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Alternative Dispute Resolution and its Effectiveness in India

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ABSTRACT

Dispute resolution is the process of deciding a dispute or a conflict that has arisen between transacting parties. The decision can be arrived at either in an amicable manner or adversarial manner. Arbitration or mediation as an alternative to dispute resolution by municipal courts has been prevalent in India from Vedic times. Our Constitution under Articles 39-A and 21 provide for free legal aid to the indigent persons and right to life respectively. Following the mandate of our Constitution, our legislators passed the Legal Service Authorities Act, 1987 and The Arbitration and Conciliation Act, 1996 which was passed on 16th August, 1996 taking into account UNCITRAL Model law and rules. The present research paper focuses on the effectiveness of Alternative Dispute Resolution mechanisms in India. The broad objective includes (a) A comparative analysis of institutional ADRs and Ad-hoc ADR, (b) to evaluate effectiveness of ADR mechanism and (c) to make concrete suggestions. ADR techniques like Arbitration, Conciliation, Mediation and Lok Adalat have their different practical application and effectiveness. On analysis of different ADR techniques in relation to Indian judicial system, it is found that mediation and lok adalat have more significance as compare to conciliation and arbitral techniques.

"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

-Abraham Lincoln

Introduction

Justice delivery system plays a fundamental role in protection and promotion of public interest and in the preservation of order in the society. Since beginning, dispute resolution mechanism has been one of the focus areas of the society. Effective system for the resolution of disputes is essential for dispensing justice. An effective dispute resolution system is essential for dispensing justice. Delay in justice, for whatsoever reason, has really defeated the purpose for which the people approach the Courts. Dispute resolution is the process of deciding a dispute or a conflict that has arisen between transacting parties. The decision can be arrived at either in an amicable manner or adversarial manner, either by the parties themselves or a neutral third party. The differences between the parties are addressed by dealing with their transaction-related interests. The present research paper focuses on the effectiveness of Alternative Dispute Resolution mechanisms in India. The broad targets included (a) A comparative analysis of institutional ADRs and Ad-hoc ADR, (b) to evaluate effectiveness of ADR mechanism and (c) to make concrete suggestions.In this work, an attempt has also been made to compare the practice of different techniques / mechanisms of Alternative Dispute Resolution, its sub-categories and how these work and their significance. Doctrinal method of research has been adopted in the present research. Primary and secondary sources are explored to complete the research. The topic of research paper is relevant for present legal scenario because legal fraternity is trying to find out the way of speedy disposal of the litigation. Broadly, there are three methods of dispute resolution:

A. Traditional Dispute Resolution
B. Alternate Dispute Resolution
C. Hybrid Method of Dispute resolution

Traditional dispute resolution method or litigation refers to the proceedings before an appropriate court of law according to the procedure established, whereas the alternative methods are more flexible and party-centric and include negotiation, mediation, conciliation and arbitration. Hybrid-methods, as the name implies are a cross-over between two alternative methods of dispute resolution.

Section 89 in the Code of Civil Procedure, 1908 and the Arbitration and Conciliation Act, 1996 were introduced to evolve alternative mechanisms to reduce the burden of the Courts and provide speedy access to justice.

Historical Development of the Alternative Dispute Resolution System

Alternate Dispute Resolution is not a new experience for the people of India. It has been prevalent in India since time immemorial. Procedure for justice is indicative of the social consciousness of the people and law is a measuring rod of the progress of the community. In earlier days disputes hardly reached courts. Decisions given by the elderly council were respected by all.

In the ancient period, when Dharma and customary law occupied the field, reform process had been *ad hoc* and not institutionalized through duly constituted law reform agencies. With the advent of British rule, significant judicial developments and reforms took place.[i] Before formation of Law Courts in India, people used to settle matters of dispute by themselves through mediation. The mediation was normally headed by a person of higher status and respect among the village people known as Village headman and he was assisted by some people of same character or cadre from several castes in the locality and such mediation was called in ancient days "Panchayat".

Referring a dispute to the 'Panch', considered as Parmeshwar, had been one of the natural ways of deciding variety of disputes which reflects that our society has always strived for resolving the dispute and not adjudicate the same.

