Historical Development of Alternative Dispute Resolution System in India

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Abstracts

Peace is sine quo non for development. Conflict is like deadly disease. The sooner it is resolved the better for all the parties concerned in particular and society in general. A dispute is basically 'lis inter partes' one dispute leads to another. If it is not resolved at the earliest possible opportunity, it grows at a very fast pace and with time and the effort required to resolve it increases exponentially as new issues emerge and conflicting circumstances plentiful. Justice is the foundation and object of any civilized society. The quest for justice has been an ideal which mankind has been aspiring for generations down the line. Hence, it is essential to resolve the dispute, the moment it raises its head. Settlement of disputes through reference to a third party is a part of the volkgiest of India since times immemorial. It has undergone a phenomenal change, growing from the stage of village elders sitting under a banyan tree and resolving disputes to the stage of gaining a statutory recognition.

Traditional legal disputes occur in a fairly straightforward manner. Two parties start with a dispute where one party harms another. The justice dispensation system in India has found an alternative to Adversarial litigation in the form of ADR Mechanism. ADR is nothing new. This informal quasi judiciary system is as old as civilization. Different forms of ADR have been in existence for thousands of years. In modern democracy ADR has become a spoke in the wheel of the larger formal legal system in India. In this essential context the paper aims to study various forms of ADR and their historical development as well as applicability to the pluralistic and democratic Society of India.

Key words: *Alternative Dispute Resolution System, Dispute, Historical Development, Justice.*

Introduction

"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]".

-Mahatma Gandhi

Human conflicts are inevitable. Disputes are equally inevitable. It is difficult to imagine a human society without conflict of interests. Disputes must be resolved at minimum possible cost both in terms of money and time, so that more time and more resources are spared for constructive pursuits.[2]

Every society has evolved its own mechanisms for dispute resolution. In India, ADR methods have a very ancient legacy. Indian civilization expressly encouraged the settlement of differences by Tribunals chosen by the parties themselves. The informal settlement or resolution of local disputes has been seen throughout India from ancient times. But we could not see any homogeneity in dispute resolution practices. The idea of *Panchayat*[3] justice is not new to us. Since the ancient period *Panchayats* have played an important role in village level dispute resolution. Elders resolve the disputes in the village by harping on their intimacy with the people and by taking into consideration local conditions, language, habits, customs and practices.

A study of the ancient Hindu law on arbitration and ancient literary works of India such as *Vedas, Sutras, Epics,* and *Dharmashastras* gives us very useful about the Dispute Resolution Institutions prevailing in the ancient India. Reference to a village *Panchayat* without court intervention was one of the natural ways for the ancient Hindus for resolution of their disputes. Village *Panchayats* denote villagers mediating between contending parties in their own village. In some cases, the *Panchayats* mostly resembled the courts. Also apart from the courts established by the king, there were other tribunals recognized in the ancient

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[1] Mahatma Gandhi, *The Story of My Experiments with Truth* (Part II, Chapter XIV).

[2] Singh, Dr. Avtar, Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 391

[3] In general terms *Panchayat* means assembly of elders and respected inhabitants of a village. Panchayats literally means a body of five persons and a *pancha* means a member of that body. The head of *pancha* is *Sarpanch*.

Smrities and texts. The *Smrities* refer, in particular, to three types of popular courts. Like *Puga*[4], *Sreni*[5] & *Kula*[6]. These tribunals were practically arbitration tribunals. Appeals were provided to the courts of judges appointed by the king and ultimately to the king himself.

ADR: Setting out the Concept

ADR is an abbreviation that stands for Alternative Dispute Resolution. It also stands for Appropriate Dispute Resolution. ADR refers to all those methods of resolving a dispute, which are alternatives for litigation in the courts. ADR processes are decision making processes to resolve disputes that do not involve litigation or violence. Unlike the courts, which use adversarial processes, ADR focuses on effective communication and negotiation. The term "alternative dispute resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes.[7]

Alternative Dispute Resolution is today being increasingly acknowledged in the field of law as well as in the commercial sector. So Alternate Dispute Resolution (herein after as ADR) is necessary as a substitute to existing methods of dispute resolution such as litigation, conflict, violence and physical fights or rough handling of situations. It is a movement with a drive from evolving positive approach and attitude towards resolving a dispute.[8]

The search for a simple, quick, flexible and accessible dispute resolution system has resulted in the adoption of 'Alternative Dispute Resolution' mechanisms. The primary object of ADR system is avoidance of vexation, expense and delay and promotion of the ideal of "access to justice". 'Alternative Dispute Resolution' or ADR is an attempt to devise machinery which should be capable of providing an alternative to the conventional methods of resolving disputes. An alternative means the privilege of choosing one of two things or courses offered at one's choice. It does not mean the choice of an alternative court but something which is an alternative to court procedures or something which can operate as court annexed procedure. The ADR techniques mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures.

