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ADR System in India: Challenges

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ABSTRACT

The Constitution's Article 21 guarantees a just, fair, and reasonable process. The sooner the conflicts are settled, the better for all persons involved individually and society at large. The ultimate farce of the law is when justice is denied by a delay, but in India, the delay really ends up killing the entire legal system.

Here comes the role of Alternate Dispute Resolution. Alternative dispute resolution is considered as a potential method for resolving conflicts. It settles disputes on a variety of topics, including civil, business, industrial, and many more. Through this method, a third person who is not engaged in the conflict must assist in resolving the issue at hand. To talk and debate the issue and find a resolution so that it may be resolved, a third impartial party is needed. It appears to be a helpful method of resolving conflicts. Alternative dispute resolution (ADR) techniques are used to speed up the resolution of disputes and reduce the load on the courts through the exclusive option through negotiation, arbitration, conciliation, and mediation.

ADR is recognised in India under Articles 14 and 21, which are founded on the principles of equality before the law, the right to life, and the right to personal liberty.

Alternative dispute resolution (ADR) techniques are used to speed up the resolution of disputes and reduce the load on the courts through the exclusive options of negotiation, arbitration, conciliation, and mediation. This project aims to throw some light on the challenges behind the implementation of ADR in India and the various socio-economic legal barriers that exist in the same.

I. INTRODUCTION

Justice needs to be delivered quickly and affordably for everyone. Every citizen has the right to life and personal liberty, which is protected by Article 21 of the Constitution, which also assures a just, fair, and reasonable process. This right includes the right to a timely trial. Every dispute is like cancer. For all parties involved in particular and society as a whole, the sooner it is settled, the better. If it is not handled as soon as possible, it expands enormously over time as new problems crop up and there are countless competing circumstances, which makes it harder and harder to fix. Conflicts build upon one another. Therefore, it is crucial to settle the conflict as

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soon as it arises.

The Indian Legislature agreed in 1996 that there should be a more effective justice delivery system in the form of arbitration, mediation, and conciliation as Alternative Dispute Resolution (ADR) alternatives in eligible civil and commercial situations in order to alleviate the burden on the courts. As a result, the Arbitration and Conciliation Act, 1996 was passed by Parliament with the intention of facilitating speedy resolution of economic disputes through private arbitration. Any commercial issue must be resolved quickly if business and industry are to run smoothly. ADR is now frequently referred to as "Appropriate Dispute Resolution" rather than "Alternative" in many contexts. Actually, the term "Judicial Dispute Resolution" (JDR) is used to describe litigation. ADR is also known as a worldwide system due to its widespread use.

This research paper will help the reader in understanding the various Socio, Economic and Legal Barriers that exist with regard to ADR and also the solutions to those barriers or problems.

II. Analysis

ADR is a tool for expediting the resolution of legal disputes, and the first step toward achieving that goal was made in 1940 with the introduction of the first arbitration Act. The Act was abolished because of its many flaws, which prevented it from being completely implemented. A new Act, which was based on the framework and guiding principles of the UNCITRAL law model, was presented in 1996. Numerous changes were made, and the committee's recommendations as well as the fact that many corporations and businesspeople were using it were taken into consideration.

The Alternative Dispute Resolution Mechanism is not an exception to the norm that everything is a combination of black and white and imperfection. Unless both parties willingly agree or sign a contract, parties cannot be forced to use ADR to settle their problems. "Arbitrators were regularly and vehemently criticised for being biased and inexperienced in settling conflicts. Most people who work in the legal field are probably blissfully unaware of the alternative way for delivering fair justice through arbitration. The system of arbitral justice has so coexisted extensively alongside the legal system, although without much anticipated success.

