

Alternate to Alternatives: Critical Review of the Claims of Alternative Dispute Resolution

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1. Introduction

Gandhiji said: "I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter men's hearts. I realized that the true function of a lawyer was to unite parties given as under. The lesson was so indelibly burnt unto me that the large part of my time, during the twenty years of my practice as a lawyer, was occupied in bringing about private compromises of hundreds of cases. I lost nothing, thereby not even money, certainly not my soul."¹

Amicable settlement is a desirable solution for business disputes and differences. It can occur before or during the litigation or arbitration of a dispute and can often be facilitated through the aid of third party (the neutral) acting in accordance with the rules.

Alternative dispute resolution (ADR), typically denotes a wide range of dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation: a collective term for the ways that parties can settle disputes, with the help of a third party. However, ADR is also increasingly being adopted as a tool to help settle disputes alongside the court system itself.²

The word 'alternative' refers to looking outside the courtroom setting to resolve some disputes. Where it is appropriate, parties involved in civil disputes should be encouraged to explore whether their dispute can be resolved by agreement, whether directly or with the help of a third party mediator or conciliator, rather than by proceeding to a formal—winner v loser—decision by a court. This happens every day in the courts, in family litigation, in large and small commercial claims and in boundary and other property disputes between neighbours. In that respect, there are strong reasons to support and encourage parties to reach a solution through agreement, especially in disputes where emotional issues combine with legal issues, provided that this alternative process meets fundamental principles of justice.

In addition to the recognition by the legal profession and the courts that some disputes can be better resolved by agreement rather than court decision, the emergence of alternative dispute resolution processes has also been associated with real problems of delays in the court system. An undoubted advantage of mediation and conciliation is the ability to get speedy access to a process that may produce a satisfactory outcome for the parties in a short space of time.

Any long delays in the court process involve clear barriers to justice: justice delayed is, indeed, justice denied. While some ADR processes may have emerged in response to delays in the court process. It is important to note that the court process has not stood still or ignored the problem of delay.

Alternative Dispute Resolution is a generic term used to describe a range of procedures designed to provide ways to resolving a dispute as an alternative to court procedures. ADR had been used by human society since ancient times though it gets wide acceptance and recognition recently. ADR methods, in comparison with court litigation, have various advantages though it is not free from different shortcomings.

The methodology applied and techniques used in mechanism of ADR to settle the disputes between the parties do not follow the ticklish procedure adopted by the Judicial Courts. The mechanism of ADR system does not partake the course of judicial process. It is completely different and divorced from judicial technicalities. The ADR process is very simple, cheap, easy, speedy and result oriented in disposal of the cases. The ADR techniques are extra judicial in character. These are the main reasons for recognition of ADR techniques³.

The Mechanism of Alternative Dispute Resolution System does not have single form or rigid application in one particular way. There is an array of hybrid procedure for settlement of disputes outside the Court. The ADR consists of various alternative techniques and forms. For example Arbitration, Conciliation, Negotiations, Mediation, Judicial Settlement, Mini Trial, Med-Arbitration and Settlement Conferences and Neutral Evaluation are the forms of ADR techniques. These techniques are much acceptable both to the judiciary and common man. The ADR techniques may be used in contentious matters, which are capable of being resolved under the law, by agreement or mutual settlement between the parties⁴.

It is important to distinguish between binding and non-binding forms of ADR. Negotiation, mediation and conciliation are non-binding forms, and depend on the willingness of parties to reach a voluntary agreement. Arbitration programs may be binding or non-binding. Binding Arbitration produces a third party decision that the disputants must follow even if they disagree with the result much like a judicial decision. Non-binding Arbitration produces a third party decision that the parties may reject. It is also important to distinguish between mandatory processes and voluntary processes. Some judicial

1.. <http://www.ebc-india.com/lawyer/articles/2002v1a3.htm>

² J. Pirie, Andrew (2000). *Alternative dispute resolution : skills, science, and the law*. Toronto, Ontario: Irwin Law. p. 5.

³ P.C.Rao & William Sheffield, *Alternative Dispute Resolution : What it is and How it Works*, Reprint, 2002, p-25

⁴ Ibid.

systems require the parties to negotiate, conciliate, mediate or arbitrate, prior to court action. ADR processes may also be required as part of prior contractual agreement between parties. In voluntary processes, submission of a dispute to an ADR process depends entirely on the will of the parties.