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[4] A board of persons belonging to different sects and tribes but residing in the same locality.
[5] An assembly of tradesmen and artisans belonging to different tribes but connected in some way with each other.
[6] Assembly of members of a clan and speak of the authority of these courts to decide law suits.
[7] *See "Evolution of ADR (Alternative Dispute Resolution) in India", available at,* http://adrandhra.blogspot.in/2013/07/evolutionofadralternativedispute.html
[8] Madhubhushi Sridhar, LexisNexis Butterworths, Alternative Dispute Resolution: Negotiation and Mediation, at 1, (1 Ed. 2006).

Historical Development of Alternative Dispute Resolution System

The system Alternative dispute resolution is not new. This informal quasi judiciary system is as old as civilization. Different forms of ADR have been in existence for thousands of years. To know the origin and development of the modern alternative dispute mechanism we should understand the same in three phases, i) ADR in Ancient India ii) ADR in British Regime & iii) ADR in Modern India i.e. Post Constitutional Era. Let me start with alternative dispute resolution system during ancient India.

i) ADR in Ancient India

The law and practice of private and transactional commercial disputes without court intervention can be dated back to ancient times. Arbitration or mediation as an alternative to dispute resolution by municipal courts has been prevalent in India from Vedic times.

The early *Vedic* period in which *Rigveda*, the oldest literary work, was composed is known as the early Vedic age in the history of India. During this period, the seeds of regular system of administration were sown. There were two popular institutions called *Sabha*[9] & *Samiti*[10] The Sabha enjoyed *Inter alia*, certain judicial functions and acted as the National Judiciary. In addition to these two institutions there were other institutions such as *Vidhata* Assembly associated with civil, military and criminal matters. The system of Arbitration was probably known to the people of the early Vedic age. The arbitrator/mediator of disputes was called *Madyamasi*.[11]

In the later *Vedic* period, the king took more active part in the administration of justice. The civil cases were decided by the king himself with the help of his assistants. Sometimes, the king delegated his power to the *Adhyaksha*.[12] The general tendency was to encourage the town councils and village *panchayats* to try local disputes. Only serious cases were tried in courts. There were also references of cases which were referred to the tribes for adjudication. At the village level, petty cases were decided by *Gramyavadin*[13] with the help of his case. During this period, the *Sabha* acted as arbitrator in certain cases. *Sabhapati*[14] acted as judge. The disputes regarding boundaries of property were settled by these *Sabhas*.

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[9] *Sabha* was a house of elders or an assembly of villages.
[10] *Samati* was the assembly of the whole people.
[11] *Supra* note 5
[12] Chief Justice.
[13] Village judge/ head of the village.
[14] Head of the *Sabha*, generally the head of village or council of elderly people.

The system of *Sabhas* continued to prevail during the age of *sutras*. The Magadha dynasty almost coincided with the *Sutras* age. There were *Parishads*[15] whose decisions on the interpretations of the texts were binding. The method of procedure generally adopted in the tribal meetings in the states was not by voting on a motion. The point at issue was either carried unanimously or referred for arbitration to a committee of referees.

Even during the epic age i.e. *Ramayana* and *Mahabharata* the *Sabhas* continued to flourished because their decisions were usually upheld by the kings. The system of arbitration seems to have been popular in this period.

