Critical Analysis of ADR Mechanism In India

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1. INTRODUCTION

The term ADR means Alternative Dispute Resolving System, is used to describe a variety of dispute resolution processes that are available in alternative to full-fledge court process. This includes settlement through mediation, negotiation, mini-trial, arbitration etc. Most of the systems look and feels very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the area of ADR. In the Indian context, Alternative Dispute Resolution ("ADR") as a method of dispute resolution may trace its evolution to certain drawbacks in the judicial system of the country. To overcome the shortcomings of the judicial process the aggrieved parties now days tend to go for ADR process. ADR process may generally be categorized as negotiation, conciliation/mediation or arbitration systems. Since the legitimacy of the ADR mechanism is premised on parties consenting to the process, the costs of engaging with either the parallel system or benefiting from the ills of the formal system have to be raised considerably high to drive the parties to consent to the ADR processes.

It is a question for our perusal that with what aim and object these ADR models were introduced? Whether that has been achieved or not? Or the whole efforts are futile?

2. MODELS OF ADR USED IN INDIA

Many ADR models as well as hybrid of ADR models are presently available in India. For e.g. panchayats, arbitration, conciliation, mini-trial, fast track system, negotiation, Lok adalat etc. Lok adalats are useful for settling motor accident claims and revenue matters. However, complex litigation must necessarily take place within the formal legal system.

In the situation the need of the day is to explore the possibility of creating a dispute resolving machinery otherwise than the court and arbitration. Emphasis must be laid to the need of establishing a culture of amicable solution of disputes whether at a post-litigation or pre-litigation stage.

India has recently entered into bilateral investment protection agreement with the United Kingdom, Germany, the Russian Federation, the Netherlands, Malaysia and Denmark. Each agreement makes provisions for settlement of disputes between an investor of one contracting party and the other contracting party in relation to an investment of the former through the following ADR procedures, viz. negotiation, conciliation and arbitration etc. India is also a party to the Convention, establishing the Multilateral Investment Guarantee Agency which provides for settlement of disputes between States, parties to the Convention and the Multilateral Investment Guarantee Agency through negotiation, conciliation and arbitration. There is number of agreements in other sectors to which India is a party containing provision for dispute resolution through ADR procedures; conciliation has been effectively used in dispute resolution. The most prominent and effective use of conciliation has been in the Industrial Disputes Act, 1947 (the I.D. Act). Conciliation has been statutorily recognized as an effective method of dispute resolution in relation to disputes between workmen and the management of the industry. The I.D. Act makes it attractive for disputing parties to settle disputes by negotiation, failing which by conciliation by an officer of the Government before resorting to litigation. Several provisions set the scene for conciliation to be successful: All parties in an industrial dispute that has had the misfortune of being litigated know that it is a tedious process that could go well beyond the lifetime of some of the beneficiaries. It is this factor that has contributed greatly to the success of conciliation in industrial relations. There are however certain abuses of the process and the benefits of the agreement

arrived in the course of conciliation that are used to suppress the trade unions which do not 'cooperate' with the management. This however does not diminish the effectiveness of the process. The mode of conciliation is used in other sectors also for e.g. Family Courts etc. where it has been proved very effective.

3. MERITS OF ADR

Like any other system, ADR system also has its own merits and demerits. Though it has demerits, its merits are stronger. That is why ADR is always recommendable. Following are the merits of the system.

a) ADR is not a mere mechanical process of dispute resolution
b) ADR is not just legal aid philosophy
c) ADR promotes rule of law in the society
d) ADR encourages the participation of people in the process of dispute resolution
e) ADR creates legal awareness and respect for rights of others
f) ADR promotes self-reliant development

The philosophy of ADR is to motivate people to resolve their disputes amicably and for this purpose it is necessary to examine ADR's main trends and underlying objectives. One of the motivations of ADR is the principle of "Cooperative problems solving" which bring within its fold theories and strategies of negotiation, including in particular problems – solving theories of negotiation.

Another benefit of ADR is reduction of costs apart from avoidance of delay in litigation. In short, it allows the parties greater control over resolving the issues between them encourage problem-solving approaches and provides for more effective settlements covering substance and nuance. It also tends to enhance cooperation and preservation of relationship. The experience abroad shows that it has found increasing favour in many countries and particularly in U.S.A.

