Combining Methods in Legal Research: Promising Avenue for Social Justice

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Social sciences are deeply interested in the lived experiences of the people. The endeavour of these disciplines is to see the world through the eyes of the persons they interact with. Social scientists believe not just in observing the social phenomena around them but in understanding them. They use a variety of tools and techniques to ascertain how people perceive their social realities and adapt their responses within the social world. Social Science research methods therefore have resulted in a tremendous expansion of knowledge of the world of human relations.

For too long, legal scholars in common law countries deliberated in the law library in an effort to build up a pure legal science, "only with those elements which are stateable in the form of legal propositions."[1] Would these legal scholars operating in a word jungle remote from reality be aware about the practical effectiveness of the law? It is anybody's guess. This is not to suggest the futility of systematizing the body of law. In fact, doctrinal research involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials'.[2] In short, it provides an understanding of concepts, doctrines and principles in legal phenomena and their relationship with each other.

Of late, however, social science research methods have made inroads into the realm of legal research. Wherever these research methods have been used in conducting legal inquiry, the analysis has revolutionized the legal system. [3] Legal academics are increasingly making use of non doctrinal research or empirical methods which they are incorporating into their theoretical framework so as to make their findings relevant and meaningful.

In an inquiry involving non doctrinal research methods, the researcher like the sociologist, inquires into the social facets of the law. His aim is to combine insights from academic disciplines with legal knowledge in order to better understand the social phenomena of law.[4] In this

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[1] Vibhuti,Khushal, Aynalem Filipos, *Legal Research Methods* ,Prepared under the sponsorship of the Justice and Legal System Research Institute,2009,available at http://chilot.files.wordpress.com/2011/06/legal research methods.pdf accessed on 28th March 2017.

[2] Hutchinson Terry, *The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law,* ELR December 2015 No. 3 - doi: 10.5553/ELR.000055 available at

[3] See K.D. Gangrade, *Methods of Data Collection: Questionnaire and Schedule,* in Verma S.K. and Wani,M.Afzal, (eds.), "*Legal Research Methodology*" ,Indian Law Institute, Delhi, 2006(Reprint) ,p.355.

[4] Rattan Singh, *Legal Research Methodology*, Lexis Nexis ,(2nd Edition) 2016, p. 316.

interaction, the hitherto unknown aspects of legal phenomena are made known from the revelations obtained through analysis of the 'social auditing' of legal norms.[5] Thus where the legal research aims to throw light on the workings of law and legal institutions, non doctrinal research using methods of social sciences may combine with legal scholarship. In this manner, non- doctrinal research is useful, if the research is intended to deepen understanding, challenge complacency, or inform and evaluate policy.

One finds that any research whether social or legal, is essentially carried out for the purpose of examining and studying relationships between variables affecting the phenomena. In such a situation the researcher may through the study be able to express the extent and direction of the association or relationship between the variables involved in the area of study. In contemporary times, the emergence of Alternative Dispute Resolution (ADR) is not surprising in the context of overburdened courts presenting special problems to justice- seekers. Litigants have to undergo a long wait for justice. The delay in obtaining justice increases the costs of litigation. Effective dispute resolution has become a national priority. The vision of the fathers of the Constitution was to ensure justice – social, economic and political to 'We, the people of India'. This means that in carrying forward its development goals, the State would have to adopt an inclusive approach where all groups would have access to justice and services provided by the State. The origin and development of alternative dispute resolution systems (ADR) came to be viewed as an appropriate response to overcrowded courts. ADR is a generic term used to refer to efforts to expedite the pace, bring down costs and ease the pressure of litigation on courts by simplifying the procedure, by providing for less formal forums for the resolution of disputes. Towards this end, section 89 of the Code of Civil Procedure,1908 (CPC) was enacted, directing courts to refer disputes likely to be settled, to any of the modes of ADR stipulated therein, in which case the specific ADR processes would be applicable.

