

CHALLENGES IN IMPLEMENTATION OF THE ALTERNATIVE DISPUTE RESOLUTION IN INDIA

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ABSTRACT

An overview of alternative dispute resolution (ADR) in India is given in this article as a means of addressing problems with the adversarial legal system. It explores several ADR processes such as negotiation, mediation, conciliation, and arbitration, and emphasises how they vary from conventional legal proceedings. The Arbitration and Conciliation Act of 1996 and Section 89 of the Code of Civil Procedure of 1908 are mentioned in the legal basis for ADR. The benefits of ADR are discussed, including its flexibility and cost-effectiveness. However, this article also discusses problems with ADR in India, including a lack of knowledge, distrust difficulties, reliance on the legal system, and privacy concerns. There are suggestions made to enhance ADR implementation, such as making ADR necessary, building infrastructure, protecting privacy, and introducing online dispute settlement.

INTRODUCTION

The preamble of the Constitution of India contains the essence of the foundation of Justice and the ultimate object of civilized society and aspires to “justice-social, economic and political”. Further, it also reflects in Article 39-A of the Indian Constitution¹ provides for ensuring equal access to justice. Henceforth to achieve the ultimate goal of justice the country relies on adversarial litigation. But in this particular system, the overcrowded courtrooms, lack of resources and manpower with delays, costs, and hardships during procedures highlighted the need for better options to resolve disputes. Therefore, the world has experienced that Alternative Dispute Resolution is the solution to that need.

Alternative Dispute Resolution is not a new concept in the Indian context as the settlement of their disputes themselves or with third-party help. In Ancient India, disputes were settled by the intervention of *Srenis* i.e. guilds of similar occupation, *Kula* i.e., family assemblies,

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¹ Constitution of India, a 39-A

Parishads, etc.² With the object of eliminating delay, vexation and expenses and promoting the idea of access to justice for all, the Alternative Dispute Resolution System is stepped in and seeks to provide simple, fast, cheap and accessible justice. Justice will be denied by delay and such denial is the biggest antecedent to the purpose of law. Any dispute is like cancer, the later you treat the more it grows. The right to a speedy trial is the right to life and liberty granted under Article 21 of the Constitution.³

The alternative Dispute Resolution process is quite distinct from normal judicial proceedings. It includes the resolution of disputes by themselves or with the assistance of a third party, and the proceedings are simple, quick and on the term agreed by the parties. Hence procedural law such as the Code of Civil Procedure 1908⁴, Indian Evidence Act 1872⁵, etc. does not apply in this system. Due to this, Alternative Dispute Resolution System aspires to resolve disputes with comparatively less expenditure of money, time and resources. Alternative Dispute Resolution not only aims at providing justice through dispute resolution but also harmonizes party relations.⁶

FUNCTIONS OF ALTERNATIVE DISPUTE RESOLUTION

Various forms of Alternative Dispute Resolution are being used to settle outside the court. It depends upon certain factors like the nature of the dispute and the agreement of parties. It resolves the conflicts of different variety of topics like civil, family, industrial, business, etc. as provided in the judgment of the case of *Afcons infrastructure and Ors. v. Cherian Verkey Construction and Ors*⁷, and the agreement of parties to go for the same is the basic requirement under such settlement. There are mainly four types of methods that can be used in Alternative Dispute Resolution such as:

Negotiation - Resolution of disputes arising out of interpersonal conflicting interests by the parties themselves, outside of court without any third-party involvement.

² Sinha SB, 'ADR and Access to Justice: Issues and Perspectives Hon'ble Thiru Justice S.B.Sinha, Judge Supreme Court of India' (latestlaws.com, 2015) <https://www.latestlaws.com/adr/articles/adr-access-justice-issues-perspectives-honble-thiru-justice-s-b-sinha-judge-supreme-court-india> accessed 10 June 2023.

³ Constitution of India, a 21

⁴ Code of Civil Procedure 1908

⁵ Indian Evidence Act 1872

⁶ Kumar, B.S. (2022) ADR system in India: Challenges, International Journal of Law Management & Humanities. Available at: <https://www.ijlmh.com/paper/adr-system-in-india/> (Accessed: 10 June 2023).

⁷ *Afcons infrastructure and Ors. v. Cherian Verkey Construction and Ors.* 2010 (8) SCC 24

Mediation - Resolution of disputes arising out of interpersonal conflicts, outside of court, by parties with the assistance of a neutral third party as a mediator.

Conciliation - Resolution of disputes arising out of inter-personal conflicts, outside of court, by the parties with the assistance of a neutral third party as a conciliator and the award comes out of it, is binding and executable as a decree of civil court.

Arbitration - A process in which a dispute is submitted to a sole arbitrator or arbitrators mutually agreed by the parties, who adjudge and make a binding award that is executable as a decree of civil courts.

