ALTERNATE DISPUTE REDRESSAL: ALTERNATIVES TO ALTERNATIVES; CRITICAL REVIEW OF THE CLAIMS OF ADR

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Abstract

Human conflicts are inevitable and so are disputes. The phenomenon, Law itself can be seen as an outcome of the quest to solve potential problems. For resolution of disputes there is a legal system in every state that constantly attempts to devise methods of establishing a cohesive society.

This Paper, to begin with offers an understanding of what Alternate Dispute Resolution Method is. The quest, advocacy and legitimacy of ADR vis-a-vis the positive aspect of reinforcement of the existing conventional system of litigation would be the next focus. The Paper also analyses the ADR mechanism on whether they deliver the promised outcomes. To conclude, an approach to access to justice has been put forward that would help achieve the goal as envisaged by the framers of our Constitution in its true spirit.

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CONCEPT AND ORIGIN OF ALTERNATIVE DISPUTE RESOLUTION MECHANISM

"Everything has been said already, but as no one listens, we must always begin again"

- Andre Gide[1]

Equality is the basis of all modern systems of jurisprudence and administration of justice in so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal and laws which are meant for his protection have no meaning and to that extent fail in their purpose.[2]

The movement towards the ADR was endorsed by a resolution at a meeting of Chief Ministers & Chief Justices.[3] The meetings brought out that the courts were not in a position to bear the whole burden of determination of disputes and that a certain number of disputes were capable of being resolved by alternative methods of resolution such as Arbitration, Mediation, Conciliation and Negotiations.

Broadly speaking, ADR procedures fall into two categories, namely, adjudicatory and non-adjudicatory or consensual. In adjudicatory procedures like arbitration and binding expert determination it is the ruling or award given by the expert or arbitrator which is binding on the parties, the decision is an imposed one, meaning to say the parties do not participate in the decision making. In consensual procedures like conciliation, mediation and good offices the parties retain their freedom to decide the outcome of their dispute. The conciliator or mediator only facilitates the dispute resolution by helping parties identify the grounds for arriving at an amicable settlement. Thus, they always have a right to recourse to litigation or arbitration.

ADR is being increasingly appreciated in the field of law as well as in the commercial sector. It offers to resolve matters of the litigants, whether in business causes or otherwise, and reach a settlement. There are many disputes that go beyond the reach of litigation where an unconventional approach is to be taken especially suited to the needs of the dispute and joint

[1] French Thinker and writer
[2] Government of India, Ministry Of Law, 14th Report By Law Commission of India on Reform of Judicial Administration 587 (1958)
[3] Held on 4-12-1993

interests of the disputants. It has great importance in private law and is considered to offer the best solution in respect of commercial disputes of international character.

QUEST FOR ALTERNATIVE DISPUTE REDRESSAL: ALTERNATIVE TO ALTERNATIVES

ADR has broken through the resistance of the vested interests owing to its broad range of methods used in an equally broad array of circumstances. It is being promoted as an escape route from the exasperating process of adjudication. They are designed to be offered as an alternative option to litigation and intended only to supplement and not supplant the legal system.[4]According to an official report of the year 2000, there is a pendency of over two crore cases in our District Courts. Naturally Litigants have to face so much loss of time and money that at the long last when the relief is obtained, it may not be worth the cost.

Hence began the search for alternatives to the conventional court system. In its ideal form, ADR is perceived not only as resolving the dispute but also as placing back the relationship of the parties status quo ante the conflict.[5] The Supreme Court of India has also suggested making ADR as 'a part of a package system designed to meet the needs of the consumer of justice'.[6] For example pre-litigation counselling, mediation points and other such informal methods have been introduced that operate within the shadows of law and help in performing conciliatory functions.

The is no single explanation, not even the convenient if simplistic argument that ADR is a way of avoiding court congestions, delays, expenses and procedural inconveniences and it seeks to justify the search for alternatives. The Act specifically on the issue of ADR & Arbitration was the new Arbitration Act, 1996 enacted to accommodate the harmonisation mandates of the UNICTRAL model.

The goals pursued by the users of ADR go beyond legal considerations. Their overriding priority is to prevent difficulties, ensure continued performance of the contractual relationship

[4] Examples are the Permanent Lok Adalat under the Legal Services Authorities Act, 1987 and Section 89 of Civil Procedure Code in India.