Research on the role and effectiveness of courts in encouraging the use of alternative dispute resolution methods provides much scope to a young researcher to understand whether ADR systems can be a tool for bringing about social change and the Constitutional guarantee of social justice.

The paper attempts to examine and to evaluate through empirical methods, the process of referral of disputes by courts to ADR systems. The said law has been enacted with a definite legislative

[5] *Supra*. Note 1.

purpose- which is to promote greater use of ADR methods by parties. How far the courts have effectively utilized section 89 of the Code of Civil Procedure, 1908, to realize this objective depends on several factors. The criteria for evaluating the effectiveness of section 89 of the CPC through empirical methods have been discussed in this paper.

Has ADR culture sufficiently taken root in Indian soil in the present century? Are the existing ADR systems suitable to persuade litigants to opt for out -of -court settlements? Do ADR systems have any strengths other than being expeditious and inexpensive? Are ADR systems suitable to try any kind of disputes referred to them? In other words, are each of the common forms of alternative dispute resolution systems equally competent and suitable to decide any legal dispute? Or is litigation better equipped to decide pure questions of law and its interpretation?

Empirical study of court referral of disputes to ADR

A starting point in the inquiry as to whether the culture of settling disputes by alternate dispute resolution systems has taken firm root in Indian soil may goad courts in referring civil disputes for settlement under section 89 of the Code of Civil Procedure (CPC). This section was inserted by way of amendment in the year 1999, prescribing settlement of disputes outside the court. Although there are many forms of alternative dispute resolution systems, in India, arbitration[6], conciliation[7], judicial settlement[8] including settlement by Lok Adalats, or mediation[9] have

[6] Arbitration: The term arbitration means resolving the dispute or difference between two or more parties after hearing both sides in a judicial manner by an impartial person or persons other than a court of competent jurisdiction. The changing conditions in modern times saw the substitution of the old law of 1940 with the enactment of the Arbitration and Conciliation Act in 1996, in harmony with the arbitral law existing in developed countries.

[7] Conciliation: Conciliation is a private, informal process in which an impartial third party assists the parties to a dispute in reaching a mutually satisfactory settlement of the dispute. In India, besides the Arbitration and Conciliation Act of 1996, conciliation is also provided under various statutes as for instance, in the Industrial Disputes Act, 1947, the Family Courts Act, 1984, the Legal Services Authorities Act 1987, among others.

[8] Judicial settlement is not defined under the Code of Civil Procedure Code. However Black's Law Dictionary, defines judicial settlement as a settlement of a civil case brought about by a judge who is not assigned to adjudicate the dispute.

[9]Mediation is a neutral, non- coercive, non- adversarial third party coordinates and facilitates negotiations between the parties to the dispute. Its procedure is outlined in UNCITRAL conciliation rules, WIPO Mediation Rules and Jagannadha Rao Committee Draft Mediation Rules 2003.

received statutory recognition under the Code of Civil Procedure, 1908 as out of court settlement methods.[10]

1. Court Referral of disputes to ADR

A perusal of the language used in section 89 of the Code of Civil Procedure shows that where it s appears to court that there exists elements of settlement ,then the court should refer the case in question to one of the stated modes of ADR. The Supreme Court has interpreted section 89 to mean that while a hearing under section 89 to consider whether recourse must be taken to ADR is mandatory, it is not mandatory to refer all disputes for out of court settlements.[11] The question that needs to be answered is what factors guide the court in referring disputes to ADR systems? Is it the mandatory language used in the law? Or is it the personal opinion of the judge based on the nature of dispute before him, the parties before him or the advocates before him ,or the work – load before him that urge him to refer disputes for settlement by ADR ?

