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BALANCING INSTITUTIONAL STRUCTURE WITH PARTY AUTONOMY: IN SUPPORT OF THE LOK ADALAT SYSTEM

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The Hon'ble Chief Justice of India ["**CJI**"], Shri N V Ramana, while delivering his keynote address on the topic –'*Making Mediation Mainstream: Reflections from India and Singapore*'– at the

India-Singapore Mediation Summit in July 2021, discussed the state of judicial pendency in India[1]. Despite over 4.5 crore pending cases in toto (of which 88% cases are pending in the lower judiciary)[2], CJI Ramana remarked that the "*inability of the Indian judiciary to cope with the caseload is an overstatement and an uncharitable analysis*." In a later statement, he added that the judicial infrastructure in India is not conducive to the smooth functioning of the legal system; it not only fails to facilitate dispute resolution but also obstructs the successful enforcement of citizens' rights.[3] In this regard, CJI Ramana has routinely extolled the values of mediation and alternative dispute resolution ["**ADR**"] in disposing of disputes long before they occupied the overburdened dockets of the courts.[4] This article seeks to examine the viability of this approach with reference to the various ADR mechanisms available under the Indian legal system: purposively, it demonstrates how the unsung Lok Adalat ["**LA**"] system offers a functional and competent fusion of a voluntary dispute resolution system and an institutionally administered justice delivery mechanism to facilitate the effective settlement of pre-trial disputes.

To this effect, this paper shows – *First*, that the scope of adversarial proceedings determines judicial pendency across the various modes of alternative dispute resolution and that these modes can be arranged from least to most adversarial on a spectrum. *Second*, that on this spectrum – multiple modes of alternative dispute resolution have become inclined towards a

[1] ANI, 'Projected pendency of 45 mn cases uncharitable analysis: CJI Ramana' *Business Standard* (18 July 2021).
[2] Satyajit Sarna, 'A Ticking Bomb: The Pendency Problem of Indian Courts' *The Indian Express* (25 May 2021).
[3] The Wire staff, 'CJI Ramana Airs Grievances on Judicial Infra, Lack of Basic Amenities in Courts to Law Minister' (*The Wire*, 23 October 2021) <https://thewire.in/law/cji-ramana-airs-grievances-on-judicial-infra-lack-of-basic- amenities-in-courts-to-law-minister> accessed 24 October 2022.
[4] Telangana Today, 'CJI Ramana Emphasises on ADR Methods to Resolve Disputes Amicably' *Telangana Today* (18 December 2021).

more adversarial process foregoing significant amounts of party autonomy that traditionally characterises ADR.[5] *Third*, that within this contextual framework – LAs offer a relatively balanced approach to party-centric dispute resolution by mandating pre-trial conciliatory processes and providing an institutional infrastructure to give effect to the outcomes of these processes. And *fourth,* that in doing so – LAs further the objectives of ADR, viz. speedy, inexpensive dispute resolution without the kerfuffle of tackling the complicated court system and procedural complications.[6] In this endeavour, the procedure to set aside orders serves as the analytical lens through which to compare and contrast the 'feasibility', 'flexibility', and – most importantly – 'finality' of these different ADR mechanisms.

Contemporary ADR Mechanisms – Populating the Spectrum

i. (Re)integrating ADR into Civil Procedure

"***Settlement of disputes outside the Court. –*** *(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.*

(2) Where a dispute has been referred-- (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act; (b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall .apply in respect of the dispute so referred to the Lok Adalat; (c) for judicial settlement, the Court shall refer the same 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 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act; (d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."[7]

… (emphasis supplied)

[5] Todd B Carver, Albert A Vondra, 'Alternative Dispute Resolution: Why It Doesn't Work and Why It Does' *Harvard Business Review,* (May-June 1994) <https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt- work-and-why-it-does> accessed 24 October 2022.

[6] Rintu Mariam Biju, 'India's Lok Adalats: Tackling Pendency, 41-Lakh Cases At A Time' (*Bloomberg Quint*, 10 December 2021) <www.bloombergquint.com/law-and-policy/lok-adalats-structure-and-effectiveness> accessed 25 October 2022.

[7] Code of Civil Procedure 1908, s 89 [ins. by Act 46 of 1999, s 7 (w.e.f. 01.07.2002)].