[5] Sarvesh Chandra, *ADR: Is Conciliation The Best Choice?*, In Alternate Dispute Resolution: What It Is And How It Works 83 (P.C. Rao & William Sheffield eds., 1997)

[6] FCI v. J Mohinderpal, AIR 1989 SC 1263, 1266; Salem Advocates Bar Association *v.* Union of India (2005) 6 SCC 344, 375-379.

and make their joint project a success.[7] Such procedures offer the disputing parties an opportunity to solve their disputes amicably, without adversely affecting the fabric of their relationship so that their on-going relationship is preserved and the conflict is avoided to pave a better future and to do that, they have to break out of the usual legal barriers, mutually agree to take the risk involved and introduce a neutral party whose approach will not necessarily be a legal one.

The solution may also take innovative forms that are not available to the courts. A well-known settlement agreement accompanied by an amendment to the contract is an example of the same. This type of agreement embodies a subtle balance between remedying a contractual breach, an agreement on purely technical questions, and amendments to the provisions of the contract such as extension of the time for its performance. A compromise involving painful sacrifices but reached at the right time is far better than an award that is legally correct but has come too late or whose remedies and relief granted are inappropriate.[8]

It is a voluntary procedure that can be abandoned at any time by either party. There is open communication, mutual agreement and also most importantly, ADR can lead to a broader array of possible solutions as compared to the Courts. To continue, there are disputes whose determination is urgent and crucial since the technical and financial consequences of waiting would be too adverse for both the parties and hence not a feasible idea. In theory, Litigation and even Arbitration provide solutions to these needs, but in practice, the story is way different.

The Indian Judiciary has been facing flak for sacrificing the expediency of the litigatory process which has led to a large number of cases pending to what is called docket explosion. The surge of establishment of Special Courts and Tribunals[9] started early in Independent India. Founding of labour Courts, Industrial tribunals, Consumer Forums, Motor Accidents Claim tribunals, Family Courts and then later Lok Adalats[10] were all aimed at expeditious and efficacious disposal of matters. The Government cast under a legal duty to provide legal

[7] 2 Jean Francois Guillemin, *Reasons for Choosing Alternative Dispute Resolution*, in Adr In Business, Practices And Issues Across Countries And Cultures 14 (Arnold Ingen-Housz, 2011)
[8] *See id*. at 27
[9] L Chandra Kumar v. Union of India (1997) 3 SCC 261,303-305 (Where it has been observed that 'tribunals are set up to meet docket explosion')
[10] State Bank of Indore v. M/s Balaji Traders AIR 2003 MP 252-254

Aid[11], coupled with the decisions of the apex Court[12], led to the constitution of Lok Adalats which got legal backing from the Legal Services Authorities Act, 1987. "Resolving disputes through Lok Adalat not only minimises litigation expenditure, it saves valuable time of the parties and their witnesses and also facilitates inexpensive and prompt remedy appropriately to the satisfaction of both the parties".[13]

Constitution of Fast Track Courts is next on the list. According to P.N. Bhagwati on the need to create adequate and effective delivery system of justice, the following are needed: creation of an ultra-modern disseminating infrastructure and manpower; sympathetic and planned system; need for new juridicare technology and models; remedy-oriented jurisprudence; and reforms of the justice administration and conflict management[14]. Successive Law Commissions have recommended reforms and have suggested multifaceted measures to grapple with the crisis[15], meaning to say that there are absurdities in the justice delivery system of the nation that are being consistently attempted to remedy. Such absurdities of the legal system and attempts of establishing fora alternate to conventional litigation seemed to be perfect for the Introduction of ADR. From Special Tribunals and Courts to Fast Track Courts and then to Lok Adalats, the noticeable question that arises is that are we going on creating alternatives to alternatives? Perhaps the search will culminate in a remedy someday. As and when such a method of dispute resolution is discovered or devised or if it has already been discovered or devised it will be entitled to be given the name of ADR.