A study of *Dharmashastras* such as *Manu Smriti, Yajnavalkya, Smriti* and *Narada Smriti,* give us useful information about the dispute resolution institutions prevailing over that time.[16] The earliest known treatise is the *Bhradarnayaka Upanishad,* in which various types of arbitral bodies *vis* (i) the *Puga* (ii) the *Sreni* (iii) the *Kula* are referred to. These arbitral bodies, known as *Panchayats,* dealt with variety of disputes, such as disputes of contractual, matrimonial and even of a criminal nature. The disputants would ordinarily accept the decision of the *panchayat* and hence a settlement arrived consequent to conciliation by the *panchayat* would be as binding as the decision that was on clear legal obligations.[17]

The study of history of Indian legal system reveals that the recognized Hindu period changed with the Muslims invasion.[18] The Muslim rule in India saw the incorporation of the principles of Muslim law in the Indian culture. Those laws were systematically compiled in the form of a commentary and came to be known as *Hedaya.* During Muslim rule, all Muslims in India were governed by Islamic laws the *Shari'ah* as contained in the *Hedaya.* The *Hedaya* contains provisions for arbitration as well. The Arabic word for arbitration is *Tahkeem,* while the word for an arbitrator is *Hakam.* An arbitrator was required to possess the qualities essential for a *Kazee*[19] whose decision was binding on the parties subject to legality and validity of the award. The court has the jurisdiction to enforce such awards given under *Shari'ah* though it is not entitled to review the merits of the dispute or the reasoning of the arbitrator.[20]

In Vijayanagar, empire the king was the fountain of justice and decided all important cases. At the provincial level, similar powers were enjoyed by the Governors. In the villages,

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[15] Assemblies of learned men who knew law.
[16] *Supra note* 5
[17] *See* S.*Chaitanya Shashank, Kaushalya T. Madhavan,* "ADR in India: Legislations and Practices" *available at* http://www.lawctopus.com/academike/arbitrationadrinindia/
[18] M.B.Ahmad, The Administration of Justice in Medieval India, Pg 98.
[19] An official Judge presiding over a court of law
[20] O.P.Malhotra, Indu Malhotra, Lexis Nexis, The Law and Practice of Arbitration and Conciliation (2 ed., 2006)

the cases were decided by the village assembly. The laws applied were mainly based on customs and traditions.

The judicial administration under the Maratha dynasty was not that well organized and up to date. It was rather simple, crude and primitive. There was no codified law, no set procedure for trail of cases. The emphasis was on amicable settlement of disputes. The highest Court was the Court of the king known as '*Hazr Majlis'*. Most of the important cases were decided by this Court. The Court also heard appeals against the decisions of the lower Courts. Next to this Court was the Court of the *Nyayadhish* or chief justice. It decided both civil and criminal cases and heard appeals from the lower Courts. But the day to day administration of justices was carried on by the village Panchayats. The *panchayat* was the main instrument of civil justice. The Panchayats were popularly called '*Panch Parmeshwar'* and the *Panchas* were often addressed as *Ma Bap*. The decision of the *Panchayat* was binding on the parties. An appeal from the decision of the village Panchayat laid to the *Mamlatdar*[21] could assemble a *Panchayat* outside the village of disputants. In such suits the *Panchayat's* decision was subject to an appeal to the *Peshwa* (Prime minister).[22]

ii) **ADR in British Regime**

ADR picked up pace in the country, with the coming of the East India Company. The British government gave legislative form to the law of arbitration by promulgating regulations in the three presidency towns: Calcutta, Bombay and Madras. Bengal Resolution Act, 1772 and Bengal Regulation Act, 1781 provided parties to submit the dispute to the arbitrator, appointed after mutual agreement and whose verdict shall be binding on both the parties.[23] These remained in force till the Civil Procedure Code 1859, and were extended in 1862 to the Presidency towns.

During the British rule, arbitration in one form or the other was being practiced by the native Indians. Mahatma Gandhi advocated, *inter alia,* the encouragement of *arbitration* courts in lieu of the British law courts in India. Then, with the passing of the Arbitration Act 1940, arbitration became the main alternative dispute resolution system amongst the disputants.[24]

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[21] Representative of *Peshwa* in the district

[22] Balu Anilkumar, "*Evolution of ADR (Alternative Dispute Resolution) in India"* 30 July 2013, *Available at* http://adrandhra.blogspot.in/2013/07/evolutionofadralternativedispute.html *visited on* 3 January, 2017.

[23] Ivneet Walia, *Alternate Dispute Resolution and the Common Man*, (Feb. 28, 2009), *available at* http://www.legalserviceindia.com/article/l312AlternateDisputeResolutionAndTheCommonMan.html *visited on* 3 January, 2017.