Literature on law relating to alternative dispute resolution systems is quick to suggest that ADR methods are an effective alternative to court litigation.[12] It also puts forth the idea that these systems are intended to complement the dispute resolution process through adjudication. In what could be termed as an exhortation to parties to opt for dispute settlement through the ADR process , the Supreme Court in *Salem Advocates Bar Association, Tamil Nadu v. Union of India,* has observed, "Keeping in mind the laws delays, and the limited number of judges which are available, it has now become imperative that resort should be had to alternate dispute resolution mechanisms with a view to bring to an end to litigation between the parties at an early date."[13] The Court has also suggested in the same case, that ADR be viewed 'as a part of a package system designed to meet the needs of the consumers of justice.'[14]

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[10] Section 89 (as also Order 10 Rules 1 A to 1 C) of the Code of Civil Procedure inserted by Amendment Act, of 1999, states *(1)* Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may 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.

[11] See M/s *Afcons Constructions and anr v. Cherian Varkey Construction (P) Ltd* (2010) 8 SCC 24 at para 17.

[12] See Rao P.C.,Sheffield (eds.),*Alternative Dispute Resolution ,What it and How it Works,* Universal Law Publishing Co. Pvt. Ltd. (1997) p. 85.

[13] See *Salem Advocates Bar Association Tamil Nadu v. Union of India* (AIR 2003 SC 189)

[14] Jasmine Joseph, *Alternate to Alternatives Critical Review of the Claims of ADR,* NUJS Working Paper Series,p.4., available at www.nujs.edu

Does ADR literature and case law on the point therefore propose that ADR methods match courts in their efficiency to resolve the disputes before them and are thus an effective alternative method in dispute resolution? Or does it lead one to believe that on account of congestion of cases before the court, the ADR system has emerged as an escape route from the exasperating processes of adjudication?[15]

If one examines section 89 of CPC, one finds that the provision only stipulates that courts must find that there exists an element of a settlement in the case before them, before referring the dispute to the ADR process . There is nothing in the provision to suggest the criteria which courts must follow to refer disputes to ADR methods. Which ADR method will be appropriate to settle which kind of dispute? There seem to be no answers. Although in the context of workplace outcomes, it has been rightly pointed out, "We do not have adequate quantitative, multivariate research on what factors best predict the adoption, design, and function of dispute resolution systems and what designs produce the best outcomes. We cannot answer questions on the impact of these private systems on public justice."[16] The focus of this inquiry would in such a case therefore consist in evaluating the law in action and its effect on the behaviour and attitude of people affected by it. The inquiry would also include an investigation by the researcher into the non –legal factors that have a bearing on the implementation of the law in question.

In finding answers to his query, the researcher would require to use empirical methods in collecting data that would enable him to arrive at conclusions on the point. In investigating whether courts may refer all or some disputes for outside -court settlement u/s 89 CPC, non-doctrinal research carried on by the researcher may help(i) to identify specific criteria or features about disputes referred (ii) characteristics of disputants (iii)the role of the lawyer/legal practitioner in assisting the court to make such a decision.(iv) nature of the alternative dispute resolution system to which the dispute is referred. (v) work –load before the judge (vi) compliance with NALSA directives to refer pending cases for National Lok Adalat[17](vii) chances of settlement . In inquiries involving the impact of the law, as in the present case, the researcher would find answers by engaging in a quantitative and qualitative analysis . A quantitative analysis in this respect would help to establish a fundamental connection between his

[15] *Supra*. Note 13.
[16] David B. Lipsky, *The Impacts of Alternative Dispute Resolution on Workplace Outcomes*, available at Digital Commons@ILR: http://digitalcommons.ilr.cornell.edu/conference/28
[17] Available at http://www.dlsanadia.org/National%20Lok%20Adalat%20(06.12.2014).pdflast accessed on 31st March 2017.

empirical observations and the mathematical expression of quantitative relationship. Thus, for instance, the researcher may ascertain in terms of statistics, the number of disputes that were referred by the court each year, in a given period of time. Along with the quantitative analysis, a qualitative analysis would enable him to inquire into the reasons behind the observable behaviour. Thus for instance, the reasons for the reluctance/ enthusiasm of parties to consent to courts referral of their dispute for ADR process would enable the researcher to appreciate the mindset of the people towards out of court settlements.

