Taking Alternative Dispute Resolution To The Common Man

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Introduction

"You have undertaken to cheat me. I won't sue you, for the law is too slow. I'll ruin you."[1]

Alternative Dispute Resolution[2] is a term that refers to several different methods of resolving business-related disputes outside traditional legal and administrative forums. These methodologies, which include various types of arbitration and mediation, have surged in popularity in recent years because companies and courts became extremely frustrated over the expense, time, and emotional toll involved in resolving disputes through the usual avenues of litigation. *"The opposing sides in litigation are attacked and demeaned at every opportunity during the course of a lawsuit,"* pointed out Wayne Hoagland in *Nation's Restaurant News. "The system is very expensive, disruptive and protracted, and by its very nature it tends to drive the parties further apart, weakening their relationships, often irreparably."* ADR programs have emerged as an alternative, litigation-free method of resolving disputes.

The entire globe of ADR can be further subdivided under ***two major subheads*** which are **arbitration** and **mediation.** *Arbitration* is the procedure by which parties agree to submit their disputes to an independent neutral third party, known as an arbitrator, who considers arguments and evidence from both sides, then hands down a final and binding decision. In contrast to arbitration, *mediation i*s a process whereby the parties involved utilize an out-side party to help them reach a mutually agreeable settlement. Rather than dictate a solution to the dispute between the two parties, the mediator—who maintains scrupulous neutrality throughout—suggests various proposals to help the two parties reach a mutually agreeable solution.

In India the need to evolve alternative mechanisms simultaneous with the revival and strengthening of traditional systems of dispute resolution have been reiterated in reports of

[1] *Cornelius Vanderbilt* on Alternate Dispute Resolution
[2] Hereinafter ADR

expert bodies.[3] Each of these reports saw the process of improving access to justice through legal aid mechanisms and ADR as a part of the systemic reform of the institution of the judiciary coupled with substantive reforms of laws and processes.

The reasons for the need for a transformation are not much in dispute. The inability of the formal legal system to cope with the insurmountable challenge of arrears argues itself. The *Parliamentary Standing Committee on Home Affairs* found that as of 2001, there were in 21 High Courts in the country, 35.4 lakh cases pending[4]. Of the 618 posts of High Court judges there were 156 vacancies as on January 1, 2000[5]. The position in the subordinate courts was even more alarming. There was a backlog of over 2 crore (20 million) cases for as long as 25 to 30 years[6]. Of these, there were over 1.32 crore (13.2 million) criminal cases and around 70 lakhs (7 million) civil cases. In its 120th Report in 1988, the *Law Commission of India* had recommended that *"the state should immediately increase the ratio from 10.5 judges per million of Indian population to at least 50 judges per million within the period of next five years."*[7] The recommendation is yet to be implemented.

All of the above should in fact persuade prospective and present litigants, as well as those engaging with the formal legal system as judges and lawyers, to reservedly embrace the notion of ADR, conciliation and mediation. ADR in itself is not a magic wand though, which would wipe off all the problems which plague the Indian judiciary and thereby emerge as 'the' choice for any dispute resolution whatsoever.

The ADR mechanisms in India are also not in the smoothest of form and need urgent attention and thought. The present essay seeks to analyse and suggest ways of improvement and implementation of the ADR mechanisms in India keeping in mind the supremacy of the judiciary and the convenience of the parties involved.

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[3] Report of the Committee on Legal Aid (1971), ***Report of the Expert Committee on Legal Aid: Processual Justice to the People,*** Government of India, Ministry of Law, Justice and Company Affairs (1973), ***Report on National Juridicare Equal Justice – Social Justice,*** Ministry of Law, Justice and Company Affairs (1977)

[4] J. Venkatesan, "Panel concern over backlog in courts", *The Hindu*, New Delhi, March 10, 2002, 12

[5] Indian Law Institute, ***Judicial System and Reforms in Asian Countries: The Case of India***, Institute of Developing Economies, Japan External Trade Organisation (IDE-JETRO), (March 2001) 39

[6] ibid

[7] ***120 th Report of the Law Commission of India on Manpower Planning in the Judiciary: A Blueprint***, Ministry of Law, Justice and Company Affairs, Government of India (1987), 3.

Legal Position of ADR in India

The first footsteps towards taking resort to alternate methods of dispute resolution in India can be traced back as early as *The Bengal Regulation Act,1772* which provided that in all cases of disputed accounts, parties are to submit the same to arbitrators whose decision are deemed a decree and shall be final. *The Regulation Act,1781* further envisaged that judges should recommend the parties to submit disputes to mutually agreed person and no award of arbitrator could be set aside unless there were two witnesses that arbitrator had committed gross error or was partial to a party. A recommendation for the first time was made to the Second Law Commission by Sir Charleswood to provide for a uniform law regarding arbitration. The *Code of Civil Procedure* was then enacted accordingly in 1859.[8]

Indian Contract Act, 1872 also recognizes arbitration agreement as an exception to Section 28, which envisages that any agreement in restraint of legal proceedings is void. Later, the *Arbitration Act, 1899* was also enacted to apply only to presidency towns to facilitate settlement of disputes out of court.