The above section of the paper aims to provide a clear framework for understanding and analysing the relevance and appropriateness of using ADR. It is thus important to have an understanding of certain relevant questions. What are the possible outcomes? What would be the best approach? What will be the risks involved if they proceed to binding adjudication? Suggest a form of amicable dispute resolution? Or what would be the most opportune time to initiate ADR? Does ADR present an advantage or disadvantage? It is thus important to

[11]Article 39A Indian Constitution.*Also see*, K. RAMASWAMY J, while delivering his key note address at Law Minister's Conference, at Hyderabad, 25-11-1975.

[12] M. H Hosket v. State of Maharashtra, AIR 1978 SC 1548, Hussainara Khatoon v. Home Secretary, State of Bihar AIR 1979 SC 1369.

[13] K. RAMASWAMY J, Legal Aid News Letter, December 1995.

[14] COMMITTEE ON JURIDICARE, DEPARTMENT OF LEGAL AFFAIRS, INDIA, REPORT ON NATIONAL JURIDICARE: EQUAL JUSTICE, SOCIAL JUSTICE 33 (1977).

[15] Besides the 114th, which is specific on the issue, the 14th, 76th, 77th, 124thand the 129th reports of the Law Commission of India, consider the need for reformation in Judiciary.

analyse all issues involved, circumstances involved and their objectives and critically examine all factors to determine which approach will permit the fewest possible errors.

LEGISLATIVE RECOGNITION OF ALTERNATIVE DISPUTE REDRESSAL; REENFORCEMENT OF THE EXISTING SYSTEM

There are varied models of conflict management and are categorised into four: rights-based, power based, interest-based and legislative[16].The conventional method of access to justice is the recourse to formal adjudication mechanisms as provided by the state, meaning approaching the courts. In the legislative model, rules and laws are formulated by the appropriate authority for determination of disputes and creates a win-lose situation or both the parties may find themselves at the losing end.

The present model of legal system in India is of British import. It is also known as adversarial model of litigation. It is argued that the faith in the present day justice administration system is gradually being eroded.[17] For some, as mentioned above, the crisis is the justification for seeking alternatives.

The movement towards ADR has received much support and acknowledgement from the Parliament. The Legal Services Authorities Act gave a strong legal backing to Lok Adalats which were considered as 'People's festivals of Justice' because settlements are not always necessarily according to legal principles but on social goals like ending quarrels; restoring family peace; proving succour for destitutes.[18]Section 30 of the Arbitration and Conciliation Act, 1996 encourages Arbitrators, with the agreement of the parties, to use mediation, conciliation or other such procedures at any time during the Arbitration Proceedings in order to encourage settlement. Section 89 of the Civil Procedure Code (Amendment) Act, 1999 was designed in such a manner so as to enable the courts to bring about out of court settlement listing four methods known as court-ordered or court-annexed ADRs as statutory alternatives to litigation and legally enforceable.

Before introduction of 2002 amendment, Justice Malimath Committee in its Report recommended:

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[16] Stephen B. Goldberg Et Al., Dispute Resolution: Negotiation, Mediation, And Other Processes 3-6 (2nd ed. 1992)

[17] Reddy K. Jayachandra, *Alternate dispute resolution*, in Alternate Dispute Resolution: What It Is and How It Works 79 (P.C Rao & William Sheffield eds., 1997).

[18] Avtar Singh, Law of Arbitration & Conciliation; Alternative Dispute Resolution Systems 504 (10th Ed. 2013)

"If a law is enacted giving legal sanction to such machinery for resolution of disputes and resort thereto is made compulsory, much of the inflow of commercial litigation in regular civil courts gradually moving up hierarchically would be controlled and reduced".[19]

Where litigation is the mainstream and ADR as the abbreviation suggests an alternative, the legitimacy of the existence of alternatives needs to be validly established and conceptualised. Richard C. Reuben remarks "the incorporation of constitutional values into seemingly private ADR is achievable, necessary, and desirable." However, creation of alternate fora doesn't solve all problems. Many argue that the current position of litigation is such that our courts are bursting in themselves that it calls for a spring cleaning.