Following are the criteria upon which the researcher may evaluate the working of section 89 of the Code of Civil Procedure 1908.

1.1. Kinds of disputes

The law in section 89 of CPC, as mentioned earlier, does not specifically provide the nature of disputes that are to be assigned for a specific ADR process. In other words, there is nothing to suggest in the law that certain kinds of disputes are to be kept out of the purview of certain ADR methods. There is no practical guide that assists a judge in such decision –making. Empirical research by the researcher to observe the trend shown in referring particular disputes to particular ADR processes and not others over a period of time, may be relevant in reaching a conclusion about the nature of disputes referred to ADR.

Disputes where time or costs are in question may be referred for settlement by speedy and inexpensive ADR processes. Disputes which would prove to be a burden on the resources would be in all likelihood be referred to for ADR. Similarly the researcher may find that a judge may refer disputes for ADR where the dispute between the parties is not fully blown up. In other words, the researcher may find that disputes are generally referred for ADR where the dispute is of less duration. The reasoning being "The longer a dispute continues, the more parties tend to become entrenched in their positions."[18] The researcher may also find that some parties involved in a sensitive family or commercial dispute may prefer to use a form of ADR to keep sensitive information private rather than having open court proceedings.[19]

Also, whether specific or general civil disputes are referred in exclusion of others, demands research, as the findings of research in this regard have not been conclusive.[20] Non doctrinal research in this selected area will demonstrate to the researcher that in contrast to the claims of

[18] Consultation Paper "Alternative Dispute Resolution" available at www.lawreform.ie
[19] *Id.* at p..17.
[20] *Id*. at p. 18.

ADR law, not all disputes are referred to ADR process on account of their unsuitability for resolution by such methods.

Certain disputes involving questions of law would generally not be referred for dispute resolution by ADR methods.[21] In questions relating to the protection of fundamental rights, the interpretation of the provisions of the Constitution , determination of the rights of the parties, the chances for referral of such disputes to ADR process, under section 89 of the Code are extremely limited.[22]

1.2. Characteristics of disputants

Some disputants may agree for courts to settle their disputes by ADR processes. This may occur in situations in which parties are exhausted and exasperated waiting for the outcome of litigation. Others may submit to ADR processes on account of their inability to continue with litigation. In some situations, the researcher through his study may discover that some litigants may prefer to opt for ADR processes taking advantage that there are unequal power relations between the parties. Lack of flexibility in the stand of parties, disputes fanned by the ego of the parties, and similar situations would be factors dissuading a judge from referring disputes to ADR processes. Willingness of the parties to opt for ADR is undoubtedly significant for the implementation of section 89 of CPC.

1.3. Role of lawyers

Lawyers are the officers of the court. They must assist the court in the task of administration of justice. The researcher may come across previous research findings indicating that legal representation of the parties can support or undermine ADR. [23] This finding may also find further support from his inquiry. The researcher may find that much depends on the attitude, knowledge and skill of the legal practitioner. Some lawyers may persuade their parties to go in for ADR processes when they find that chances of success through court litigation are poor. Inquiry may reveal that lawyers motivate parties to go in for out of court settlement where they find that parties are financially not sound. Some others may comply with referrals, not to bring displeasure to the judge before whom the dispute is pending. Some lawyers may agree for parties to approach for out of court settlements only to delay the proceedings, knowing full well that parties involved are headstrong and would not want to change their stands.

[21] See Afcons *Supra* Note 11.
[22] *supra* .Note 17 at p.18.
[23] Report by Kathy Mack, *Court Referral to ADR: Criteria and Research*, submitted by National ADR Advisory Council and Australian Institute of Judicial Administration, at p.6, para 1.5.3.