There are rumblings that the Arbitration and Conciliation Act, 1996 has lost its essential character and structure and is no longer what its lawmakers intended it to be nearly 15 years after it was passed. The success of ADR depends on the parties and their attorneys' good intentions; nevertheless, unrepresented and/or misinformed parties have a lower chance of success in an ADR. ADR has no value as a precedent. Typically, precedents are not given significant weight in ADR cases. Depending on the arbitrator or mediator and other variables,

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ADR outcomes might vary. A poor mediator or arbitrator's credentials, manner, and attitude can lead to a failed resolution and undermine the goal of ADR. However, when considering the benefits as

1. LEGISLATIVE PROBLEMS

The old legislation, the 1940 Act, was replaced with the 1996 Act because it failed to meet the expectations of India's citizens in general and the business community in particular. The 1996 Act was primarily passed to comply with the UNCITRAL Model Law, fulfil the international responsibility, and appease the business community. Unfortunately, the Model Law was not properly secured at the time. India fully embraced the Model Law, but the UK partially adopted it and many other nations, including the US, never moved to fully adopt it. In actuality, India merely reproduces the Model Law's provisions. The unique requirements of the Indian business community, the legal system, societal issues, a shortage of judges, court infrastructure, etc., were not taken into consideration.

The new Act has repeatedly shown itself to be a failure of legislation. This legislation is a prime example of "poor legislative effort" due to a number of flaws. The Arbitration and Conciliation Act of 1996's definition of "Court" differs significantly from the language found in the prior statute from 1940. Due to this new definition, the District Judge now has a huge workload that was previously split amongst other judges in the Civil Court. The District Judge cannot dedicate as much time to arbitration proceedings as is expected, and the cases are simply piling up, as seen by the experience of the previous 10 years. It prolongs the process and worsens the situation for the plaintiffs. The District Judge is the most senior judge in the district handling civil cases, and she also serves as the Sessions Judge, making her the most senior judge handling criminal cases. Consequently, the title of the district's chief judge is “District and Sessions Judge”, the majority of the District and Sessions Judge's time is spent on criminal cases since they are significantly more urgent than civil cases like arbitration. This includes ordinary criminal proceedings like bail and interim petitions. The District and Sessions Judge typically is unable to set aside enough time for arbitration proceedings that need for in-depth investigation, although having the best of intentions.

All issues relating to arbitration must be submitted in the primary Civil Court of Original Jurisdiction in a district, with the exception of a few towns where the High Courts wield conventional original civil jurisdiction. This is the District Judge's Court by definition. The legislation purposefully excluded any civil court of a lower grade than such major Civil Court or any Court of Small Causes. This leaves the Court of the District Judge and only this court to

have jurisdiction over arbitration matters.[2]

As a result, the arbitration cases remain unresolved, leaving the plaintiffs with little choice but to wait. Sometimes, litigants choose extralegal means to resolve the conflict, which is bad for the economy and society. It gives the legal system a bad reputation and begins to cause trust to erode. Additionally, it makes Indian business partners and investors think of India as having a slow-moving judiciary. As a result, the business sector in particular and the economy as a whole suffer.

2. INTERVENTION OF COURTS

Avoiding going to court is the main goal of Alternative Dispute Resolution (ADR) techniques, of which arbitration is the most prevalent. However, court involvement is unavoidable. There are occasions when intervention is wanted to keep the arbitration process on track. Court interference is a practise that is recognised all over the world. Most governments give the subordinate judiciary the authority to review arbitration cases; nonetheless, some cases end up in the highest court. The similar method is used in India, and many arbitration cases are filed in the lower courts.

Because the parties have agreed to arbitrate their disputes, the foundation of every arbitration agreement is party autonomy. However, this independence has limitations. The relevant laws and public policies determine what restrictions can be placed on this autonomy. The norms of arbitral organisations also place restrictions on the freedom of the parties. Additionally, instances of arbitrator bias, inappropriate process behaviour, etc. call for court intervention. Courts may also get involved to invalidate or sustain an award. Complete independence of the parties in an arbitration is unacceptable, and the logical conclusion is that complete court non-interference is also unwelcome. For example, in the Hooters case, the court refused to uphold the arbitration clause and said,[3]

"The parties agreed to submit their claims to arbitration-- a system whereby disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty."