Traditional informal systems, on the other hand, cannot be relied upon to dispense justice. Recently, a women was commanded by her village "panchayat", to abandon her husband and "return" to her first husband without having had any say in the matter. Part of the problem stems from the lack of clarity regarding traditional systems and their functions – as admitted by the Minister for Panchayati Raj, caste groups often masquerade as panchayats and intervene in social issues. A comprehensive audit of such systems is long overdue, and must precede any major investment of time or resources in ADR.

One of the models popular in India is mediation. The system faces many hindrances, which block the path to mediation. Exposure to mediation technique remains limited. Judges and lawyers harbour understandable apprehensions about the relationship between mediation and the formal judicial process and deep skepticism over the application of mediation to a wide variety of Indian legal disputes particularly outside the commercial area. The courts are still in search of an operational case management trigger under sec.89 or Order X of the CPC for referring cases to mediation. The explicit terms of sec.89 calling for a form of judicial conciliation by the trial judge may be incompatible with subsequent referrals to mediation under that provision. Putting aside the rapid development of mediation training in Ahmedabad, Chennai and Mumbai, trained mediators in most courts are not yet available.

An ADR system that is both transparent and accountable is in the circumstances imperative in order to make the crucial difference to those presently engaged in the formal legal system, which is largely perceived as lacking in this area. As has been pointed out by several speakers, a successful implementation of ADR processes will have to be preceded by an identification of categories of cases or specific dispute areas that are most amenable to their introduction.

Despite the challenges that face the ADR processes today, the benefits in the long run that they are capable of generating appear to outweigh the factors that may in the short run deter their enforcement. The diverse nature of the country's population defies any uniform approach or set pattern and this is perhaps the biggest strength of the ADR mechanisms. Their flexibility and informality, the scope they offer for innovation and creativity, hold out the promise of a great degree of acceptability lending them the required legitimacy. Their utility as a case management

tool cannot be overemphasized. ADR processes provide the bypasses to handle large chunks of disputes thus leaving the formal legal system to handle the more complex litigation. Even while they do not offer to be a panacea for all the ills of the formal legal system, ADR processes offer the best hope yet of complementing and helping to fortify the formal legal system.

Another challenge is the issue of professionalism and what constitutes credible education of professionals. In this issue about credentialing and specialization, many of the issues involved. There is a growing problem with training large numbers of lawyers and non-lawyers in skills and processes, who approach the field as entrepreneurs in a new industry. Many of them are finding it hard to find sufficient opportunities to practice their newfound skills.

It is observed that concepts such as pure mediation may in this century become less significant than a range of approaches that are woven into society and practiced by people who are not professionals. Various eminent lawyers, High Court and Supreme Court judges stress the importance of community ADR. The real question is how professionals will respond if conflict resolution becomes a part of everything rather than something separate.

It can be said that good lawyers bring more to bear on a problem than legal knowledge and language skills. They bring creativity, practical wisdom and good judgment. A real challenge for the law schools is to help law students to develop broader problem-solving skills. The curriculum should not end with doctrinal analysis, but should include other skills such as counseling, planning and negotiation. In the l970s when the Ford Foundation granted more than $10 million to laws school through its Council on Legal Education for Professional Responsibility to promote clinical programs, a number of elite law schools joined the many others that created and integrated those programs into their curricula.

5. LIMITATIONS OF ADR

Although ADR mechanism can play an important role in many development efforts, they are ineffective and perhaps even counter productive in serving some goals related to rule of law initiatives. Although ADR programs can play an important role in many development efforts, they are ineffective, and perhaps even counterproductive, in serving some goals related to rule of law initiatives. In particular, ADR is not an effective means to:

a) Define, refine, establish and promote a legal framework.

b) Redress pervasive injustice, discrimination, or human rights problems.

c) Resolve disputes between parties who possess greatly different levels of power or authority.

d) Resolve cases that require public sanction.

e) Resolve disputes involving disputants or interested parties who refuse to participate, or cannot participate, in the ADR process.