Our holy text book "*Bhandarnayaka Upanishad*" authored by great philosopher and scholar '*Yajnavalakya'* refer to the three kinds of institution which resolved disputes by informal proceedings without the intervention of the King, :-[ii]

1. PUGA : Board of persons residing in a locality to resolve local disputes and conflicts.
2. SRENI : Assembly of tradesman and artisan deciding over commercial disputes.
3. KULA : Group of persons bound by familial ties to resolve the familial matters.

Members of these institutions were adept in their field and the decision by these bodies was binding on to the parties, appeals against which were provided to the Court of Judges appointed by the King himself[iii].

During Mughal's Rule in India, a hybrid of such institutions grew up. The Mughals had three separate judicial agencies, all working at the same time and independent of each other. Those were the courts of religious law, court of secular law, and political courts. These institutions governed the disputes between Muslims and Non-Muslims community without the intervention of the Sovereign, the King. Hedaya containing the Islamic laws refer Arbitration as Tahkeen. Thus, it could be inferred that the alternative modes of redressal of disputes existed in India much before the time when the Britishers formally introduced in India.

Judicial administration was changed during British period. The current judicial system of India is very close to the judicial administration as prevailed during British period. The traditional institutions worked as recognized system of administration of justice and not merely alternatives to the formal justice system established by the British. The two systems continued to operate parallel to each other Britishers firstly brought a provision in the Bengal Regulation of 1772 that provided "In all cases of disputed accounts, etc., it shall be recommended to the parties to submit the decision of their cause to Arbitration, the award of which shall become the decree of Court"[iv]. Further, facilities for Arbitration were given by the Regulations of 1780 and 1781. The Regulations of 1781 provided that "No award of any Arbitrator be set aside except on full proof made by oath of two credible witnesses that the Arbitrator has been guilty of gross corruption or partially in the cause in which he has made the award"[v].

The Bengal Regulation of 1793 empowered the Court to refer matters to arbitration with the consent of the parties where the value of the suit did not exceed sicca Rs.200 and the suit were for accounts, partnership debts, non-performance of contracts, etc., the regulation also laid down the procedure for the conduct of arbitral proceedings[vi]. The Regulation of 1795 extended the Bengal Regulation to Banaras and the Regulation of 1803 extended it further to the territory ceded by Nawab Wazir.

A need was felt thereafter by the British Govt. that provisions of arbitration should be transferred into a comprehensive and separate Act, which led to the enactment of Indian Arbitration Act, 1940 repealing all earlier Acts relating to arbitration & also amended Second Schedule of Code of Civil Procedure, 1908. The 1940 Act consolidated and amended the law relating to Arbitration in British India.

The United Nations Commissions on International Trade Law (UNCITRAL) adopted the UNCITRAL model Law on International Commercial Arbitration in 1985 and UNCITRAL Conciliation Rules in 1980. These model law and rules were recommended by the General Assembly of the United Nations to all the countries for adoption in their own laws.

This resulted in enactment of a new Act, which could cater to the contemporary needs. The Arbitration and Conciliation Act, 1996 was passed on 16th August, 1996 taking into account UNCITRAL Model law and rules and vastly making amendments in the law relating to the domestic arbitration contained in the 1940 Act. The 1996 Act repealed the Arbitration Act 1940; Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961[vii]. It also repealed the Arbitration and Conciliation Ordinance, 1996, which was in promulgation before the Act came into the force. The Act of the 1996 seeks to consolidate and amend the law relating to Domestic Arbitration, International Commercial Arbitration, and enforcement of Foreign Arbitral Award and to define the law relating to conciliation and for matter incidental and connected therewith [viii]. The 1996 Act has been amended by The Arbitration and Conciliation (Amendment) Act, 2015 (Act No. 3 of 2016).

Our Constitution under Articles 39-A and 21 provide for free legal aid to the indigent persons and right to life respectively. Since our Courts are over-burdened and face the crisis of large number of pendency and law has to help the poor, who do not have the means, i.e., economic means to fight their causes, the concept to ADR has been recognized under constitution of India to meet the end of justice[ix].Following the mandate of our Constitution, our legislators passed the Legal Service Authorities Act, 1987 and brought the establishment of Lok Adalats as a means of ADR. The Lok Adalats are an innovative form of voluntary efforts for amicable settlements of disputes between the parties. These are not akin to regularly constituted law Courts and are to supplement and not to supplant the existing adjudicatory machinery. One of the important aspects is that it provides speedy and inexpensive justice at the very doorsteps of the people[x].

