JOURNAL FOR LAW STUDENTS AND RESEARCHERS

EVOLUTION AND APPLICATION OF ADR IN INDIA

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ABSTRACT

Alternative Dispute Resolution (ADR) is the procedure for settling disputes without litigation. ADR procedures are usually less costly and more expeditious. They are increasingly being utilized in disputes that would otherwise result in litigation, including high-profile, divorce actions, labor disputes and personal injury claims.

Our objectives of writing research paper is to offer comparative study between conventional methods of solving disputes and ADR , to put ADR process in equal footing as other methods of solving disputes as ADR is considered as a secondary option in solving disputes rather it can be primary source .

Indian judiciary is the world's most renowned and one of the oldest judicial system but in today It has been clogged with long unsettled and pending cases. There are around 3 crore cases pending. More than 1000 of fast track court are set up even than millions of cases are far from being solved and are still pilling up. To deal with this scenario Alternative Dispute Resolution can be proved as a helpful mechanism to resolve the conflict in a very subtle, peaceful, effective, and efficient where the outcome is satisfactory for both the parties.

INTRODUCTION

Two men glare at each other. Long-haired and bearded, their fur garments oily from use, they hold gnarled clubs loosely at their sides. Emotions have been building since the rainy season started and the river overflowed. Who will be forced to brave the swollen river to hunt, and who will hunt near their village? Today it will be decided. With war cries, the disputants raise their clubs and begin to circle. Suddenly an old man appears, shouting: "Behold, the Deciding Stone!" The two men stop in midstride. The old man says, "Ush, the smooth side is yours; Ore, the rough side is yours." The pair hesitate, looking angrily at each other and at the old man, and finally they nod in agreement. With all his might, the old man throws the stone into the air. Their heads turn to the sky as they watch the stone turn over and over.

This imagined story of prehistoric times illustrates that while humans have always had the tendency to solve their differences by fighting, they also have recognized the benefits of settling matters peacefully by flipping a coin or some other way. This search for alternatives to violence gave birth to the precursors of alternative dispute resolution (ADR).

The most basic form of ADR is negotiation: at its core, two people simply talk about a problem and attempt to reach a resolution both can accept. It follows that mediation started when two negotiators, realizing they needed help in this process, accepted the intervention of a third person. If the third party was asked to make a decision or placed the decision in the hands of some arbitrary mechanism, the process was arbitration. Other methods followed:

When the third party undertook an investigation that helped bring the matter to closure, this was fact finding. If the matter is brought before the community and all members had to be satisfied with the outcome, we today call that process consensus building.

ADR is often thought of as a new way of resolving disputes. In fact, its roots run deep in human history, and they have long played a crucial role in cultures across the globe.

Man is a social animal as said by Aristotle. it is not astonishing when we say that every person has its own way of doing things, this is due to the fact that people have different level of understanding this different level of understanding and way of doing things has made man to invent the word “conflict” in earlier times no one knows how to solve conflict, but our ancient scriptures do throw

light on the methods of solving conflicts. In Ramayana Angada son of Bali approached Ravana to opt the path of peaceful settlement and even in Mahabharata lord Krishna endeavored to mediate between the Pandavas and Kauravas.

ADR refers to all those methods of solving disputes which are alternatives for litigation in the courts. ADR is usually a process in which litigants and potential litigants may resolve their disputes by involving an independent person (an ADR practitioner, such as a mediator, negotiator, arbitrator or conciliator) and seek their help to sort out the disputes between the parties through decision making process. ADR can help people to resolve a dispute before it comes so big that a court a tribunal becomes involved.