The Arbitration Act, 1940 repealed and replaced the previous act[9]. When India became a state signatory to the protocol on arbitration under the Geneva Convention and in order to give effect to the same, the *Arbitration (Protocol and Convention) Act* was passed. Later, India also became a signatory to the *New York Convention* and accordingly Foreign awards *(Recognition and Enforcement) Act, 1961* was passed. After liberalization of Indian economy in the 1990's *Arbitration and Conciliation Act, 1996* was enacted which superseded the earlier Act of 1940 and brought about radical changes in the law of arbitration and introduced concepts like Conciliation[10] to ensure speedy settlement of commercial disputes. A key feature of the act is that by virtue of **Section 5,** the judiciary shall not intervene in an arbitration agreement between parties to dispute except as provided under the Act. The Act is a comprehensive one consisting of 39 sections and provides for judicial intervention only under sections-9, 11, 14 and 34, dealing with exceptional situations.

[8] Section 312, 313-325 and 326-327 laid down the permission and procedure for arbitration without the court's intervention.
[9] *Arbitration Act, 1899*
[10] Under Part I of the Act

The following is a brief overview of the Act:

Section	Overview
Section 7	Relates to arbitration agreement.
Section 8	When parties should move to court.
Section 9	Interim measures.
Section 10	No. of arbitrators to be appointed.
Section 12	Procedure of appointment of arbitrators.
Section 13-14	Challenge of Arbitrator.
Section 16-17	Jurisdiction of Arbitrator.
Section 18-30	Conduct of Proceedings
Section 31	Awards
Section 32-33	Correction of Award.
Section 34	Recourse Against Reward.

An important feature of the current legislation in force is that it has been codified along the lines of *Model Law on International Commercial Arbitration* adopted by *United Nations Commission on International Trade Law* (UNCITRAL) and therefore corresponds to international standards of norms.

In *Advocate Bar Association v. Union of India*[11], the Supreme Court directed the setting up of a committee to formulate the manner in which various provisions of the *Code of Civil Procedure including* **Section 89** is to be brought into operation. The court also directed the formation of rules and regulations that are to be adhered to while taking recourse to alternate dispute resolution systems.

In the case of *Babar Ali v. Union of India and Ors.*[12] , the constitutionality of the act was challenged. The apex court held that the Act of 1996 was not unconstitutional and it does not in any way offend the basic structure of the Constitution of India. The act was further strengthened when in the case of *Kalpana Kothari v. Sudha Yadav and Ors.*[13] the Hon'ble Supreme Court held that as long as the arbitration clause exists, a party cannot take recourse to the Civil Courts for appointment of Receiver etc. without evincing an intention to start the arbitration proceedings.

[11] Writ Petition no. 496 of 2002, decided on 25.10.2002.
[12] (2000) 2 SCC 178
[13] (2002) 1 SCC 203

Why Arbitration is still corporate savvy?

Originally, in ancient India, ADR as we know today was the way disputes were generally settled. The whole village by way of *Gram Panchayat* used to solve the problems of the villagers by sitting together and mediating the problems faced by the two parties. Since the advent of the modern legal system, this method of dispute settlement has largely been set aside. Today, this age old method of dispute settlement has become corporate savvy and exclusive to big concerns. It has become the talk of the boardrooms and the way the corporate world now looks towards settlement of disputes.

The reason as to why such a phenomenon is witnessed in our country is very interesting. **First** of all, the process still is a very costly affair as very few people specialize in this field that are competent enough to arbitrate on various matters, thereby resulting in making ADR a very exclusive and high end service. **Secondly**, ADR is just too flexible in nature and there is no guarantee in its proceedings. There is no set procedure which is required to be followed while finding solutions through ADR. Such a system juxtaposed with the modern legal system which is time-tested, predictable and follows a set procedure, becomes a much safer and hence attractive option for dispute settlement for the common man.

Also, the *Indian Law* recognizes mainly Arbitration as a way of ADR which pretty much curtails the full scope of ADR. The major drawback due to the same is that Arbitration involves the principle of arbitrability of subject matter. Since most matters which have a specific legislation to its name are left out due to the non-arbitrability of its subject matter, the actual scope of ADR is heavily compromised on. It is important that if ADR has to reach the common man and not just remain a corporate toy then it be allowed to spread out its wings and fly.

ADR to the common man: Our Suggestions

- ***Establishing a state-run parallel authority for ADR.***

A nationwide network needs to be envisaged for providing solutions through ADR. An apex body viz. the *International Commission for Alternate Dispute Resolution* needs to be constituted to lay down policies and principles for making ADR available to the common man to frame most effective and economical schemes for ADR. It should also disburse funds and grants to State ADR Authorities and NGOs for implementing ADR schemes and programmes for the common man.

In every state a **State ADR Authority should be constituted** to give effect to the policies and directions of the Central Authority. State ADR Authority should be headed by the Chief Justice of the State High Court or the Advocate- General of the state or any such eminent person in the field of law.

District ADR Authority then needs to be constituted in every district to implement ADR programmes and schemes in the district. The District Judge of the district or a similar person of repute in the legal field be its ex-officio Chairman.