Regardless of how fierce the critics, court intervention in such circumstances is necessary, beneficial, and should never be eliminated. The primary goal and legislative objective of the

[2] *Special Address by Dr. S. Muralidhar, International Conference on ADR, Conciliation, Mediation and Case Management Organised By the Law Commission of India, 2003*
[3] *Hooters of America v. Phillips, 1999*

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new Arbitration and Conciliation Act, 1996 is to curtail the excessive court intrusion that seriously undermined the older Arbitration Act, 1940. As a result, Section 8(1) of the New Act mandates that when a case has been referred to an arbitral tribunal, the judicial authority, or court, must stop any pending litigation. Similar rules are set forth in relation to the New York and Geneva.

In situations like the Konkan Case, the Court initially supported the 1996 Act's implementation, but subsequent reality has been far from ideal. Despite the fact that a staggering 91% of respondents in a global survey rejected the appeals process in international arbitration cases like the ONGC Case and the SBP & Co Case, the public has shamelessly fought government efforts to promote arbitration in India. An arbitral judgement was contested in the ONGC Case on the grounds that it violated Indian public policy; however, the court used a very broad definition of public policy rather than a restrictive one that limited it to actions that went beyond a prima facie breach of Indian law. The Court continued by equating patent illegality with legal mistake and holding that any violation of Indian law would automatically render the award unlawful.

Thus, the floodgates were opened for the exact rounds of laborious judicial review that the Act was designed to avoid.[4] The Supreme Court further broadened the scope of judicial intervention when it ruled in SBP & Co that the Chief Justice of India had the authority to decide on issues like whether arbitration agreements were valid and that the CJ could even call for evidence to resolve jurisdictional issues while performing the function of appointing an arbitrator when the parties were unable to come to an agreement. Such verdicts would be decisive and bind the parties, the Supreme Court continued. This amounted to a scenario where the arbitral tribunal's ability to decide its jurisdiction was compromised since it effectively violated the norm of competence.

As a result, courts effectively gave themselves the authority to materially prolong arbitral procedures, which is contrary to the main motivation of the passage of Section 13 of the 1996 Act. This takes us to the controversy between high standards and low principles in today's adjudication. A catena of cases that all restate the judiciary's right to examine the arbitral judgement have followed ONGC's wide interpretation of the word "public policy," raising major concerns about the Court's expanding intrusion into the judicial sector. According to the Supreme Court, in situations like the Hindustan Zinc Case, “awards might be set aside on grounds such being counter to the terms of contract as ONGC allowed power for intervention in such grounds.”

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[4] *Aloke Ray, Dipen Sabharwal, “What Next for Indian Arbitration?”, The Economic Times, 2006*

3. CULTURAL NORMS

The Indian public, in general, continues to express resistance to arbitration. The continued attitude of some urban arbitrators, which is characterised by a lack of sensitivity towards national law of a developing country like ours and their mandatory application, is negatively affecting the legal environment necessary to promote the idea of arbitration, particularly in the field of business relationships. This attitude is caused by ignorance, carelessness, or unjustified psychological superiority complexes.[5]

The arbitrators are unable to comprehend how many aspects of Indian culture operate. Few of them are familiar with or knowledgeable about the customs and cultures of all of India. They don't even bother to consider the viewpoints of the parties in the current procedure.

Such remarks may simply be the product of people with a case of "sour grapes" who find a cause to criticise a procedure they believe is out of their control or produces results that do not match their idealised expectations. Such remarks would be simple to explain away if that were the only reason behind them.

People from diverse backgrounds frequently have preconceived notions about one another's cultures, habits, and attitudes. It is simple to understand how this may inadvertently translate into a perception of prejudice toward an arbitral tribunal that does not accurately represent the cultures of one or more of the parties. Above all, arbitrators need to be aware of these factors and modify their strategy accordingly.

Unfortunately, the dynamic that is the interaction between the Tribunal and the parties may also be influenced by political and religious concerns. In order to prevent concerns from negatively influencing the process, the Tribunal's responsibility should include being aware of possible issues and employing the procedure dynamically. Another significant obstacle to arbitration in India is miscommunication. When translated in a country with many distinct languages, spoken words can take on a radically different meaning. Body language, looks on the face, and gestures can occasionally convey the incorrect messages.

