasive within states. As difficult as it is to accept, the truth is that justice is an inborn privilege to some and to others, a luxury which cannot be accessed easily and this is often the case with the marginalised communities.

IV. Approaches to ADR for enhancing Access to Justice for the Marginalised Groups

"Equal justice for all" is a fundamental principle that underpins the entire modern egalitarian justice system, emphasizing its role in upholding basic human rights⁶. When examining the potential of Alternative Dispute Resolution (ADR) in expanding access to justice for marginalized individuals, it becomes essential to define the threshold for "economically disadvantaged." Does this pertain to extreme discrimination, or is the focus on those with modest means who struggle to achieve effective results through litigation?⁷

Alternative dispute resolution (ADR) is a set of processes and techniques for resolving disputes outside of the formal court system and includes various mechanisms such as negotiation, mediation, conciliation, arbitration, early neutral evaluation and more. It can offer additional avenues for the marginalized to access justice, reaching those who might have been unable to navigate traditional legal systems. Within ADR, mediation stands out as a versatile process that

⁵Bachani Di Giovanna P, 'Engaging Marginalized Communities: Challenges and Best Practices' ICMA (2021) <https://icma.org/articles/pm-magazine/engaging-marginalized-communities-challenges-and-best-practices>

⁶ Thiru SB, 'ADR and Access to Justice: Issues and Perspectives', Tamil Nadu State Judicial Academy <https://www.tnsja.tn.gov.in/article/ADR-%20SBSinha.pdf>

⁷ Singh, S. 'Access to Justice and Dispute Resolution Across Cultures', Fordham Law Review, (2020) 89(2), 2407-2424 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5681&context=flr>

can be applied across various sectors, including social welfare, employment, and healthcare. Mediation takes place neutrally and follows a structured strategy, addressing the dispute's issues, exploring potential solutions, and reaching a mutually agreed-upon resolution. It is often preferred in rights-based disputes as it allows parties to gain a clearer understanding of the problem. For cases involving discrimination and disability, the flexibility offered by conciliation and mediation processes contributes to more acceptable resolutions for both parties. The privacy and speed of mediation are also advantageous, especially for those who have experienced discrimination. A claim in support of this strategy is that an increased understanding through mediation can help dismantle the prejudices and biases that results in discrimination, thereby preventing future incidents. Moreover, mediation can be particularly useful in cases involving ongoing relationships, such as a disabled individual seeking access to a shop, where maintaining positive relations is in everyone's interest. A potential solution to improving access to justice for those in need is to integrate legal aid into trusted institutions like schools or community centres and by diversifying the pool of mediators and arbitrators.⁸ Additionally, research suggests that people tend to categorize others based on learned observations, leading to subconscious bias. For example, a study found that the race of the defendant significantly influenced the determination of guilt, with white jurors more likely to find a black defendant guilty and vice versa. Continuous exposure to such biases contributes to the internalization of implicit bias.⁹ ADR within the context rights of the marginalised emphasizes a strong rights-based perspective. A key distinction in ADR approaches is between a competitive rights-based method and an interest-based or problem-solving approach. The rights-based approach relies on resolving conflicts by referencing perceived legal rights and obligations. Interest-based approaches, rooted in interest-based negotiation principles, focus on eliciting parties' needs and interests, fostering mutual understanding, generating creative solutions, reduced formality and legalism that can offer complainants a more accessible process and serve as a viable alternative to judicial proceedings in terms of process participation and control over resolution outcomes. Further it can also aid in education by fostering an environment where respondents in disputes are more open to understanding complainants' challenges. For instance, in resolving conflicts related to educational services for children with disabilities, parties' mutual concern for the "best interest of the child" forms the basis for constructive dialogues and mutually satisfactory outcomes. Deviating from Eurocentric justice traditions, the unappealing nature of traditional litigation system paves way

⁸ *Id.*

⁹ *Id.*

for fostering ADR as a viable option depending on interest-based or rights-based approach for easy access to justice.

V. Implications

Debates persist regarding the suitability of ADR as a means to promote and safeguard human rights, mirroring the broader discussion on the advantages and limitations of ADR. In cases involving gross human rights violations, formal, public, binding determinations or authoritative interpretations of the law may be necessary to ensure accountability, prevent impunity, and reinforce societal norms. Nonetheless, ADR remains a vital tool in addressing marginalised rights issues. Particularly in discrimination law, which often involves emotionally charged and perception-based disputes, ADR processes, such as mediation, offer a more constructive and informal means of resolution than formal court proceedings. In mediation, the mediator's role as a 'third party neutral' is pivotal to the fairness of the process. It also empowers the parties to be actively engaged in both the process and settlement terms, enabling culturally sensitive resolutions that resonate with all parties. However, concerns arise from disparities in knowledge and bargaining power, which can either benefit or harm marginalized groups based on external factors. For example, in cases of domestic abuse, power imbalances may threaten women during the negotiation process. Additionally, economic vulnerability can pressure one party into an unfavourable compromise if litigation costs are prohibitive. This may result in an unequal distribution of assets, particularly in marital disputes where one party outearns the other. These concerns emphasize the need for a balanced approach to ADR as the exclusive means of resolving discrimination cases. While ADR offers a level of personal satisfaction that traditional courts may lack which is the ability to listen fully to the claimant's to air grievances, to make-right, the question is whether this can be delivered without being at expense of the development of the law. One alternative is the triage model, where cases undergo an initial assessment to determine the most suitable conflict resolution method. There is a place for both ADR and formal judicial processes. Striking the right balance between these approaches remains a significant challenge in the quest to ensure justice and protection of right of access to justice of the marginalised.

VII. Comparative analysis

ADR has a well-established history in several Commonwealth countries like Canada, Australia, and New Zealand, where conciliation is often the initial method for dispute resolution. The United States' Equal Employment Opportunity Commission (EEOC) also has significant experience in

using conciliation for employment discrimination and rights issues. The establishment of the Commission for Equality and Human Rights (CEHR) in the UK further signifies the growing importance of ADR. CEHR will take over responsibilities related to equality, and human rights, including new provisions for age, religion, belief, and sexual orientation. In many countries, including Australia, domestic human rights and anti-discrimination laws incorporate ADR as a fundamental element for addressing human rights violations and discrimination claims.¹⁰ El Salvador, known for its high violence rates, initiated ADR projects focusing on rural legal centres to enhance access to justice. Focusing on community-based resolution of disputes, this development is particularly significant where the introduction of mediation in the criminal justice system is expected to contribute to a more peaceful and democratic society.

VI. Conclusion

Access to justice project implementation in developing nations is difficult and it is even difficult for the marginalised groups. The paramount lesson is to engage the leadership of the judicial system and acquaint them with the procedures. Assistance from key stakeholders within the justice system, including attorneys, judges, and system officials, is critical for the effective execution of access to justice initiatives. It is important to remember that having access to justice does not always equate to having “high-quality” justice. In seeking to expand access to justice, maintaining the quality of the justice made available is essential. With a participatory, flexible machinery where non-adversarial, settlement-oriented procedures are employed, the marginalised has a good chance to deliver fair, quick and inexpensive system of dispute settlement.

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