Institutional ADR and Ad-Hoc ADR

Usually in **Ad-hoc ADR** the parties to the dispute make their own arrangements for the dispute resolution proceedings. They themselves do selection of arbitrators, mediators etc., and designation of rules, applicable law, procedures and administrative support. Ad-hoc ADR is a good method of dispute resolution in comparison to Institutional ADR, if the parties approach ADR with a spirit of cooperation. This may also possibly make the ADR process more flexible, cheaper and faster than its institutional counterpart. In general greatest drawback of ad hoc ADR is that it usually does not have a set of pre-established rules that are applicable. The parties" can either create or adopt their own set of rules or may also adopt some pre-existing set of rules elaborated by an arbitral or mediation institution or by an international organization, such as UNC1TRAL. This flexibility is definitely a positive aspect of ad-hoc arbitration, but can bring along with it certain potential complications as well. These arbitrators do not

have sufficient qualification, training and knowledge in arbitration. There was also a view that very few people with non-law back ground turned out to be arbitrators, particularly with engineering qualification. The fact that majority of the arbitrators in India with law background brings along with them over emphasis on the procedural law which slow down the entire dispute resolution process. It was also pointed out that some of arbitrators do not have sufficient knowledge and expertise in arbitration. The one of the greatest drawbacks of the ad hoc arbitration in India is the fact that, retired judges who come as arbitrators bring with them their tendency of emphasizing on complying with the procedural formalities and strict adherence to law of evidence.

Institutional ADR is one in which a specialized institution administers the arbitral and mediation process as provided by the rules of that institution. Once the matter is taken up by these institutions the dispute will be arbitrated by trained and qualified arbitrators who are in the panel of that institution. The institution shall supervise and administer the whole process for which they would collect a stipulated fee. The famous arbitral institutions in the world are the London Court of International Arbitration, The International Court of Arbitration etc. The advantages of institutional arbitration are (a) availability of pre-established rules and procedures, (b) administrative assistance from institutions (c) Panel of well-trained arbitrators (d) physical facilities and support services etc.[xi].

It was pointed out by a few scholars that compared to ad hoc arbitration; institutional arbitration ensures more transparency and accountability in the arbitral process. In an institutional arbitration, the arbitrators are appointed from its panel of arbitrators, the institution can keep a constant watch of the entire proceedings. They were of the opinion that institutional arbitration would be a better option if the institution rules were made more transparent[xii].

Ad hoc arbitration in India has failed to achieve its objectives as it is haunted by the problems of conventional litigation, like delay, over emphasis of procedural law and frequent adjournments. It is also affected by huge fee charged by arbitrators, lack of their accountability and commitment, absence of rules of conduct and standards of professional ethics. These factors have invited the attention of stakeholders in building up a strong institutional arbitration promoting their interests. In the absence of a well-organized institutional set up, the practice of arbitration would not bring about the desired results. Mediation and Lok Adalats etc. as modes of ADR have been to a great extent successful in resolving disputes because of their institutional set up. In the light of the fact that there is a scope for enhancing the ambit of disputes that can be the subject of arbitration, setting up of a strong institutional mechanism would definitely help transforming India in to an international centre of arbitration.

Mediation and Conciliation

Over the years, mediation has been recognised as the fastest growing method to resolve disputes worldwide. Mediation allows parties to relook at mutual interests and rights of each other, and to come up with amicable and innovative solutions. This helps in maintaining cordial relations between the parties.

The role of courts or arbitrators is adjudicative and more formal in nature. In contrast, the nature of mediators or the process of mediation is very practical and flexible. Many a time, it can prove to be speedier, more effective and economical than the other adjudicative processes[xiii].