Section 89 of the Code of Civil Procedure, 1908 ["**CPC**"] (as inserted by the 1999 Amendment thereto) enumerates the various ADR mechanisms available to litigants in India. It references arbitration and conciliation under the Arbitration and Conciliation Act, 1996 ["**Arbitration Act 1996**"]. It also refers to the LAs established under Section 19 of the National Legal Services Authority Act, 1987;[8] finally, it provides legitimacy to mediation, even without any other statutory backing thereto (such as the Mediation Bill 2021 before the Rajya Sabha).[9]

Before 1999, Section 89 only included a reference to arbitration. However, with the enactment of the Arbitration Act, 1940, the need for such reference abated.[10] Only upon the recommendations of the Law Commission of India ["**LCI**"] – in their 129th Report on "*Urban Litigation: Mediation as Alternative to Adjudication*" – Section 89 was reintroduced and expanded to augment the scope of ADR as prescribed by the CPC.[11] Further, procedural clarifications were proposed with respect to Section 89 of the CPC *qua* the insertion of Rules 1-A, 1-B and 1-C to Order X of the CPC.[12] To this effect, Section 89 serves as effective scaffolding for the development of more sophisticated ADR mechanisms.

ii. Relativising the Adversarial Shades of ADR

The modes of ADR prescribed by Section 89 are distinguishable amongst themselves. Arbitration relaxes court procedures slightly and allows for the technical expertise of an arbitrator to be reflected in the adjudication process[12] upon the prior consent of the parties for such arbitration.[13] LAs aid and assist parties in reaching a conciliatory settlement,[14] with Permanent Lok Adalats ["**PLA**"] going further by adjudicating disputes only if a settlement is not reached.[15] It has been settled in law that such adversarial adjudication is a recourse of last resort and that voluntary conciliatory processes need to be followed as long as viable.[16] Mediation allows parties to discuss their interests with each other candidly to arrive at a win-win agreement which both parties can find mutual benefit in.[17] To this effect, these different modes embody the parties' autonomous choices in different degrees.

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[8] National Legal Services Authority Act 1987, s 19; *See also*: National Legal Services Authority Act 1987, s 22B (Permanent Lok Adalat).
[9] PRS, "The Mediation Bill 2021" (*PRS*) <prsindia.org/billtrack/the-mediation-bill-2021> accessed 24 October 2022.
[10] SC Sarkar, PC. Sarkar, *The Law of Civil Procedure* VOL. 1 (11th ed, Wadhwa & Co., 2006) 498; *See*: Arbitration Act 1940 (Act No. 10 of 1940).
[11] Law Commission of India, (Report No. 129), *Urban Litigation: Mediation as Alternative to Adjudication* (1988) [3.21]. [12] Law Commission of India, (Report No. 238), *Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions* (2011) [6.2]-[6.4].
[12] Jean Baker, 'Arbitrators Provide Technical Expertise, Confidentiality' (*Corporate Counsel Business Journal Blog*, 2017) <inhouselegaltech.com/uncategorized/arbitrators-provide-technical-expertise-confidentiality/> accessed 25 October 2022.
[13] Arbitration and Conciliation Act 1996, s 7.
[14] National Legal Services Authority Act 1987, ss 20(3), 20(4); *See also*: National Legal Services Authority Act 1987, s 22C(5), 22C(7).
[15] National Legal Services Authority Act 1987, s 22C(8).
[16] *United India Insurance Company Ltd v Ajay Sinha & Anr* (2008) 7 SCC 454, [27]-[28].
[17] Aisha Ado Abdullahi, 'Overview of the Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention)' (*International Bar Association*) <www.ibanet.org/article/946CFAF9-F0B5-41DE- 85D6-CFF422FB4852> accessed 24 October 2022.

Clearly, mediation makes for the most party-focused process[18] – since parties initiate, deliberate and ameliorate their issues of their own volition, only under the supervision and helpful guidance of a mediator.[19] Conversely, arbitration and LAs are slightly more adversarial – since they operate within an institutional framework which substitutes some degree of party autonomy. In other words, when cases are referred to arbitration or LAs, parties forego some portion of their deliberative freedom in favour of an institutionally secured outcome[20]. Conceptually, the exercise of party autonomy in arbitration occurs prior to the incidence of the dispute which may result in some resistance to the initiation of the arbitration proceedings. Contrastingly, consent to ventilate a dispute before the Lok Adalat is obtained after the dispute has arisen, leaving the parties with freer rein to participate in the proceedings. Procedurally, however, there are other stark differences between the two processes as well. Reserving comment on the vast jurisprudence on determining the arbitrability of a dispute,[22] this piece will look at how proceedings are initiated and how their outcomes may be vacated to better understand the exercise of party autonomy and agency in both arbitration and LA proceedings.