- ***ADR to be made mandatory in certain cases.***

To successfully bring ADR to the common man while still reducing the backlog of cases piled up in files in the back offices of courts, radical steps need to be taken. It is important that the legislature introduce certain provisions which **discourage initiation of litigation in cases where out of court settlements can easily be worked out**. Cases under the *Motor Vehicles Act (1988)*, *The Consumer Protection Act (1986)*, *and The Contract Act (1872)* etc. are cases where the major cause for initiation of litigation is conflict of interests of the parties involved. These are precisely the type of cases where ADR mechanisms can be pressed into action without any second thoughts. Similarly cases involving certain civil matters, certain matters under family law, insurance etc. can be brought under the aegis of obligatory ADR.

- ***De-criminalization of certain offences covered under the IPC***

The word *"crime"* in legal terms comes to mean any act or omission defined as an offence under the *Indian Penal Code (1860)*. Various types of crimes have been defined under the Indian Penal Code. While some are regarded as more *"serious"* crimes by the society, some crimes may be classified as lighter in nature, viz. *Offences Relating to Weights and Measures (Chapter XII)*; *misappropriation of property*, *criminal breach of trust* etc. as defined under Chapter XIX and *defamation* as defined under Chapter XXI. **Acts or omissions resulting in such crimes attract lesser attention from the society and such matters can easily be settled outside the court if carried out in a proper manner.** A very important part of criminal litigation is establishing guilt, which *prima facie* makes solutions offered by ADR less effective, useful and applicable in cases where criminality is sought to be established. What we would like to suggest in this case is that ADR by way of mini-trials, supplemented neutral fact-finding and case evaluation will result in prompt disposal of such cases. The primary reason for development of ADR is to provide a speedy, cheap and efficacious remedy to a problem faced by the common man. By resorting to such measures, not only is the common man being able to jump the long queue that litigation entails, he also saves a lot of money by avoiding court fees, fees paid to lawyers etc. Such a step will not only be beneficial to the common man, it will also go a long way in reducing the burden on the judiciary and make way for the more seriously viewed crimes to come to the fore-front and be tried and disposed off quickly, keeping in tune with the saying, *"Justice delayed is justice denied."*

- ***Online Dispute Resolution(ODR)***

The Internet, which has initially been the cause of increase in disputes, has itself provided a new means to resolve not only the disputes generated due to its advent but also other disputes wherein it has had no role to play. It does through **Online Dispute Resolution**[14] in its various flavours.

ODR is viewed differently by different think-tanks. It is nothing but the employing of available communication technology to deliver ADR services i.e., it is the implementation of

[14] Hereinafter ODR

ADR in an online environment. In today's day and age, **ODR can be a very effective way to provide ADR solutions to a host of people in a large area without incurring traditional costs involved in setting up a state run authority otherwise.** Also, the easy access it provides to the common man to reach out for solutions through ADR will truly be an ingenious and progressive step forward in bringing justice closer to the common man.

- ***Imparting Legal Literacy***

Perhaps the biggest roadblock that faces any country is illiteracy. Our government has continuously been trying to eradicate illiteracy and now the new task has become even harder, that is, to impart legal literacy to the literates and illiterates alike. Legal literacy empowers one to be an active and alert citizen, thereby making a population more vigilant about its rights and duties. **ADR is a fairly new concept and concepts like these not only take time in percolating to the grass root levels**, acceptance of such a concept is also a big problem. Therefore a robust programme imparting legal literacy to the masses in India, especially in the field of ADR becomes a necessity. Not only will this allow bringing ADR to the common man, an aware citizen will contribute positively to the development of the nation too.

- ***Integrating ADR in the Indian legal education***

The legal education of today's India needs to take the ADR mechanisms seriously. Today these mechanisms are taught only as part of speciality courses which primarily focus on the deployment of these processes pertaining to areas of corporate mergers and amalgamations. The need of the hour is different – **It is time when these dispute resolution mechanisms are taught as essential courses** for a new breed of lawyers who will be adept in these forms of dispute resolutions would surely help the ordinary man. US law schools have responded to rise in ADR mechanisms.[15] Indian law schools are growing in number and are producing the finest lawyers. No time can better be suited for the implementation of this idea.

[15] R. MOBERLY, ADR in the Law School Curriculum: Opportunities and Challenges At mediate.com <*http://www.conflict-resolution.net/articles/moberly.cfm?plain=t*> (last accessed on 1.11.2008)

Conclusion

India is a nation which epitomises a subtle mix of the modern and the ancient. The preservation of the best of both is what Indians are best at.

Keeping in mind the same spirit of India, the common Indian of today should get the best of all the dispute resolution mechanisms in India. The motive behind any legislation, amendment or new introduction has and always been the welfare of the ordinary citizen of the country.

Alternate Dispute Resolution mechanisms are not an exception to this rule. The suggestions imparted in the instant essay endorse and admire the same spirit. The authors firmly feel that the time for the formulation of a solid ADR mechanism base in India has come and the same shall help in preservation of justice in the nation.