Different cultures' approaches to business may reveal significant variations. Not so long ago, the only indication that an agreement had been achieved was frequently a nod and a handshake. Even today, the way business is conducted in various jurisdictions reveals quite distinct patterns of behaviour. Indeed, there have been significant changes over the past ten years, with contracts in India being far more intricate and complex than they were before. However, the Tribunal

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[5] *Sarah Hilmer, "Did Arbitration Fail India or Did India Fail Arbitration", 2007*

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must be aware of any possible differences in strategy since they might be mistakenly seen as a lack of support for a specific stance.

4. ADEQUATE HUMAN RESOURCES

A system is only as effective as the individuals using it. Arbitration has not been as effective as it could have been for a number of reasons, the most significant of which being the entrenched interests of various professional groups.[6]

A lack of standards in the conduct of arbitration in India is largely due to the fact that lawyers are frequently untrained in the law and practise of arbitration and have a propensity to drag out proceedings, request pointless adjournments, sandwich proceedings between routine court appearances, etc. Due to this, parties have begun choosing international arbitration or, as a "lesser evil," returning to courtroom litigation in India.

Simply passing a legislation on arbitration that is progressive is not sufficient. It's comparable to having a first-rate football field, a brand-new stadium, and a legitimate football. A game also requires umpires and participants who are knowledgeable about the rules.

The future success of arbitration in India depends on the availability of competent, educated, and trustworthy arbitrators as well as fully functional arbitral institutions. Arbitration's future would undoubtedly be harmed if it were to be determined that by opting for arbitration over litigation, parties significantly reduced their prospects of receiving fair justice. The major parties, including the lawyers, the Bench, the arbitrators, the arbitral institutions, and the arbitration consumers, must cultivate a culture of arbitration and demonstrate a real commitment to preventing the “banalization” of arbitration.

If arbitration is to give the advantages it is capable of providing, Indian attorneys and judges would benefit from being aware of and absorbing some of the finest arbitration practises from nations with a more developed culture of arbitration. Ten years later, arbitration in India under the 1996 Act is still in its infancy and has not yet reached its full potential.

Furthermore, the majority of institutional arbitrations and ad hoc arbitrations in India are presided over by retired judges who, as a result of their protracted time on the bench, have become accustomed to strict civil procedure and evidence rules and are thus far too prone to falling into that trap. Due to this, arbitrations essentially devolve into a battle of formalities and pleadings, with each side trying all in their power to postpone if doing so serves their interests.

Furthermore, because the Arbitrator has retired and has the chance to make some post-

[6] *Justice S.B.Sinha, “ADR and Access to Justice: Issues and Perspectives”, SCR, 2008*

retirement income and because there is no set schedule of fees and his ability to set his charge is entirely up to his whim and fancy, there is a self-interest in prolonging the proceedings. It goes without saying that many arbitrators find it challenging to achieve that balance unless they are either overworked or take delight in making decisions quickly, with money being of little consequence.[7]The Arbitrator may not be familiar with Arbitration law or how to properly conduct the process. Furthermore, the retired judge will also not be familiar with technical expert matters.

5. FINANCIAL RESOURCES

At any event, it is becoming more typical in India for arbitration sessions to be held in pricey locations. In a few cases, the parties are required to pay for an entire day even if the proceedings are quite brief. The cost will be higher if the venue is a five-star hotel. Parties feel embarrassed if they have to reject request for an expensive venue.[8]

On the other hand, there are accommodations that are rather acceptable and less expensive than five-star hotels. A number of public organisations do provide their conference rooms for arbitration, and all spaces may be rented for a reasonable price. The Commission has been told that certain arbitrations, which have been ongoing for years, have cost thousands of rupees to cover venue charges. Depending on how the arbitral tribunal rules on expenses in the award, one party who is wealthy enough may agree while another who is not as wealthy may disagree. Nevertheless, both parties may wind up sharing the significant costs.

The enormous cost of arbitrations is still another, more crucial factor. While the State pays the judges who preside over matters in courts, this is not the case with arbitrators. Additionally, parties must pay the arbitrators' fees. Legal representation is always paid for, whether in court or before arbitrators. The fees paid these days to arbitrators are fairly high. We have heard from attorneys and arbitrators. But we have to take care of interest of the parties also.

Furthermore, it must be thought through what would occur if the appointment of arbitrators were to be made automatically and the appointing authority under Section 11 were to make no further considerations.