PURPOSE OF ADR MECHANISM

The purpose of Alternative Dispute Resolution is to solve the dispute of parties in more cost effective manner and also in expedient manner. ADR as name suggest is the alternative method of resolving disputes other than courts and is less adverse means of dispute settlement than courts. ADR process is highly recommended in country like India where more than 3 crore cases are pending in courts so to reduce the number of cases and provide cheaper and less adverse from of justice which is lesser formal and complicated system. ADR is highly recommended even the judges have started recommending ADR to avoid court cases. In India there are lakh of cases pending in courts to deal with this situation; ADR plays a significant role by its diverse technique to help Indian Judiciary in reducing its burden

ADR is also based on the fundamental rights such as article 24, article 21 which says about right to life, personal liberty and equality before law respectively. ADR in society rationale is to provide political social, economic justice and maintain integrity in society which has been enshrined in the preamble itself.ADR also aims to achieve free legal aid and equal justice provided under article 39-A which has been prescribed in directive principle of state policy.

ARBITRATION PRACTICE AROUND THE WORLD

- **USA**

  Arbitral tribunal were established as early as 1768 in New York and shortly thereafter in other cities primarily to settle disputes. The federal statutory law of arbitration contained

in Fedral Arbitration Act, which was 1st enacted in 1925, has been amended several times since then.

In 1976, Pound conference was held to commemorate the 70th anniversary of Dean Rosco Pounds dissertation on the " Public dissatisfaction with American legal System" The conference took a close view as to the reasons as to the why American court criticized one of the reason why justice administration is America was criticized because of overcrowded and costly system. The ADR movement started with Pounds conference 1976. In the native America culture, peacemaking is the primary method of problem solving. Disputes are handled in a way, which deals with the underlying cause of conflict, and mends relationship. The institutionalization of ADR in America can be said to be with the establishment of America arbitration association. The principal arbitration institution is the American Arbitration Association (AAA), which was found in 1926 in response to the need for an arbitration institution able to administer all kinds of cases in all parts of United States of America. It is an independent, non-governmental, non-profit organization. In usa where adr has been practiced in every court at the state level since the 1970s, more than 90% of all pending cases are settled through advocate and judicial mediation and hardly a few percent of all cases actually proceed to trial.

- **UK**

  In uk arbitration has been used since long back. Earlier it was used in solving chattles and torts but with the expansion of trade and commerce the number of disputes increased between traders and merchants, so it burdened the courts so it was thought that arbitration can be used to release the burden of the courts.

  The very first legislation was came for the encouragement of arbitration in year 1698 then in the year 1889 the general laws of arbitration were codified after this many regulations and changes were introduced and finally the arbitration act 1996 came into existence

DEVELOPMENT OF "ALTERNATIVE DISPUTE RESOLUTION" IN INDIA (HISTORY OF ADR IN INDIA)

Alternative method of resolving disputes outside the courts is not new. We can see development of ADR through following various points:

- **ADR in ancient India:**

  It is generally presumed that the commonly prevalent system of government in Ancient India was monarchy and this view is based on the apparent perception that since in Ancient India king was the ruler therefore the systemof monarchy was there. But this is not the system prevalent in ancient time, in early times, disputes were peacefully decided by intervention of Kulas(family or clan assemblies), Srenis (guilds of men following the same occupation, belonging to different sects and tribes or assemblies or meetings of tradesmen and artisans belonging to different tribes, but having some type of connection with one another through the profession practiced by them.), Parishads (assemblies of learned men who knew law) before the king came to adjudicate on disputes.

  There were also grades of arbitration in ancient time Puga, Sreni, Kula.

  There was hierarchy of appeal also the decision of kula or kin group was subject to revision by sreni which, in turn could be revised by puga. From puga appeal was to Pradvivaca and finally to the sovereign and the prince. Also in joint family disputes in its members solved by its elders if it did not resolve than, sreni used to intervene.

- **ADR in mughal period:**

  The mughals had three separate judicial system agencies, which were working at the same time and was independent of each other and these are:

  Courts of religious law- it was headed by quazis

  Courts of secular law-headed by governors, faujdars, kotwal and in case of hindu cases it was headed by Brahmins

  Political courts-it was headed by subahdars, faujdars, kotwal etc;

  Most villagers however resolved their cases in the village courts itself and appeal to caste courts or panchayats, the arbitration of an impartial umpire (salis). The emperor was the final court of appeal.