While arbitration emanates from an agreement to arbitrate that may be entered into by the parties when they enter into the initial contract,[21] a dispute can reach a LA through several avenues. The parties may consent to the LA's jurisdiction[22] – but an LA may also take a case up upon the application of one party if the presiding officer is of the *prima facie* opinion that a settlement may be possible[23] (only after affording a reasonable opportunity to be heard to the other party).[24] At the same time, if the LA is organised specifically to address the pendency in a specific High Court or lower Court – any cases pending before it[25] or likely to be instituted before it on account of such Court's jurisdiction over them[26] may be taken up by such LA. In any case, a Court may refer a matter to the allied LA specifically.[27]

However, the multiple modes of arriving before the LA do not *ipso facto* imply that parties have lesser autonomy in the determination of their disputes. A more suitable metric to assess the centrality of party autonomy to the LA process may be found in the procedure to set aside orders – as discussed hereunder.

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[18] American Arbitration Association, 'Model Standards of Conduct for Mediators' (2005) Standard I (A) [Self-Determination]<www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf>.
[19] *Ibid*, Standard VI [Quality of the Process].
[20] National Legal Services Authority Act 1987, ss 22C(8), 22E; *c/f* Arbitration & Conciliation Act 1996, s 35. [22] *Vidya Drolia v Durga Trading Corpn* (2021) 2 SCC 1.
[21] Arbitration & Conciliation Act 1996, s 7.
[22] National Legal Services Authority Act 1987, s 20(1)(i)(a).
[23] National Legal Services Authority Act 1987, s 20(1)(i)(b) *r/w* s 20(2); *See also*: National Legal Services Authority Act 1987, s 22C.
[24] National Legal Services Authority Act 1987, s 20(1).
[25] National Legal Services Authority Act 1987, s 19(5)(i).
[26] National Legal Services Authority Act 1987, s 19(5)(ii).
[27] National Legal Services Authority Act 1987, s 20(1)(ii).

Assessing Party Autonomy: The Procedure to Set Aside Orders

i. Limited Scope of Judicial Interference with Lok Adalat Orders

The awards given by an LA (Section 21(2)) or a PLA (Section 22E) are final and non-appealable under the National Legal Services Act, 1987. However, such awards generally give effect to the settlement arrived at by the parties during the conciliatory process in the exercise of their party autonomy – no matter the extent of such settlement.[28] Although, a PLA may also decide a dispute on merits in case no settlement is reached;[29] however, the threshold for such breakdown of voluntary settlement is so high that the PLA is constrained to observe due conciliatory process even where one party is wholly uncooperative, and the dispute appears to persist *ex parte*.[30] In any case, these awards have the force of a civil court order,[33] effectively making them executable[31] and barred by the principle of *res judicata*.[32] Since the awards are final and binding, it becomes important that unfavourable awards are set aside insofar as they vitiate party autonomy or give effect to unconscionable claims. To this effect, there needs to be a procedure to effectuate such setting aside.

An application for the setting aside of an LA award lies before a Writ Court in accordance with the jurisprudence of Article 226/227 of the Constitution.[33] It is because in granting an infructuous award, an LA exceeds the scope of the National Legal Services Authority Act, 1987 – amounting to a violation of a party's/parties' legal right to justice. Further, since any such

award is final and non-appealable – no appeal or review lies before a civil court.[34] However, such an application can only be maintainable if such statutory violation is established. Therefore, an application to set aside the award of an LA lies only if one of the following grounds are met:

First, it has been recently reiterated by the Hon'ble Supreme Court of India in the matter of *Estate Officer v Col (Retd) H V Makotia,*[35] that an LA cannot pass an order on the merits of a dispute before it. The appellant was directed to the LA of the High Court of Madhya Pradesh where the adjudicating officer decided his dispute on merits and made an order disposing the case altogether; the writ before the High Court also failed. It was contended by the respondent