[24] *Supra note* 19 at 4

The Charter Act of 1833 provided for the establishment of the legislative council for India in the year 1834. The Act VIII of 1857 codified the procedure of Civil Courts. Sections 312 to 325 of this Act dealt with arbitration in suits and Sections 326 and 327 provided for arbitration without the intervention of Court.

The Code of Civil Procedure was revised in the year 1882 and the provisions relating to arbitration was reproduced under Section 506 to 526. The provision for filing and enforcement of awards on such arbitrations was made in 1882 Act No. XIV. The first Indian Arbitration Act was introduced in the year 1899 based on the English Arbitration Act of 1889.It was the first Substantive law on the subject of arbitration. Due to several defects in this Act, in the 1908 the Code of Civil Procedure was re-enacted and the provisions relating to arbitration were set out in the Second Schedule of the code, though no substantial changes were made in the law of Arbitration. In 1925, the Civil Justice Committee recommended several changes in the arbitration law. On the basis of the recommendations by this Committee, the Indian legislature passed the Arbitration Act of 1940.

In the year 1940, the Arbitration Act was enacted[25]. This Act replaced the Indian Arbitration Act of 1899, Section 89, Clauses (a) to (f) of section 104(1) and Second Schedule of Code of civil Procedure 1908. Thus, Arbitration Act of 1940 finally amended and consolidated the Law relating to arbitration in the British India.

iii) ADR in Modern India i.e. Constitution and post liberalization Era

After the dawn of freedom in India, powerful voices were raised for providing speedy, inexpensive and substantial justice, which suit the genius of Indian people. The drafters of the Constitution aimed that, the judicial process must be reorganized and justice must be brought near to the people. The sole of the good government is providing justice to the people; the Constitution highlighted the aspect of political, social and economic justice to the people.[26]

Article 39-A of the Constitution of India, secures the operation of the legal system, promotes justice on the basis of equal opportunity, so that no citizen is denied access to justice on account of financial or other disability.[27]

The Constitution mandates that the *"state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that the*

[25] Salil K.RoyChowdhury, H.K .Saharay, Arbitration Law, (III Ed), p 6, 7.
[26] The Preamble of Indian constitution, 1950
[27] Ins.by the Constitution (42nd Amendment) Act , 1976, S.8 (w.e.f. 3-1-1977)

opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."[28] The Constitution now commands us to remove impediments to access to justice in a systematic manner. All agencies of the Government are now under a fundamental obligation to enhance access to justice.[29]

The Arbitration Act, 1940 was not meeting the requirements of either the international or domestic standards of resolving disputes. Enormous delays and court intervention frustrated the very purpose of arbitration as a means for expeditious resolution of disputes. The Supreme Court in several cases repeatedly pointed out the need to change the law. The Public Accounts Committee too deprecated the Arbitration Act of 1940. In the conferences of Chief Justices, Chief Ministers and Law Ministers of all the States, it was decided that since the entire burden of justice system cannot be borne by the courts alone, an Alternative Dispute Resolution system should be adopted. Trade and industry also demanded drastic changes in the 1940 Act. The Government of India thought it necessary to provide a new forum and procedure for resolving international and domestic disputes quickly.[30]

The Code of Civil Procedure, under section 89 has introduced four alternative methods to settle disputes outside the Court, namely through Arbitration, Conciliation, *Lok Adalat* and Mediation.

The liberalization of Indian economy opened the gates for inflow of foreign investment. India opened its economy and took several measures of economic reforms in the early 90's. After the development in the international trade and commerce, with the increasing role of GATT and later WTO, there was a spurt in trading in goods, services, investments and intellectual property. Disputes arose between the trading parties, which were diverse in nature and complex, involving huge sums. Such disputes required quick and amicable settlement since the parties could not tolerate the prolonged legal process in Courts, appeal, review and revision.[31]

The Constitution of India, Article 51, clauses (c) and (d) provide that, *the State shall endeavor to foster respect for international law and treaty obligations and encourage settlement of international dispute by arbitration.* The Constitution of India puts arbitration under the Articles providing for the Directive Principle of State Policy.