2. Forms of ADR

- a) Arbitration:** Arbitration, in the law, is a form of alternative dispute resolution — specifically, a legal alternative to litigation whereby the parties to a dispute agree to submit their respective positions (through agreement or hearing) to a neutral third party (the arbitrator(s) or arbiter(s)) for resolution.⁵
- i) Commercial arbitration:** Agreements to arbitrate were not enforceable at common law, though an arbitrator's judgment was usually enforceable (once the parties had already submitted the case to him or her). Contract Arbitration can be carried out between private individuals, between states, or between states and private individuals.
- ii) Labor Arbitration:** A growing trend among employers whose employees are not represented by a labor union is to establish an organizational problem-solving process, the final step of which consists of arbitration of the issue at point by an independent arbitrator, to resolve employee complaints concerning application of employer policies or claims of employee misconduct.
- iii) Judicial Arbitration:** Some state court systems have promulgated court-ordered arbitration; family law (particularly child custody) is the most prominent example. Judicial arbitration is often merely advisory, serving as the first step toward resolution, but not binding either side and allowing for trial de novo.
- b) Mediation:** Mediation is a process of alternative dispute resolution in which a neutral third party, the mediator, assists two or more parties in order to help them negotiate an agreement, with concrete effects, on a matter of common interest; lato sensu is any activity in which an agreement on whatever matter is researched by an impartial third party, usually a professional, in the common interest of the parties.

Mediation commonly includes the following aspects⁶ :

- a controversy, dispute or difference of positions between people, or a need for decision making or problem-solving;
- decision-making remaining in the parties rather than being made by the neutral;
- the willingness of the parties to negotiate a positive solution to their problem and to accept a discussion about respective interests and objectives;
- the intent to achieve a positive result through the facilitative help of an independent and neutral third person.

The typical mediation has no formal compulsory elements, although some common elements are usually found:

- Each party having a chance to tell his or her story;

- Identification of issues, usually by the mediator;
 - The clarification and detailed specification of the respective interests and objectives,
 - the conversion of respective subjective evaluations into more objective values,
 - Identification of options;
 - Discussion and analysis of the possible effects of various solutions;
 - the adjustment and the refining of the accessory aspects,
 - memorializing the agreements into a written draft
- c) Conciliation:** Conciliation is an alternative dispute resolution process whereby the parties to a dispute (including future interest disputes) agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award,⁷
- d) Expert Determination:** Expert determination is a historically accepted form of dispute resolution invoked when there isn't a formulated dispute in which the parties have defined positions that need to be subjected to arbitration, but rather both parties are in agreement that there is a need for an evaluation, e.g. in a preceding contract.⁸
- e) Negotiation:** Negotiation is the process whereby interested parties resolve disputes, agree upon courses of action, bargain for individual or collective advantage, and/or attempt to craft outcomes which serve their mutual interests. It is usually regarded as a form of alternative dispute resolution. Given this definition, one can see negotiation occurring in almost all walks of life, from parenting to the courtroom.⁹
- f) Lok Adalat:** Lok Adalat is called 'People's Court' presided over by a sitting or retired judicial officer, social activists or members of Legal profession as the chairman. National Legal Service Authority(NALSA) along with other Legal Services Institutions conducts Lok Adalats on regular intervals for exercising such jurisdiction. Any case pending in regular court or any dispute which has not been brought before any court of law can be referred to Lok Adalat. There is no court fees and rigid procedure followed, which makes the process fast. If any matter pending in court of referred to the Lok Adalat and is settled subsequently, the court fee originally paid in the court when the petition filed is also refunded back to the parties.

3. Advantages of Alternative Dispute Resolution

- Less time consuming: people resolve their dispute in short period as compared to courts
- Cost effective method: it saves lot of money if one undergoes in litigation process.