Huge pendency of cases and poor rate of conviction are the major problems of the Indian judiciary. With huge inflow of cases on a daily basis and substantial amount of arrears, the problem of arrears is taking a gargantuan shape.[20] The structure of our judiciary creates loopholes at all levels and there is a need to maintain a certain ratio of appellate courts to subordinate courts. At higher levels of judiciary, increasing the number of benches, at least the minimum, filling up of existing vacancies[21] will help in addressing this issue. Quality of appointment has suffered enormously. Complaints are heard everywhere that judicial arbitrariness has replaced executive arbitrariness.[22] Judiciary is independent but that doesn't give it license to function arbitrarily. Thus the fault lies not in the institution but in the administration.

Loss of social harmony due to litigation is one major compelling reason to advance the cause of ADR.

The concept of litigation has no inherent loopholes and the complexity created by the existing laws and enactments is the case in point. The solution is the reformation and revamping of the system that is haunting our society.

The problem of delay lies in the extended role of the advocates who despite being officers of the court don't have any accountability towards the expedient disposal of cases. Granting

[19] Government of India, Ministry of Home Affairs, Report By Committee on Alternative Modes and Forums of Dispute Resolution Headed by Justice Malimath112, 168, 170 and 171 (1990).
[20] *See* for details, B. Debroy,In The Dock: Absurdities Of Indian Law (2000).
[21] It has been noted that 228 posts of High Courts judges remain vacant.
[22] Government of India, Ministry of Home Affairs, Report by Committee on Reforms of Criminal Justice System Headed by Justice Malimath 134 (2003)

frequent adjournments by Judges on trivial grounds is another problem which everyone complains.

In this regard, the remarks of eminent jurist, Nani A. Palkiwala are relevant:[23]

"....legal redress is time consuming enough to make infinity, intelligible. A lawsuit once started in India is the nearest thing to eternal life ever seen on this earth....

I am not aware of any country in the world where litigation goes on for as long a period as in India. Our cases drag over a length of time which makes eternity intelligible. The law may or may not be an ass, but in India it is certainly a snail and our cases proceed at a pace which would be regarded as unduly slow in a community of snails. Justice has to be blind, but i see no reason why it should be also lame: here it just hobbles along, barely able to walk."

The price escalation of securing justice is a repercussion of the adversarial model of litigation which makes justice illusory in India.

In our constitutional framework, petitions for protection and enforcement of fundamental rights can be filed only in the High Courts and the Supreme Court. Hence, the issue of accessibility is another matter of great concern.

Uncertainty as to the forcible execution of the judgment, lack of finality of judgement, obsolete rules of admissibility of evidence, problem of bringing third parties to the proceedings are also notorious enough to be attended.

However, even the people endorsing ADR will agree that ADR cannot succeed in all situations and there are circumstances when litigation is inevitable. Each of the As in ADR- amicable and alternative and appropriate eventually take support of judicial assistance for enforcement. Cases that involve questions of law, constitutional issue and matters involving public interest need to go through the watchful eye of the judiciary. Also, the application of judicial wisdom can bring justice, is an accepted proposition. The courts even lay down a principle or set sail the development of law. The Courts' role, their responsibility and their authority shouldn't be misinterpreted or restrained to be just that of dispute resolvers. What we can hope is a vigilant judiciary that uses its discretion with responsibility.

[23] Nani A. Palkhivala, *We The Nation : The Lost Decades* 215 (1994)

HOW FAR THE EXISTING ADR FRAMEWORK HAS DELIVERED THE PROMISED OUTCOMES?

The often-quoted statement of Abraham Lincoln conveys the message to "discourage litigation, persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expenses, cost and time" and this statement is the beginning point of many discussions on ADR. And the argument ends here.

Paradoxically though, this powerful, separate and independent branch of legal discipline has certain underlying weaknesses which can lead one to say that effectiveness of the present form of ADR system can be questioned. It has many detractors in the legal field, who claim that its importance is exaggerated. For some it makes businessmen think they can practise the law and lawyers that they can do business, a dangerous switch of roles that could lead to notorious problems.

From Special Tribunals/Courts to Lok Adalats to Arbitration, Conciliation, Nyay Panchayats, all are institutionalised and operate within the bounds of legislations. Hence the nature of informality in proceeding doesn't exist in reality.