ALTERNATIVE DISPUTE RESOLUTION IN INDIA

In India, apart from non-binding forms of Alternate Dispute Resolution like Negotiation and Mediation, Arbitration and Conciliation are governed by Arbitration and Conciliation Act, 1996⁸. The impugned act is divided into four parts. Part I deals with “Arbitration”, Part II deals with “Enforcements of Certain Foreign awards”, Part III deals with “Conciliation” and lastly Part IV deals with some “Supplementary Provisions”. Apart from these, there are seven schedules to govern the Alternative Dispute Resolution system in India. And Section 89 of the Code of Civil Procedure⁹, 1908 which provides to refer the disputes between parties for Alternative Dispute Resolution.

Before the existence of Section 89 CPC 1908, there are several provisions in The Hindu Marriage Act, 1955¹⁰, The Industrial Disputes Act, 1947¹¹ and The Family Courts Act, 1984¹² provides provisions for mediation and conciliation. And, in due course, in compliance with other laws that provide the resort to Alternative Dispute Resolution and the question of law arises before courts in various cases regarding its governance, the legislation came up with the Arbitration and Conciliation Act 1996.

Alternative Dispute Resolution is initially considered a voluntary act of the parties until it got statutory recognition by Section 89 of the Code of Civil Procedure 1908¹³, which is enacted

⁸ Arbitration and Conciliation Act 1996

⁹ Code of Civil Procedure 1908, s 89

¹⁰ The Hindu Marriage Act 1955

¹¹ The Industrial Disputes Act 1947

¹² The Family Courts Act 1984

¹³ Code of Civil Procedure 1908, s 89

by the CPC (Amendment) Act, 1999¹⁴ with effect from July 2002, provides compulsory recourse to Alternative Dispute Resolution System. When it appears to the court that there is any element of settlement that may be acceptable to parties, and then it refers them for arbitration, conciliation, judicial settlements including Lok Adalats, or mediation.

ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION

There are several advantages of this system, there are several irrelevant pieces of information and in judicial proceedings, the parties hesitate to part ways with irrelevant information, this particular drawback is efficiently catered by the process of Alternative Dispute Resolution because of its efficient informal exchange of relevant information across the table. In Conciliation as well as mediation and negotiation, it is the parties who are responsible for the decision as they know the actual truth of their position and the obstacles do not exist due to that particular aspect.

The process of settling disputes outside the court is cost-efficient and less formal than the traditional judicial procedure where cost is deciding factor and the gate to justice for some parties. Furthermore, the Alternative Dispute Resolution procedure aims to establish harmony between the parties and formulate terms to avoid disputes in the future which is not limited to mere settlement of disputes. Also, the non-applicability of strict procedural law to Alternative dispute Resolution leaves the scope for the parties to decide their terms as the impugned system provides flexibility and versatility. Such procedural laws are made in compliance with the greater public good, which may create hindrance to a speedy trial in some individual cases, hence in this system parties are not bound to adhere to such procedural law strictly and are free to formulate rules on their mutually agreed terms.

ISSUES WITH ALTERNATIVE DISPUTE RESOLUTION IN INDIA

Following the general rule “nothing is perfect”, Alternative Dispute Resolution Mechanism has certain drawbacks. The necessity of a mutual agreement to resolve their disputes by the means of Alternative Dispute Resolution is creating hindrances to go for settlement of the disputes outside the court. Even many people are blissfully ignorant of the existence of such a mechanism.

¹⁴ CPC (Amendment) Act 1999

Now nearly one and half decades of enforcement of Arbitration and Conciliation, 1996 yet not actively achieved its objectives and it is considered as the act has lost its basic structure and identity as intended by the makers of the same. Successful implementation of the Alternative Dispute Resolution mechanism is highly dependent upon the good faith of the parties and their attorneys. In furtherance, there is always doubt about the independence, and impartiality of the arbitrator, conciliator and mediator. Also, when such an opinionated person having preconceived notions appointed as the arbitrator, conciliator or mediator will defeat the entire purpose of the Alternative Dispute Resolution system.¹⁵

Many challenges prevent Alternative Dispute Resolution (ADR) from being prevalent and successful in India. First and foremost, the primary obstacle is the general public's and even some legal experts' lack of knowledge and comprehension of the advantages and processes of ADR methods. As a result, traditional litigation becomes more preferred, which adds to the already overburdened court system's caseload. There is also a problem with the lack of qualified ADR practitioners. It is challenging to effectively manage the rising amount of conflicts due to the dearth of skilled mediators, arbitrators, and conciliators. Furthermore, parties may choose to ignore or put off putting the agreed-upon resolutions into effect, which would defeat the purpose of the entire process and raise questions about the enforceability of ADR rulings. A problem with the acceptance and use of ADR procedures is the cultural tendency towards adversarial litigation combined with a lack of faith in the impartiality of ADR practitioners. Subsequently, the lack of a thorough legislative framework guiding ADR practices in India causes inconsistent and ambiguous outcomes, impeding the process' effective operation. To address these issues and promote the expansion of ADR in India, it would be necessary to implement strong awareness campaigns, more training opportunities, improved enforcement mechanisms, and a thorough legislative framework.¹⁶

Apart from this, there are some inherent behavioural and operational challenges that Alternate Dispute Resolution is facing since its inception and they are-

Lack of Awareness - When it comes to the matter of referring the disputes to ADR, then the necessity of the element of such intention of the settlement must be derived from the case, which is an essential condition derived in Section 89 CPC, 1908¹⁷. If not, then the parties

¹⁵ Sinha (n2)

¹⁶ Kumar (n6)

¹⁷ Code of Civil Procedure 1908, s 89

head up with the litigation. And to incorporate such elements in their agreement the awareness of ADR and its advantages must be known to the parties. And due to not familiarity with this mechanism, parties straight up opt for litigation.