ADR process neither set precedent, refine legal norms, establish broad community or national standards nor do they promote a consistent application of legal rules. ADR processes are tools of equity rather than tools of law. They seek to resolve individual disputes on a case-by-case basis and may resolve similar cases in different ways if the surrounding conditions suggest that different results are fair or reasonable according to local norms. Furthermore, ADR results are private and rarely published. As long as some other judicial mechanism exists to define, codify and protect reasonable standards of justice, ADR programs can function well to resolve relatively minor, routine and local disputes for which equity is a large measure of justice and for which local and cultural norms may be more appropriate than national legal standards. These types of disputes may include family disputes, neighbor disputes and small claims among others. In disputes for which no clear legal or normative standard has been established ADR may not be able to overcome power imbalances or fundamental disagreements over norms among disputants.

On the other hand in situations where there is no established legal process for dispute resolution ADR may be the best possible alternative to violence. ADR mechanism cannot correct systemic injustice, discrimination, or violations of human rights.

ADR systems often reflect the accepted norms of society. These norms may include discrimination against certain groups and populations. When this is true, ADR systems may hinder efforts to change the discriminatory norms and establish new standards of group or individual rights.

ADR process does not work well in the context of extreme power imbalance between parties. These power imbalances are often the result of discriminatory norms in society and may be reflected in the result of ADR mechanism. Even when the imbalance is not a reflection of discriminatory social norms, most ADR mechanisms do not include legal or procedural protections for weaker parties. A more powerful or wealthy party may press the weaker into accepting an unfair result so that the settlement may appear consensual but in fact result from coercion. For the same reason, ADR programs may not work well when one party is the government. When the "program design has been able to enhance the power or status of the weaker party ADR has been effective in conditions of discrimination or power imbalance.

ADR settlements do not have any educational, punitive or deterrent effect on the population. Since the results of ADR mechanisms are not public, ADR mechanisms are not appropriate for cases, which ought to result in some form of public sanction or punishment. This is particularly true for cases involving violent and repeat offenders such as in many cases of domestic violence. Societal and individual interests may be better served by court-sanctioned punishment such as imprisonment.

It is inappropriate to use ADR to resolve multi-party cases in which some of the parties or stakeholders do not participate. This is true because the results of most ADR mechanisms are not subject to standards of fairness other than the acceptance of all the participants. When this happens the absent stakeholders often bear an unfair burden when the participants shift responsibility and cost to them. ADR is more able than courts to include all interested stakeholders in disputes involving issues that affect many groups such as environmental disputes. When all interested parties cannot be brought into the process, ADR may not be appropriate for multi-stakeholder public or private disputes. ADR process may undermine other judicial reform efforts.

6. CONCLUSION

In the present day context development of law must begin from development in legal education. Only those who had a good legal education would be good lawyers and consequently good Judges. Having regard to the docket explosion it is incumbent that all the Three wings of the State come forward and see to it that justice is Dispensed to the litigating public within a reasonable time by Adopting various dispute resolution mechanisms.

It is a fact that a large number of civil disputes pending in the courts, and to a small extent petty criminal matters, have been 'disposed of' through the Lok Adalats that are a permanent 'embedded' feature of the functioning of legal services authorities. While one point of view sees this as a success, another questions whether the Lok Adalat as presently institutionalized is really a tool of 'case management' which essentially addresses the problems of an over-burdened judiciary and not so much as an instrument of justice delivery for the litigant. If the 'success' of the Lok Adalat stems from negative reasons attributable to the failures of the formal legal system, the utility of this mechanism may also be short-lived. In other words if the incentive for litigants to accept Lok Adalat decisions is that if they didn't they would be faced with the prospect of further delays, uncertainties and costs, it constitutes a confirmation for them that the formal legal system is unable to provide an acceptable quality of legal services or justice. This in turn would not promise well for the legitimacy of the system in the long run.

What this then means is that there has to be a gradual but conscious effort to offering positive reasons, and not negative ones, for litigants to be willing consumers of the ADR processes. An audit of the existing ADR mechanisms from the point of view of 'customer satisfaction' would help to shape the programme for the future in order to maximize the 'successes.