1.4. **Nature of the alternative dispute resolution system**:

It has been observed that selecting the appropriate dispute resolution system for the purpose of reference of a dispute is by far the most challenging aspect for all concerned. An inquiry into this aspect would be crucial to determine which of the ADR systems are considered effective in which kind of disputes. A researcher would be better able to obtain answers for his query after understanding what each of the dispute resolution systems offer. In this regard, it would require the researcher to also examine the goals of the parties to dispute. Where parties seek to preserve their relationship and do not desire it to be strained, the choice of mediation over the other forms of ADR may occur. In like manner, a judge under section 89 of the CPC may have to examine the goals of the parties as they appear to him. Such an understanding would call for a good grasp over the subject- matter of the dispute. Once the judge ascertains the nature of the dispute involved, he would be in a better position to suggest the ADR method.

The researcher would appreciate in this context, that an unprepared or hasty decision by the judge could ruin the chances of a settlement for the parties. Where no out of court settlement is reached, the matter would return to the same court for trial.

1.5. **Work –load before the judge**:

Would the work load before the judge be a factor in implementing section 89 of CPC? Court referrals should hinge on the fact that the dispute between the parties needs to be resolved. A researcher may find that the motivating factor for a judge to refer cases to ADR processes is to reduce the work load before him. But one can also argue that where the settlement process has failed, the matter would eventually return to the court for trial for adjudication by the court.

Where ADR fails, the case is returned to the court for trial. A judge may find that in certain cases the ADR process has secured a positive outcome and the dispute is resolved. Such cases do not return to the judge for trial. Accordingly, a judge may rely on a previous successful outcome in particular kind of dispute as a motivation to him to refer a similar dispute for the same process on another occasion.

1.6. **Compliance with NALSA directives to refer pending cases for National Lok Adalat**

Referrals to ADR methods, particularly Lok Adalats, have become common, following the directives from National Legal Services Authorities. As per the directives of the Apex body, courts are required to refer matters to Lok Adalats particularly with respect to pending cases. The directive has underscored that such references of disputes to Lok Adalats is a priority to be complied with by courts. However, an inquiry into this practice which is aimed at easing the

pendency of cases, may go contrary to the idea of ADR in cases where parties are unwilling to settle their matter but have no choice as the court has suggested otherwise.

1.7. **Chances of settlement**: Where the court finds that the chances of settlement of a dispute are high, it may refer the dispute for ADR process. Although chances of settlement are high, findings may reveal that the outcome may be quite different, as the choice of ADR method may not have been successful. Would the outcome have been different if the method chosen for ADR had been different? Would the failure in settling the dispute reflect on the effectiveness of a specific method of ADR as a dispute resolution method? To obtain answers to this query, the researcher would have to appreciate the influence of several other competing factors that would ultimately ensure the success of a particular ADR method.

Empirical research used in combination with the doctrinal method is definitely valuable in explaining the role of the courts in promoting alternative dispute resolution methods.[24] In studying the association between the variables for the purpose of section 89, the researcher may find that the court referrals to ADR is an extremely complex phenomenon and is not caused exclusively by any one of the above factors. The inquiry may further provide material for future development and action in the field of ADR systems. The researcher by using empirical methods can the pave way for future research on themes such as impact of alternative dispute resolution in resolving work place disputes, or the effectiveness of ADR methods in resolving conflicts within the family, ADR methods in business disputes, and the like.

Conclusion:

Various ADR forms have emerged in the present century as an alternative to traditional dispute resolution by courts. Legislative intent is clear. Courts must make all out efforts to promote the use of alternative dispute resolution methods by parties. Evaluation of the law in practice suggests that its effectiveness depends on a variety of factors – including non –legal factors. Each of the factors may exert a greater or lesser control on the decision making of the judge. An inquiry combining doctrinal and non- doctrinal methods is a step in the right direction which would enable the identification of potentially more useful research directions for future reform and the development of the law.

[24] Khadihaj Mohammed, *Combining Methods in Legal Research* , 11(21).Medwell Journal (2016).