[28] National Legal Services Authority Act 1987, ss 21(1) [Lok Adalat], 22C(7) [Permanent Lok Adalat].
[29] National Legal Services Authority Act 1987, s 22C(8).
[30] *Canara Bank v G S Jayaram* [2022] 7 SCC 776, [36]-[37]; National Legal Services Authority, 1987, s 22D. [33] National Legal Services Authority Act 1987, ss 21(1), 22E(2).
[31] Code of Civil Procedure 1908, Order XXI.
[32] Code of Civil Procedure 1908, s 11.
[33] *State of Punjab v Jalour Singh* [2008] 3 SCC 660.
[34] *United India Insurance Company Ltd. v Ajay Sinha & Anr.* [2008] 7 SCC 454, [25]; National Legal Services Authority Act 1987, ss 21(2), 22E(4).
[35] *Estate Officer v Coloner H V Mankotia (Retd.)* Civil Appeal No. 6223 of 2021 [7].

that the parties consented to the procedure of an LA and that the entirety of the matters, including the merits thereof, was therefore, within the adjudicatory purview of the forum. However, the Supreme Court found concurrence with the views of the appellant – which stressed upon the importance of "settlement" in the statutory scheme of the National Legal Services Authority Act, 1987.[36] Such settlement is necessarily a bilateral process which does not render itself to external resolution in the absence of party consent.[37] On this account, an LA does not have the jurisdiction to involve itself with the merits of the case; any order it issues on the merits of the case will become null and void.[38]

Second, another statutory violation may lie if the forum giving effect to a settlement is not a *bona fide* LA established by proper procedure: officers issuing awards from such office are neither members of the LA nor competent to invoke the statutory authority of the LA. In the matter of *Sanjay Kumar & Anr v Secretary, City Civil Court Legal Services Authority*[42]– the parties witnessed a perplexing state of affairs where the Additional Chief Judges of the City Civil Court also sat to preside over matters appearing before the LA. The Supreme Court found that the awards so passed were not passed by an LA in the first place and were, therefore, void.

Most importantly, an award of the LA can be set aside only if it can be shown that there was no settlement to begin with or that the award was not based on any settlement arrived at by the parties. Even the granular details of the settlement – viz. the mode, time and nature of payment cannot be altered by the LA.[39] This ground is most reminiscent of the party autonomy inherent in ADR – and has been invoked against LA awards aplenty. To this effect, any settlement obtained by fraud, misrepresentation or coercion is also liable to be set aside if given the form of an award. Illustratively, in the matter of *A L Abul Kalam Azad v A L Jawaharlal*[40] – the LA passed a bizarre award ordering the sale of suit properties but affixing the loan liability attached thereto to one of the joint owners (petitioner), such that the equity in the property proceeds stood at a 90% and 10% division. The Madras High Court noted that the award cannot be relied on as a preliminary decree to effectuate such an unconscionable division of assets and that no one-sided settlement of such a nature could be bona fide. 'Compromise' cannot be interpreted to mean a total surrender of one party to the benefit of the other.[41] A settlement is essentially a contract imposing mutual obligations, and unilateral enforcement cannot be sought by a party when corresponding obligations have not been discharged.[42]

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[36] National Legal Services Authority Act 1987, ss 19(5), 20(3), 20(5).
[37] *State of Punjab and Ors v Ganpat Raj* [2006] 8 SCC 364.
[38] Press Trust of India, 'Lok Adalat has No Jurisdiction to Decide Matter on Merits if No Compromise Between Parties: SC' (*The Economic Times,* 7 October 2021) <economictimes.indiatimes.com/news/india/lok-adalat-has-no- jurisdiction-to-decide-matter-on-merits-if-no-compromise-between-parties> accessed 24 October 2022.
[42] *Sanjay Kumar & Anr v Secretary, City Civil Court Legal Services Authority* W. P. No. 19143 of 2009.
[39] *P R Yelumalai v N M Ravi* [2015] 9 SCC 52.
[40] *A L Abdul Kalam Azad v A L Jawaharlal* C.R.P. Nos. 4093 and 4094 of 2010 (series).
[41] *NFU Development Trust Ltd. Re* [1973] 1 All ER 135.
[42] *Chen Shen Ling v Nand Kishore Jhajharia* [1973] 3 SCC 376.

ii. *The Overarching Critique of Setting Aside Arbitral Awards*

In comparison to Lok Adalats, Section 34 of the Arbitration Act, 1996 offers a catena of highly sophisticated grounds to set aside an arbitral award, ranging from party incapacity;[43] to a Court finding the award inconsistent with the public policy of India[44] or the most basic notions of morality.[45] Shukla and Anand have covered the scope of Section 34 of the Act in their comprehensive piece published in a prior issue of this magazine;[46] deferring to their erudite, this piece will not set out these grounds in detail. However, it is fair and pertinent to remark that these grounds are founded on multiple constitutive theoretical bases of which party autonomy does not appear to be foundational.