Mediation needs to be promoted as a mechanism that complements the judicial process. To achieve acceptance and popularity of Mediation as the first step before approaching the court or any other Alternative Dispute Resolution (ADR) method, it is crucial to develop confidence in the process of Mediation. Court-annexed mediation, to a certain extent, has been adopted as a measure of docket management and must go hand in hand with promotion of mediation as a successful, revolutionary, economical and time-saving method for all the stakeholders.

It is interesting to note that while the terms “mediation” and “conciliation” are often used interchangeably globally, India recognises “conciliation” as a separate form of ADR process. Equally interesting is the fact that while mediation is gaining immense popularity in India, conciliation has not received its due credit despite the existence of a statute governing it i.e. The Indian Arbitration and Conciliation Act 1996[xiv].

Merriam Webster dictionary defines conciliation as “*the settlement of a dispute by mutual and friendly agreement with a view to avoiding litigation*”. In simple terms, Conciliation is a form of Alternate Dispute Resolution (ADR) process of settling disputes arising out of a legal relationship between parties without the interference of the Court, through conciliator(s) appointed by the parties. The conciliator attempts to bring about an amicable resolution of the dispute between the parties by persuading them to reach a settlement. The conciliator plays an active role in the process by proposing solutions to resolve the conflict which is distinct from a mediator who facilitates the parties to reach a conclusive and mutually satisfactory agreement[xv].

Part III of the Arbitration and Conciliation Act, 1996 (the “Act”) puts in place the legislative framework for conciliation and its regulation. The Act provides for the Conciliator to be not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 (Section 66), Section 67 of the Act provides for the Role of the Conciliator which is to assist the parties in *an independent and impartial manner* in their attempt to reach an amicable settlement of dispute. Principles of objectivity, fairness and justice, consideration to rights and obligations of the parties, usages of trade and surrounding circumstances to the dispute among other things are to be kept in mind by the conciliator who is empowered to make proposals for a settlement at any stage of the conciliation proceedings. Once a settlement agreement is signed between the parties it is final and binding having the same status and effect as that of an arbitral award[xvi].

Current Scenario of ADR Techniques under Statutory Provisions

1. Conciliators appointed under Section 4 the *Industrial Disputes Act, 1947* are assigned with the duty to mediate and promote settlement of industrial disputes with detailed prescribed procedures for conciliation proceedings. If used appropriately, it’s a cheap and quick process. However, only a few cases have been

resolved and the very intent of having such provision has been frustrated. Unfortunately, large numbers of matters which ought to have been resolved by this provision are still pending in courts and new matters are filed every day.

2. In 2002, an amendment to the *Code of Civil Procedure, 1908* (**CPC**) was brought in section 89 read with order X rule 1A provided for reference of cases pending in the courts to ADR. In addition, Order XXXIIA of the CPC recommends mediation for familial/personal relationships, as the ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Though many courts in India now have mediation centres, there is no accurate data available to show that this provision has been utilised successfully.
3. Even Section 442 of the *Companies Act, 2013*, read with the C*ompanies (Mediation and Conciliation) Rules, 2016*, provides for referral of disputes to mediation by the National Company Law Tribunal and Appellate Tribunal.
4. The *Micro, Small and Medium Enterprises (MSME) Development Act, 2006* mandates conciliation when disputes arise on payments to MSMEs.
5. More particularly, family and personal laws including the *Hindu Marriage Act, 1955* and the *Special Marriages Act, 1954* require the court in the first instance to attempt mediation between parties.
6. Section 32(g) of the *Real Estate (Regulation and Development) Act, 2016* provides for amicable conciliation of disputes between the promoters and allottees through dispute settlement forum, set up by consumer or promoter associations.

Effectiveness of the Mediation and Conciliation as ADR mechanism

Despite having the above stated statutory recognition, mediation has not been able to achieve great success in India. The Mediation and Conciliation Project Committee (**MCPC**) was established by the Supreme Court in April 2005 to oversee the effective implementation of mediation. The endeavour of the MCPC was to give a boost to court-annexed mediation and to help mediation in growing not as an 'alternative resolution mechanism', but as 'another effective mode of dispute resolution'[xvii].