- **ADR during British regime**:

The administration in India was significantly in British regime the current judicial system was very much similar to British India. The alternative dispute resolution India picked up the pace by coming of east India company .modern arbitration regulations were laid down by Bengal regulation of 1772,1780 and 1781and designed to encourage arbitration after the several regulations containing provisions relating to arbitration act VIII OF 1857 codified the procedure of civil courts except those established by the royal charter which contained sections 326 and 327 provided for arbitration without the intervention of the court . After the enactment of provisions from time to time the Indian administration act passed, 1899 was passed based on English arbitration act, 1889 this was the first attempt to provide substantive law on the subject of arbitration but its application was limited to the presidency town if Calcutta, Bombay and Madras however there were many defects and attracted lots of criticisms. After all this in year 1940the arbitration act of 1940 was enacted replacing Indian arbitration act of 1899 and section 89 and clauses (a) to (f) of Section 104(1) and the second schedule of code of civil procedure 1908. It amended the consolidated the law relating to arbitration in British India and remained comprehensive law on arbitration even in the republican India until 1996.

COMPRATIVE STUDY BETWEEN ADR AND JUDICIAL SETTLEMENT

Judicial settlement is a formal process in which parties solve dispute in the court with the help of jury and judges with more strict rules which should be followed during proceedings like formal evidence rules where as alternative dispute resolution is more flexible process which can be formal or informal in nature, it is more private process where there is third party which helps parties to solve dispute, using agreed process and rules.

Time- In India there are already lakhs of cases pending in the court which clearly indicate the state judicial settlement and one has to wait on till the court has time to observe it this can take months, year or years and the alternative dispute resolution is more chop –chop

process once the arbitrator is appointed the case can be heard straightaway without delaying and the appeals are very limited so disputes can solved very quickly

Cost – litigation or judicial settlement is very expensive process as compared to alternative dispute resolution as it take count of lawyer fees and court fees and expenses of pre–trial detection and cost of protracted trials in the courtroom increases the cost where as cost of the alternative dispute resolution process is restricted to the arbitrator or mediator fess based on the quantum of the claim and the expertise of the arbitrator or mediator and lawyer fees

Privacy or confidentiality – litigation is formal process and subjected to public records and can also damage the reputation of the parties as they are done in public court rooms and in ADR the proceedings are more private and confidential in nature and are not subjected to public records and they can be kept confidential unless some law necessitates to the contrary.

Appointment of judge / arbitrator ,mediator - in litigation the parties are not free to decide the judge or jury, they are appointed and parties have no say to it where as in ADR parties can choose and decide jointly there mediator or arbitrator .

Joinder of Parties - Parties may be compelled to participate in ADR proceedings only by agreement. Thus, if any additional parties are necessary for complete relief, those other parties either must have agreements requiring such participation or otherwise must consent to their joinder in the proceedings. In contrast, in court proceedings, all persons and entities involved in a dispute typically can be joined as parties.

On – going relationship – litigation does not take into account whether litigants have continuing relationship or not they are more antagonistic in nature. And on the other hand in ADR can be solved more amicably and preserves ongoing relationship allowing flexibility, control and participation of disputing parties.

Evidence allowed – In litigation full evidence discloser is required but in ADR evidence process is limited and rules of evidence does not apply there is no interrogatories, no discovery process and no subpoenas.