Lack of Trust - There is always scepticism about the independence and impartiality of the third party, and that costs parties not to resort to ADR. Such a lack of trust can also be noticed in the enforceability of ADR outcomes.

Legal Culture - In India, people rely more on courts and there is very low percolation of ADR mechanism for dispute resolution. It's difficult to introduce such a system to parties because of the aforementioned reason and that results in to increase in costs and delay in justice.

Privacy and Confidentiality Concerns - Even the courts of India face a lack of trust by the parties to secure their Right to privacy under Article 21 of the Indian Constitution¹⁸ as interpreted in Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.¹⁹ And it is short in gaining trust because of previous examples of privacy compromise. And because of such a lack of trust, parties are sceptical to resort to ADR.

Power derived from Arbitration Agreement - In the case of Prakash Cotton Mills Pvt. Ltd vs Vinod Tejraj Gowani²⁰, Bombay High Court threw light on the importance of the existence of the Arbitration Agreement as a process of Arbitration derives its power from Arbitration Agreement. If there is no Arbitration Agreement, no arbitration will be resorted. And due to this essentiality, the objectives of ADR lose their essence and Identity.

Archaic Legal Processes - The Supreme Court in Garware Walls Ropes Ltd. v Coastal Marine Constructions & Engineering Ltd.²¹ held that the arbitration agreement is invalid merely because of non-payment of Stamp duty. Due to this complex and old-fashioned approach, the option to resort to ADR has become cumbersome.

¹⁸ Constitution of India, a 21

¹⁹ K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors. (2017) 10 SCC 1, AIR 2017 SC 4161

²⁰ Prakash Cotton Mills Pvt. Ltd vs Vinod Tejraj Gowani (2014) 6 ABR 1

²¹ The Supreme Court in Garware Walls Ropes Ltd. v Coastal Marine Constructions & Engineering Ltd 2019 SCC OnLine SC 515.

RECOMMENDATIONS

There is no rationale for closing the inflow of cases in the courts, but there is an urgent need of increasing the capacity of the system, both qualitatively and quantitatively, with the strengthening and introduction of additional outlets. There must be some huge steps should be taken to change the situation of ADR implementation in the country.

Despite the myriad of issues that have been identified in the previous chapter, efforts are needed to make the future of ADR bright in the Indian system. To enable a speedy integration, some of the issues can be resolved neatly and instantly and some will take time. Smart work should be done to identify the problems and build on existing capabilities to increase the advantages of ADR in the field of justice delivery systems.

It is recommended that a soft-touch regulatory system strengthens the current system and judicial framework and introduces systems that could be managed and adopted by the parties. Several objective recommendations should be adopted and they are:

- Mandatory reference to ADRs.
- Increase efficiency to build trust, with quality infrastructure.
- Increase Privacy and make strict rules to implement confidentiality.
- Modernise the process with the introduction of Online Dispute Resolution.
- To spread awareness and shift in the legal system for better word of mouth.

CONCLUSION

When in contrast to traditional litigation, alternative dispute resolution (ADR), which includes numerous procedures including mediation, arbitration, and conciliation, offers a quick and economical way to settle conflicts. ADR gives the parties concerned faster dispute resolution, lower financial responsibilities, and more convenience. Additionally, it empowers participants by giving them greater input in procedural matters, potentially reducing the load on the legal system. Collective efforts are required to raise awareness and promote its use in order to nurture and progress ADR's processes. Such coordinated efforts have to include programmes designed to spread information about ADR and encourage its adoption. In order

to successfully utilise their resources and influence, it becomes important to include the media and non-governmental organisations (NGOs).

Government resources must be rendered open to court-annexed mediation and conciliation efforts in order to make them more easily accessible. By providing the tools and support needed to enable these alternative processes, such financial help can dramatically improve access to justice. The creation of judicial academies at the state level also stands out as a significant idea for advancing the goals of ADR. These institutes would be devoted to providing legal professionals and judicial officials with information, abilities, and training in ADR. The development of judicial academies greatly advances ADR objectives by fostering expertise in ADR. The successful completion of these phases is essential to achieving the crucial goal of assuring everyone's access to justice. In order to promote and enhance ADR mechanisms, a comprehensive strategy that includes the aforementioned steps is essential.