High Courts have their separate set of rules governing Mediation and Conciliation. Barring for a few High Courts, there is no data available to show the status of mediation cases referred, successes/failure of matters, and number of settlements arrived at and effectively implemented[xviii].

If the object of the MCPC was to reduce backlog, more attention is required towards framing of a national policy with an appropriate legal framework. The success and popularity of mediation is restricted and there is a need for urgent measures to promote and support its effective implementation.

The following are the important developments in the field of mediation:

1. The 129th Law Commission of India Report recommends courts to refer disputes for mediation compulsorily.
2. In the landmark case of *Afcons Infrastructure Ltd v. Cherian Varkey Construction Co. (P) Ltd*[xix],the Supreme Court observed about the cases which could normally be mediated or not.
3. The 2018 amendment to the *Commercial Courts Act 2015* (Section 12A), made it mandatory for parties to exhaust the remedy of pre-institution mediation under the Act before instituting a suit. *The Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018* have been framed by the government. Settlements arrived at in this process are enforceable by law. The period of mediation would not be computed for the purposes of limitation under India's Limitation Act.

Measures for effective implementation and growth of Mediation in India

There is an urgent need for a uniform statue exclusively governing the mediation process in India. Mediation legislation exists in more than 18 other jurisdictions, including Singapore, Malaysia, and Ireland (plays regulatory role). The Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC) have framed SIAC-SIMC Arb-Med-Arb Protocol (AMA Protocol) to manage disputes in accordance with an "Arb-Med-Arb" clause for commercial contracts.

In India, parties mainly opt for court annexed-mediation, for which the respective High Courts have their own set of Rules. Private mediation is less preferred due to lack of recognition.As the above provided enactments have been introduced or are being introduced in our country, what we simultaneously need is a quick evolution of the mediation mechanism. For this, the mediation process, be it private or court-annexed, would require practical recognition by the legislature and the judiciary.

The judiciary mostly deals with matters that require adjudication, but there are situations where mediation techniques would be more appropriate and beneficial to the parties. Therefore, identification of such matters and situations by parties, lawyers and judges becomes extremely crucial and important in the promotion of mechanism.

Conclusion

It is evident that unlike other nations, India has given recognition to different mode of ADR i.e. Arbitration, Lok Adalat, Negotiation, Mediation and Conciliation. However, while arbitration, mediation and Lok Adalat have received widespread acceptability in India, as compare to conciliation process. ADR techniques are effective mode of settlement of disputes which are more likely to resolve disputes amicably, expeditiously and in a cost efficient manner while ensuring that good relations are maintained between the parties and judicial animosity kept at bay. Conciliation will assume greater significance in commercial disputes relating to trans-border performance of contracts with the applicability of foreign law or that of multiple jurisdictions. It would be worthwhile to actively promote this ADR process in order to improve the ease of doing business in India following the examples of most advanced nations where litigation is often the last resort unlike in India where it is normally considered the first and often only resort for adjudication of disputes. Promotion of conciliation will also greatly help in reducing the burden on the judiciary which

is already reeling under enormous pressure of millions of pending cases in various courts across India.

Suggestions

- Grassroots level awareness to public at large and easy access to the ADR mechanism.
- Arbitration and mediation Centres need good infrastructure and a standard pattern to make parties comfortable.
- Arbitration and mediation must develop into a full-time profession as it gives lawyers an excellent opportunity to demonstrate their legal, analytical and professional skills.
- Theoretical as well as practical training in arbitration, mediation, conciliation and Lok Adalat to be included in syllabi of law colleges and introduction to mediation, conciliation and Lok Adalatcourse to be conducted for all practicing lawyers. Structured mediation training with accreditation for specialising in mediation should be provided in a cost effective manner all over India. Continued skill enhancing courses should be conducted from time to time for lawyers and other professionals who wish to take up arbitration, mediation and conciliation as a profession.
- The selection process of arbitrators and mediators and adequate training standards forthem should be developed. There is a need to ensure standardised training programmes for potential arbitrators and mediators and details about the professional and educational background of the them, including previous proceedings conducted, areas covering the issues involvement in prior mediations, expertise in other discipline(s), if any, etc. need to be maintained.
- Conciliation process should be encouraged and in commercial courts it should have essential procedural requirement.

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