Focus to the real problem – in ADR the prime problem through which conflict arises is focused nut in litigation the other legal rights and legal obligation are given more importance

ADR IN AYODHYA DISPUTE

Even India's judicial system is also considering the arbitration system is also fruitfull process to solve the dispute that's why they have mention to use mediation process for such an important issue of Ayodhya dispute. From a decade the Ayodhya dispute is pending and Supreme Court now referred the long standing Ram Janambhoomi Babri Masjid can dispute for mediation to a three member panel. The history of the dispute cannot be undone as its impossible but all knows that this matter involves emotions and has its effect on a ample number people. This issue has very ramifications that are why it could be called of some public interest. The Supreme Court itself felt that there must be atleast last ditch effort to resolve this issue through mediation. As a three panel member selected by constitutional bench of the top court of the india are Sri Sri Ravishankar , Kulifijullah , Sri Ram Panchu . Through giving a mediation a chance in such mass effecting issue may through mediation there arise a possibility that both parties involved may understood each other and come to a kind of win- win situation where both can give no room to conflict and can walk away from conflict with their heads held high . As the mediation is a process getting both the parties to focus on their interest can come on a resolution which is best suited to them. Mediation process is an alternative dispute resolution process which is quite professional. May through mediation which involve a set of trained mediator can often address the underlying emotions and could get the parties involved to walk in each other's shoes and possibly come closer to an understanding that is the process , ideally is choosing the mediation process or giving this process a chance supreme court did the best thing as one cannot fight perpetually over these matters whatever the results and parties accept may the best outcome comes.By choosing alternative dispute resolution method the supreme court has given mediation a limelight that this adr method can be considered in this serious matter too

ADR IN ASSAM –NAGALAND LAND DISPUTE

Sriram Panchu is the founder of the mediation chambers and also a board of the international mediation institution as a directo. Sriram Panchu set up Indias first court –annexd mediation centre in 2005 in Madras High Court. His one of the remarkable work is seen in the dispute between Assam and Nagaland for boundary from 50 years came to an end through mediation process only. Both the states were fighting for the land dispute. Nagaland and Assam shares a boundary of 434 km in common. State of Assam says that Nagaland has been invadely upon over 6600 hectars in Shivsagar, Joharat, Kabri Angoly and Golaghat district. Over 42000 hecters in Golaghat alone is a site of trouble. The invaded area also includes over 80 percent of reserved forest. According to Assam it says Nagaland has 3 civil subdivisions on Assam territory on other hand Nagaland insists that the more tracts under occupation of Assam belongs to Nagaland. The root cause of the problem is that during the British government it created Naga Hills district part of Assam province. When the Nagaland gained full statehood in 1963, the Nagaland demanded some portions because it believed historically belonged to it. The Supreme Court to resolve it appointed two mediators. Sriram Panchu and Niranjan Bhatt and by using mediation process finally the sates was in favor of an amicable and permanent settlement of the long standby harder dispute

ADR IN INDIA –PAKISTAN DISPUTE

No one in the world says that they did not hear about dispute between India and Pakistan since partition till now. Both the country shares same history till partition but have no good terms even being neighbor countries with many common features. There is a water dispute between both the countries; the Indus River is the principle waterway in Pakistan. After the independence India is retaining the Indus River's headwaters, by shutting off the flow of water which has cause grave crisis between both the countries and took around 15 years to resolve. In 1960 Indus water treaty came in. the treaty allocated the water of eastern rivers to India and India is obliged to cut the water of western river flow. But since the tension between India and Pakistan is increasing day by day, Pakistan is blaming India for stealing of water, which is violating 1960 treaty.

Another biggest point of contention between the countries is Kashmir conflict. After the partition Kashmir or ruler of Jammu and Kashmir opted to be part of India even being Muslim majority

region. Pakistan is blaming that as Kashmir has majority of Muslim population and geographically it is closer to Pakistan then India.

One more dispute between the countries is over the Sir Creek, it is strip of water between the India and Pakistan in Kutch and has over interpreting on boundary of maritime between Rann of Kutch [India and Sindh (Pakistan)]. This sir creek is important for oil, fishery and gas resource. Pakistan claims that entire creek territory its own according to the resolution called the Bombay government resolution 1914 and on the other hand India claims boundary lies elsewhere as per map of 1925, and still after the seventy years it's a matter of falling – out.