⁵ <http://en.wikipedia.org/wiki/Arbitration>

⁶ <http://www1.worldbank.org/publicsector/legal/adr.htm>

⁷ <http://en.wikipedia.org/wiki/Conciliation>

⁸ http://en.wikipedia.org/wiki/Expert_determination

⁹ <http://en.wikipedia.org/wiki/negotiation>

- It is free from technicalities of courts, here informal ways are applied in resolving dispute.
- People are free to express themselves without any fear of court of law. They can reveal the true facts without disclosing it to any court.
- Efficient way: there are always chances of restoring relationship back as parties discuss their issues together on the same platform.
- It prevents further conflict and maintains good relationship between the parties.
- It preserves the best interest of the parties.¹⁰
- Flexibility-Parties have more flexibility in choosing what rules will be applied to the dispute. They have the freedom to do so.
- Increased compliance with agreed solutions.
- *A single procedure*¹¹– Parties can agree to resolve in a single procedure a dispute involving intellectual property.
- *Party autonomy*- Because of its private nature, ADR affords parties the opportunity to exercise greater control over the way their dispute is resolved than would be the case in court litigation. In contrast to court litigation, the parties themselves may select the most appropriate decision-makers for their dispute. In addition, they may choose the applicable law, place and language of the proceedings. Increased party autonomy can also result in a faster process, as parties are free to devise the most efficient procedures for their dispute. This can result in material cost savings.
- *Neutrality*– ADR is neutral to the law, language and institutional culture of the parties, thereby avoiding any home court advantage that one of the parties may enjoy in court-based litigation.
- *Confidentiality*- ADR proceedings are private. Thereby, the parties can agree to keep the actions confidential. This allows them to focus on the merits of the dispute without concern about its public impact.
- *Finality of Awards*- Unlike court decisions, which can generally be contested through one or more rounds of litigation, arbitral awards are not normally subject to appeal.
- May not protect parties' legal rights. The rights of the parties may not be protected by alternative dispute resolution.
- **Your case might not be a good fit**¹²– Alternative dispute resolutions resolve only issues of money or civil disputes. Alternative dispute resolution proceedings will not result in injunctive orders. They cannot result in an order requiring one of the parties to do or cease doing a particular affirmative act.
- **There are limits to the discovery process**– You should also be aware that you are generally proceeding without the protections offered parties in litigation, such as those rules governing discovery. Courts generally allow a great deal of latitude in the discovery process, which you will not have in an alternative dispute resolution.
- There is no guaranteed resolution. With the exception of arbitration, alternative dispute resolution processes do not always lead to a resolution.
- Arbitration decisions are final. With few exceptions, the decision of a neutral arbitrator cannot be appealed. Decisions of a court, on the other hand, usually can be appealed to a higher court.
- Participation could be perceived as weakness. While the option of making the proceeding confidential addresses some of this concern, some parties still want to go to court “just on principle.”
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4. Disadvantages of ADR

Some disadvantages of alternative dispute resolution are:

- It can be used as a stalling tactic.
- Parties are not compelled to continue negotiations or mediation.
- Does not produce legal precedents.
- Exclusion of pertinent parties weakens final agreement.
- Parties may have limited bargaining power. Parties do not have much of a say.
- Little or no check on power imbalances between parties.

5. Alternate To ADR

1. ADR schemes are NOT alternatives to advice.

- You nearly always need good, informed legal advice before deciding how best to resolve your dispute. This is especially true if there are time limits for taking legal action, as there are in many employment disputes, and if you are using mediation to reach a legally binding settlement.
- You may need advice as you go along - in family mediation, in particular, it's worth checking with a solicitor in between meetings to make sure that the outcomes you are discussing are safe and fair.
- You could also find it helpful to get some advice before deciding whether to accept a solution agreed through mediation or conciliation. In equalities mediation, for example, accepting a settlement at the mediation means that you can't take the same dispute to court or tribunal later.

2. When deciding whether or not to try ADR, think about your bargaining position.

¹⁰ Anubhav Pande: Pleaders, May 9, 2017

¹¹ <http://www.wipo.int/amc/en/center/advantages.html/9-7-2012>

¹² <http://www.life123.com/career-money/business-law/contracts/disadvantages-of-alternative-dispute-resolution.shtml/8-7-2012>

- If you are afraid of violence or intimidation, it may be safer to get a solicitor to try to negotiate on your behalf, or to take your case to court for a judge to decide.
- If the other side won't negotiate with you or agree to mediate, you may need to start legal action in order to get them to take your claim seriously.
- If you are concerned that the other side won't do what they promise, you may need to think about using the courts to enforce action.
- ADR may not be the best solution if you need to rely on a legal precedent from an earlier judgment. Your case may also be important in setting a precedent for the future, or in making the press and public aware of bad or illegal actions by large organizations.