According to the standard method used by the arbitrators today, the claimant is required to submit his claim statement and any supporting papers at the first hearing. The opposing parties are instructed to submit their response and supporting documentation at the second hearing. The

[7] *D. M. Popat, —Adr And India: An Overview", The Chartered Accountant, Dec 2004*
[8] *Christine Cervenak, David Fairman and Elizabeth McClintock, —Leaping the Bar: Overcoming Legal Opposition To ADR in the Developing World", Dispute Resolution Magazine 1998*

claimant then submits his response at the third hearing. There are often two or three adjournments at each of these points. Applications for temporary orders are also submitted sometimes. Today, any jurisdictional matter is typically not considered for the first time until at least 6 adjournments have passed. The number of adjournments is unquestionably higher if the defendant is the State or a public sector organisation. For each hearing, the parties pay the arbitrators' fees which comes to almost thousands of ruppees.

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6. LACK OF ADEQUATE POLITICAL SUPPORT

India adheres to the separation of powers principle. The three branches of government—legislature, executive branch, and judiciary—all function separately yet there is clear overlap between the first two.

The Union Legislature is led by the President, who serves as its chief executive. Every member of the Prime Minister-led Council of Ministers must be a legislator, or if they are not, they must join within six months. As a result, the Government has undisputed control over the legislative process. Since coalition governments have been in power for a while, the primary ruling party's programme must be acceptable to other coalition members, which unquestionably reduces the government's final say.

The government has found it more and more challenging to pass legislation that it has even proposed itself in the Parliament over the past few of years. The Arbitration and Conciliation (Amendment) Bill, 2003, which the government at the time introduced based on the Law Commission's advice, is one such instance. It gets much more challenging when personalities and egos collide and a couple of self-styled messiahs control the legislative process.

After the 1996 Act had been in effect for five years, the Sixteenth Law Commission, led by Justice B. P. Jeevan Reddy, presented a report with the report number 176 to the Union Government. The report suggested that the 1996 Act be amended as needed. 30 The new legislation on arbitration had some flaws that the legal and business community had pointed out, and the law minister at the time, Mr. Arun Jaitely, had stated a wish to have them examined. He had also received some representations.

The Government was required to take swift action in order for the required adjustments to be

implemented on time. The Government delayed further by taking too long to decide on something as simple as the definition of "court," which should never have been juggled in the first place and for which there was consensus among all parties involved and a recommendation from the Law Commission.

The Law Commission's report, which was sent to the government in September 2001, was read carefully by the government. An amendment proposal took two years to be made. The "Arbitration and Conciliation (Amendment) Bill, 2003" was introduced in the Rajya Sabha on December 22, 2003, by Mr. Arun Jaitley, the country's then-law minister.The bill included a number of amendments.

The 2003 Bill has been withdrawn as a result of political rivalry. Even if the 2003 Bill revisions proposed by the Law Commission and later introduced in the Rajya Sabha appear to be in the interests of the general public, a battle of two titans is keeping the country hostage.

At this point, the issue that has to be addressed is whether it is wise to just duplicate law without adapting it to our requirements. It is also time to consider whether it was a good idea to form so many committees to examine the Law Commission's proposals.

It is well knowledge that the Law Commission is made up of distinguished legal professionals. Reports from the Law Commission represent the wisdom of the group. How is it questionable? Not just once, but several times. How many times should the work of the Law Commission and the Government's Legislative Wing be reviewed? There must be an end to this.

All of these committee members must also consider whether or not what they have been doing in the guise of analysing the Law Commission's conclusions is helpful.

III. LEGAL PROVISIONS

1. Constitutional Background of ADR

The Indian Constitution's Articles 39-A and 21 provide free legal aid to the underprivileged who cannot afford to retain attorneys to defend them in court. Because of this, they have a chance to defend themselves.[9]

The campaign to save constitutional provisions began with the publishing of the committee report by justices V. R. Krishna Iyer and P. N. Bhagwati. The study said that the poor will be given access to all courts, from the Munsiff courts to the Hon. Supreme Court.