The dispute between the countries is endless. And solution is seemless. In Rann of Kutch dispute once arbitration was considered and proved successful. Though Rann dispute had little strategic or economic value and did not represent chief or substantive dispute. Both the nations have bigger fish to fry .but alternative dispute resolution is thus a feasible option. United Nation Institute of Peace has worked with both the nation but still there is not appropriate solution has been come out and situation is getting worse. Instead of using United Nation or using just un alone.

Mediation should be used in better form like having mediator to someone closer or more understanding of both the parties. this because 'mediation by someone insider who knows the parties well and conflict well and has vested interest in the resolution of conflict is seen as giving mediator more credibility and legitimacy. The mediator of this kind is proved to be essential for a long term solution. Religion have also played a in establishment of India and Pakistan's rivalry, but it in conjunction with mediation process it may help in way of casting concerns that previously used political and secular means alone have thus been unable to solve the dispute between the nation . Religious figures from both sided should be part of the peace talks.

Former US president also said that " discourage litigation, persuade your neighbor to compromise , whenever you can point out them , how the nominated winner is often a real loser in fee , expenses and waste of time "Alternative dispute Resolution can deliver further efficiencies within the civil courts system at a time of significant reform. Private Alternative dispute Resolution providers and the civil courts can work alongside each other to improve efficiency and access to justice for all concerned. As an integrated dispute track within the civil courts, private providers of Alternative dispute Resolution would complement and enhance the evolving structure of an Online Court by

ensuring that specialist expertise could be brought within the system as and when required. There are many types of cases that are required by law to go through the mediation process. Labor disputes and domestic (Family Law) disputes are two few prime examples. In India, however, this type of mandatory mediation is rarely seen. Many jurisdictions in India require some form of alternative dispute resolution before a case may be resolved through the traditional judicial process. As soon as a case is filed, the parties are provided with a number of Alternative dispute Resolution options. They must, unless exempted by the Court, select and pursue one of these options. But people don't give a chance to it as because of lack of knowledge. By looking at the multiple available statutes in the Indian context, it becomes clear that there are primarily four Alternative Dispute Resolution processes, which may be classified as Mediation, Conciliation, Arbitration and an ambiguously defined mechanism known as Judicial Settlement through Lok Adalat.

As there are no formal legislative principles relating to mediation and settlement as there are for Arbitration and conciliation, it leads to confusion amongst practitioners who would have intended to opt for one method but erroneously chose the other method of Alternative dispute Resolution. Hence, caution must be exercised so that people within the Alternative dispute Resolution ecosystem are knowledgeable about the types of Alternative dispute Resolution processes and the mechanisms that are involved in each of the variant.

Lack of Clear Distinction in Laws Pertaining to Arbitration, Mediation and Conciliation. The Mediation and Conciliation Rules, 2004 was brought into effect from 11th August, 2005. A cursory look at these rules and other rules pertaining to the Alternative dispute Resolution realm would reveal that the Mediation and Conciliation Rules, 2005 are not adequately framed and they do not cover the entire spectrum of the mediation process. Practitioners of Alternative dispute Resolution methods have noted that the Mediation and Conciliation Rules, 2004 cover more or less the same provisions that are covered in Arbitration and Conciliation Act, 1996. Hence, it is seen that there is lack of clear distinction and absence of specific statutes leads to a lack of confidence and a feeling of vagueness in the mediation process.

Distinct Legal Framework for Laws Pertaining to Arbitration, Mediation, Conciliation. The government must come up with clear, distinct statutes that would provide a framework that can be identified with the specific Alternative dispute Resolution processes. This would greatly help the

practitioners in structuring the processes of Alternative dispute Resolution on a more solid footing and a strong underlying legal principle. The government must set a minimum percentage of new cases in each financial year that must be solved via any of the Alternative dispute Resolution processes. This would prompt them to train and up skill member advocates in the field of Alternative dispute Resolution and start developing a gainful practice in Alternative dispute Resolution. The government must come up with a mechanism to have a directory of all the Alternative dispute Resolution professionals that meet a minimum benchmark and are well versed with specific a body of knowledge pertaining to Alternative dispute Resolution practice, much like the insolvency professionals. .