Arbitration was the mother source of all the ADR mechanisms, recognised by statutory laws in India. However, it did not fulfil the intrinsic functions of ADR, failing to become an end in itself. Various criticisms have been levelled at Arbitration: High Costs; Delaying tactics; Set of procedural rules with unnecessary provisions; Bureaucracy by the Arbitration Institutions; Appointment of arbitrators with their interests in pleasing the parties for obtaining future projects; Risk that neither party will be satisfied which will result in uncertainty; Plethora of written submissions, hearings, witnesses, expert opinions; The methods used to resolve the dispute might lead to objections or a hasty assessment of the situation; fostering of unethical practices; Lack of confidentiality, since the procedure and Award may create rights to go to Courts; the transfer of public power to private bodies, leading to the risk of power play and privatization of justice.

The promotion and development of ADR mechanisms as a means of grappling with the increasing impediments posed by the rickety and mystified civil judicial system, is in its nascent stages in India. However, it does have some inherent problems:

a) Mediator's opinion or decision is not enforceable by a process of forcible execution.[24]
b) Recourse to these practices can be dangerous if one of the parties does not act in good faith and uses important information to initiate arbitration or litigation proceedings.
c) ADR can be transformed into a method of extremely effective delaying tactics, with one party seeking to manipulate the neutral or stringing out negotiations by causing continuous incidents or making false or minor concessions.[25]
d) It is a revocable procedure. If negotiations become too long and drawn out, or the neutral proves clumsy or incompetent, or obstacles emerge, the parties don't hesitate to abandon the process at anytime.
e) In a society where power relationship plays a vital role the presence of free will is a mirage.
f) Owing to considerable amount of antipathy met by ADR by the legal fraternity the following issues need attention like awareness, advocacy and most importantly effective implementation.
g) Other causes of popular dissatisfaction with the process[26]:
    i. Prevents elaboration of development of law and judicial precedent.
    ii. Public trials and publication of the decision results in protection of individual rights. Most of the ADR processes do not give scope for the same.
    iii. Lack of public accountability.
    iv. Loss of law's educative function.
    v. Obscuring unequal social powers using the language of compromise, settlement and relationships.
    vi. Prejudices forming part of the dispute settlement process. Prejudices of the parties are more likely to be apparent in informal proceedings and especially when they are away from public eye.
    vii. Women and other traditionally marginalized sections of societies would be worse of in ADR proceedings.

[24] *See supra* note 9.
[25] *See supra* note 9.
[26] Bryant G. Garth, Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution, 18 Ga. St. U. L. Rev. 570, 570-571(2001). Kimberlee K. Kovach, Centennial Reflections on Roscoe Pound's The Causes of Popular Dissatisfaction With the Administration of Justice, 48 S. Tex. L. Rev. 1003, 1026-1042 (2007).

AUTHOR'S VIEW AND SUGGESTIONS

All the legal systems try to attain the legal ideal that whenever there is a wrong there must be a remedy and nobody can take law into his own hands. Law derives its authority from its people and resolution mechanism chosen by a society reflects the concept of justice in that society since Justice stands in intrinsic nexus with conflict management. The notion of Justice evokes the cognition of the rule of law, of the resolution of conflicts, of institutions that make law and of those who enforce it; it expresses fairness and the implicit recognition of the principle of equality.[27]

A model where there is a fine synchronization and integration of the Adversarial Litigation and ADR methodologies can answer the requirements of access to justice in a country like India. But the means and ends of such a model must be creditable, practicable and conducive to the demands of justice.

Critical analysis of both the approaches must be taken into consideration with a view to set right all the loopholes in both these approaches at all levels. Attempts must be made with regard to revamping and reinforcing the traditional system of litigation by new comprehensive legislations, amendments in the existing enactments; specially the procedural laws and create constitutional safeguards with effective execution, formulating practical and workable solutions to the problems mentioned with detailed analysis and effective case management system. There is a dire need to address the issue of enforcement of fundamental rights guaranteed by the Indian Constitution by the three organs of the State. A special mention for the Judiciary to play a more pro-active role at all levels to set things right and bring back the faith in the people of this country in the approach of access to justice. The lacunae in both these approaches need to be deeply understood, analysed and channelized in the right direction in order to ensure a combined and synchronised system which is free from antipathy and resistance, feasible to a society like ours.

[27] J Rawls, *A Theory of Justice* (1997)