The interpretive breadth afforded to courts in the assessment of the legitimacy of such grounds as raised by the applicant party essentially subjects the parties to a secondary round of litigation, despite arbitration having already concluded.[47] Further, despite this interpretive exercise and adjudicatory exertion, the Court may only remand the matter and not modify the award to deliver justice to the parties in question.[48] Such a process exists because arbitration in itself is not particularly facilitative of party autonomy once it is initiated – resulting in the overarching role of the arbitrator subsuming the mutual interests of the parties into an adversarial process. While parties may continue to exercise some control over the logistical and bureaucratic aspects of the proceedings,[49] such institutional control cannot be said to be material to the merits of the dispute before the tribunal.

The customizability of the forum may be a relative function of the subject matter of both arbitration and LA/PLAs. The former generally contemplates high stakes commercial agreements in which parties seek sophisticated outcomes viz. procedural orders, particularised costs, specific performance, high-value awards, etc.[50] The latter is concerned with more routine disputes with public utility services over terms of standard-form contracts that occasion resolvable grievances, predominantly by negotiating purely monetary pay-outs. Compared to

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[43] Arbitration & Conciliation Act 1996, s 34(2)(a).
[44] Arbitration & Conciliation Act 1996, s 34(3)(b)(ii).
[45] Arbitration & Conciliation Act 1996, s 34(3)(b)(iii).
[46] Rishabh Shukla, Srishty Anand, 'Determining the Scope of S.34(4) of Arbitration and Conciliation Act, 1996: A Critical Analysis' (2022) 3(1) GNLU SRDC-ADR 22 <gnlusrdcadrmagazine.com/wp-content/uploads/2022/06/Volume-III-Issue-I-Article-3.pdf> accessed 24 October 2022.
[47] Nand Gopal Khaitan, Shounak Mitra, Rishav Dutt, 'Judicial Interference in Arbitration: Section 34 Saga' (*Lexology*, 8 October 2020) <www.lexology.com/commentary/arbitration-adr/india/khaitan-co/judicial-interference-in- arbitration-section-34-saga> accessed 24 October 2022.
[48] *The Project Director, National Highways No. 45E and 220, National Highways Authority of India v M Hakeem & Anr* C.A.
No. 2756/2021.
[49] *ONGC v Afcons Gunanusa JV* 2022 SCC OnLine SC 1122.
[50] Renuka Mishra, Avishek Mehrotra, 'VI. Untying the Gordian Knot of Delays in Post-Pleading Arbitration Stages: A Suggestive Analysis' (2021) *RGNUL Financial and Mercantile Law Review* 96.

the rigours of adversarial arbitration, the ethos of the LA/PLA makes for more consistent adjudication and grievance redressal operant in a landscape of malleable monetary interests.

Conclusion: Redeeming Lok Adalats

This paper has shown how the LA system has emerged as an imperfect but enduring remedy to the judicial pendency plaguing the Indian legal system. It has demonstrated this by *first*, acknowledging that ADR mechanisms exist on a spectrum depending on how adversarial they are. On this spectrum, mediation would constitute the liberal extreme, offering the least amount of contest and securing the highest degree of party autonomy. Other modes of dispute resolution populate the spectrum accordingly. *Second*, upon evaluating the procedure of the LA, the paper remarks on the modes to initiate, deliberate and settle disputes before LAs such that they result in speedy and inexpensive delivery of justice. *Third*, the paper shows how this process does not take away from the interests of the parties since the leitmotif of party autonomy allows for easy and clear setting aside of orders even if unfavourably passed. And, *fourth*, upon comparing this process with that of arbitration, this paper demonstrates that LA must be placed higher on the spectrum of adversarial processes compared to arbitration since it provides for an effective mode of dispute resolution without compromising party autonomy to the degree that arbitration does. Arbitration certainly has its merits where parties require high technical expertise, low turnaround times, and the ability to determine the rules of the game most suited to their unique relationship. However, with institutionally mediated proceedings, a virtually plenary civil jurisdiction, and the principles of justice and fairness built into the mechanism – Lok Adalats provide for greater flexibility in resolving the substantive merits of the dispute, albeit within set rules of procedure. The party autonomy afforded to the common man in this institutional framework of ADR is definitely commendable and deserving of more popular consideration.