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[28] Sabharwal Y.K, J. "Alternative Dispute Resolution"; Article- 39A of the Constitution of India, NYAYA DEEP, Vol. VI, Issue: 01, Jan. 2005, p. 48

[29]Dr. Laju P. Thomas, "*Dispute Resolution in Rural India: An Overview*", Journal of Legal Studies and Research [VOL. 2 ISSUE 5] ISSN 2455-2437, *available at* www.jlsr.thelawbrigade.com

[30] Dixit Sujoy, "Alternative Dispute Resolution Mechanism", *available at* www.legalserviceindia.com

[31] O.P Malhotra, Indu Malhotra,The Law and Practice of Arbitration and Conciliation,p13.

To fulfill the constitutional mandate and to respond positively to the judicial demand for utilitarian legislation the then Hon'ble parliament enacted The Arbitration and Conciliation Act, 1996. This Act was in harmony with the UNCITRAL[32] Model Law on International Commercial Arbitration, 1985.[33] The Supreme Court has held that, although this Act was brought into force with effect from 22nd August 1996, it became effective from 25st January 1996, the date on which the First Ordinance was brought into force.[34] This Act repealed all the three previous statutes. Its primary purpose was to encourage arbitration as a cost effective and quick mechanism for the settlement of commercial disputes. It covers both domestic arbitration and international commercial arbitration.[35] It marked an epoch in the struggle to find an alternative to the traditional adversarial system of litigation in India.

ADR at present in practice are Arbitration, Mediation, Conciliation, Negotiation and *Lok Adalat*[36] Undoubtedly, the concept and philosophy of Lok Adalat or "People's Court Verdict" has been mothered by the Indian contribution. It has very deep and long roots not only in the recorded history but even in pre-historical period. It has proved to be a very effective alternative to litigation. People's Court is one of the fine and familiar fora which has been playing an important role still today in settlement of disputes.[37]

Conclusion

With the advent of the alternate dispute resolution, there is new avenue for the people to settle their disputes. The settlement of disputes in Lok Adalat quickly has acquired good popularity among the public and this has really given rise to a new force to ADR and this will no doubt reduce the pendency in law Courts. There is an urgent need for justice dispensation through ADR mechanisms. The ADR movement needs to be carried forward with greater speed. This will considerably reduce the load on the courts apart from providing instant

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[32]This is a remarkable legacy given by the United Nations to International Commercial Arbitration, which has influenced Indian Law. In India, the Model Law has been adopted almost in its entirety in the 1996 Act

[33] N.K .Acharya,Law Relating to Arbitration and ADR.(2004),p2,3

[34] *Furest Day Lawson Ltd. v. Jindal Export India Ltd.* (2001)

[35] Krishna Sarma, Momota Oinam & Angshuman Kaushik, "*Development and Practice of Arbitration in India – Has it Evolved as an Effective Legal Institution", available at:*
http://iisdb.stanford.edu/pubs/22693/No_103_Sarma_India_Arbitration_India_509.pdf

[36] A community based dispute resolution mechanism. Lok Adalat was a historic necessity in a country like India where illiteracy dominated other aspects of governance. It was introduced in 1982 and the first Lok Adalat was initiated in Gujarat. The evolution of this movement was a part of the strategy to relieve heavy burden on courts with pending cases. It was the conglomeration of concepts of social justice, speedy justice, conciliated result and negotiating efforts. They cater the need of weaker sections of society. It is a suitable alternative mechanism to resolve disputes in place of litigation. *Lok Adalats* have assumed statutory recognition under the Legal Services Authorities Act, 1987. These are being regularly organized primarily by the State Legal Aid and the Advice Boards with the help of District Legal Aid and Advice Committees.

[37] Deshmukh Raosaheb Dilip, J. "Efficacy Of Alternative Disputes Resolution Mechanisms In Reducing Arrears Of Cases", NYAYA DEEP- Vol. X, Issue: 2, April 2009, pp. 26-27

justice at the doorstep, without substantial cost being involved. If they are successfully given effect then it will really achieve the goal of rendering social justice to the parties to the dispute. Amicable settlement of disputes is very essential for maintenance of social peace and harmony in the society.

ADR has now become an acceptable and often preferred alternative to judicial settlement and an effective tool for reduction of arrears of case. ADR can serve as useful vehicles for promoting many rule of law and other development objectives. Properly designed ADR undertaken under appropriate conditions, can support court reform, improve access to justice, increase disputant satisfaction with outcomes, reduce delay, and reduce the cost of resolving disputes in pluralistic and democratic Society of India.

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