A number of solutions for settling civil disputes in both legal and extralegal contexts have been

[9] Dr. Avtar Singh, Law of Arbitration And Conciliation- 7th Edition (2006).

devised and implemented by the committee for the implementation of legal aid services (CILAS).[10]

The states have established Lok Adalats, legal aid programmes, family court, and other other forms of alternative conflict resolution on the basic premise of this principle.

Giving the people justice is the cornerstone of effective administration, and our constitution includes provisions for all three types of justice—economic justice, political justice, and social justice. Therefore, in order to provide justice, it is necessary to develop an ultra-modern distributed framework, synthetic and planned human resources, judicare technology and models, and remedy-oriented legal doctrine.

2. Legislative Recognition of ADR

The People's Court Decision, also known as Nyaya Panch, is a traditional method of resolving conflicts through arbitration or mediation. It is ingrained in the lok adalat philosophy. People who find lok adalat different from all the other things mentioned call it people court as it involves the people who are directly or indirectly related to the disputes. Some people associate lok adalat with conciliation or mediation, while others associate it with negotiation or arbitration.[11]

The legislation governing dispute resolution has evolved throughout time to encourage quick conflict resolution. As exhorts the courts to close all outstanding cases. To alleviate the burden on the courts and make it possible for ADR to be successfully implemented as a redress mechanism, organisations like ICA, ICADR, consumer redressal forums, and Lok Adalats were revived. This led to the elimination of the UNCITRAL model legislation, which was based on international commercial arbitration, and the introduction of the Arbitration Act of 1996.[12]

Two laws, the first being the Arbitration and Conciliation Act of 1996 and the second being Section 89 of the Civil Procedure Code, demonstrate the legislative concern for delivering swift justice.[13]

IV. Conclusion

As was previously said, India's ADR system faces several legal, social, and economic issues. The diversified and culturally rich population of India is the cause of these issues, as well as a

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[10] Singh, Dr. Avtar; Law of Arbitration And Conciliation, Eastern Book Company 7th Edition (2006)

[11] *V. Karthyaeni ; Bhatt Vidhi,* "*Lok Adalat And Permanent Lok Adalats- A Scope For Judicial Review: A Critical Study*"

[12] *Origin Of Alternative Dispute Resolution System In India*

[13] *Dr. Avtar Singh; Law of Arbitration And Conciliation (Including Adr System), Eastern Book Company, Lucknow, 7th Edition (2006)*

lack of governmental benevolence in this area.

The government must take strong action to remove these obstacles, starting by adopting the 176th Report of the Law Commission. Combined with this Administration, both at the State and Union Levels must develop educational initiatives that target not just the general public but also arbitrators. ADR is a relatively new idea, and ideas like this not only require. Acceptance of such a notion at the grassroots level is another major issue. Therefore, it becomes essential to implement a strong programme in India to teach the general public legal literacy, especially in the area of ADR. This would not only make ADR accessible to the general public, but an informed citizen will also benefit the country's progress.

This inaccuracy in the ADR system is equally the fault of the general public. To obtain quick and affordable justice, people should choose alternative dispute resolution (ADR) over litigation and use this system carefully. the objective that ADR was designed to fulfil. India's law education nowadays must treat ADR processes seriously.

These mechanisms are only taught nowadays as a part of specialised courses that mainly concentrate on the application of these procedures in relation to corporate mergers and amalgamations.

India is a country that perfectly embodies the careful blending of the contemporary and the old. Indians excel in preserving the best aspects of both. The ordinary Indian of today should benefit from all of India's conflict resolution processes while keeping in mind the same spirit of India. The welfare of the nation's regular citizens has always been the driving force behind any legislation, amendment, or new introduction.

Alternative Dispute Resolution (ADR) is not intended to replace litigation; rather, it is intended to improve the effectiveness and efficiency of our current judicial systems. Effective Alternative Dispute Resolution must be developed. Ways to lessen the current judicial functioning load must be found. The number of cases on the backlog is growing daily, yet the judiciary is not accountable for the same on its own. Noteworthy is the fact that the "inadequate judge population ratio" is what causes the backlog and the absence of fundamental infrastructure. Hence, the government must take a proactive approach in this regard.

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