3. Think about what kind of process would suit you best.

- If you'd prefer to tell your story face to face, and have a conversation about the problem with the other side, then mediation may be right for you. •
- If you'd be more comfortable sending in copies of letters and documents for someone independent to make a decision, then perhaps adjudication, arbitration, or an ombudsman scheme would suit you best. •
- If you are unsure that you can explain your concerns and say what you want to have happen, you may be happier to get a legal adviser or a solicitor to negotiate on your behalf.
- If you want to have a day in court, and for a judge to make a public pronouncement about who is right and who is wrong, then you may want to take legal action.¹³

Litigation is the well-acclaimed process through which dispute settlement is sought in independent India.¹⁴ On the other hand, it is also argued that the faith in the present day justice administration system is gradually being eroded.¹⁵ The existing crisis in the judicial system, for some, is the justification for seeking alternatives.¹⁶ When litigation is the mainstream and ADR, as the acronym suggests, the alternative,¹⁷ the legitimacy of the existence of alternatives needs to be validly established. Here, alternative is sought to remedy the problems existing in the conventional. It therefore becomes interesting and essential to conceptualize ADR as currently understood to understand its character. The attempts to find answers for the problems existing in the present day legal system could be categorized into two:¹⁸

- 1) revivalist- attempting to traditionalize the system¹⁹
- 2) approach of fusion - wherein creative syntheses of Indian and Western methodologies are sought.²⁰

The Institute for the Study and Development of Legal System suggests a three tier reform action plan.²¹ It is an integration of court administration,²² case management²³ and consensual dispute resolution (CDR).²⁴ The first two proposals to streamline the judicial system is yesterday's need. The proposal on CDR needs further evaluation to see how pragmatic it could be. The suggestion is, for a court annexed scheme, and making available opportunities for a selection of alternative processes. This tends to be State centric and does not directly provide access, but indirectly facilitates regaining the lost faith of the people by early disposal of the cases. This does not widen the net of the centers of justice delivery. The proposed system needs a comparatively high initial investment, which in the present economic trend will lead to privatization of justice, escalating the price tag.

Discords are bound to arise in society and ingenious human minds have always devised ways and means for resolution of conflicts. The phenomenon, law, itself can be seen as a result of the quest to address potential problems. Nature has endowed people with rationality and they have constantly attempted to discover methods of establishing a cohesive society. Dispute resolution is one of the major functions of a stable society. Through the medium of the State, norms and institutions are created to secure social order and to attain the ends of justice or the least to establish dispute resolution processes. States function through different organs and the judiciary is one that is directly responsible for the administration of justice. In commonplace perception judiciary is the tangible delivery point of justice. Resolving disputes is fundamental to the peaceful existence of society. Therefore, effective and efficient systems for determination of disputes become an obvious appendage.

“Discourage Litigation. Persuade your neighbors to compromise Whenever you can. Point out to them how the nominal winner is often the real loser in fees and expenses, and waste of time. As a peace maker the lawyer has a superior opportunity of being a good man. There will still be business enough.”

Abraham Lincoln

¹³ Margaret Doyle, Advice Services Alliance, June 2012

¹⁴ MARC GALANTER, Fifty Years on, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 57, 57 (B.N. Kirpal et al. eds., 2000)

¹⁵ REDDY K. JAYACHANDRA, Alternate Dispute Resolution, in ALTERNATE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS 79, 79

¹⁶ K.G. Balakrishnan, Chief Justice of India, Law Day Address to the Nation, (Nov. 25, 2008) (transcript available at [http://www.supremecourtindia.nic.in/new_links/Law_Day_MessageAs_recorded_on_24\[1\].11.08.pdf](http://www.supremecourtindia.nic.in/new_links/Law_Day_MessageAs_recorded_on_24[1].11.08.pdf))

¹⁷ Richard C. Reuben, Public Justice: Toward a State Action Theory of Alternative Dispute Resolution, 85 Calif. L. Rev. 557, 557-558 (1997)

¹⁸ Jasmine Joseph, Assistant Professor of Law, The West Bengal National University of Juridical Sciences, Kolkata

¹⁹ MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA, Chapter 3 (1997)

²⁰ Id., at 47

²¹ Hiram E. Chodosh et al., Reform of the Indian Civil Justice System: Limitation and Preservation of the Adversarial Process, 30 N.Y.U. J. Int'l L. & Pol. 1, 1-78 (1998).

²² “Court administration,” consists of the internal management of the courts, including classification system, monitoring, coordination and case-flow tracking mechanisms. Id., at 59

²³ Case management is said to be an early, managerial intervention by a judicial officer in the parties' preparation of a civil case. The primary features being, early identification of disputed issues of facts and law, establishing a procedural calendar and initiation and coordination of consensual resolution process. Id., at 61 9

²⁴ Consensual Dispute Resolution is expected to contain a variety of techniques like, mediation, arbitration etc. to create a variety of options for dispute settlement. Id., at 66