

## Role of ADR in access to justice

Arpit Jain

Student, Indore Institute of Law, Indore, Madhya Pradesh, India

### Abstract

The “Alternative Dispute Resolution” mechanism has shaped the way we see the role and functioning of courts in the society. The Alternative Dispute Resolution has emphasized to provide better dispute resolution processes. Access to justice is crucial aspect of ensuring the enforcement of the fundamental rights. The cases are pending before the courts because of its complicated procedure which increase the backlog of the cases and it simultaneously incur high costs. The judicial process is not only expensive for an ordinary person but also takes many years to deliver the justice. To overcome the criticised delay in justice delivery, the adoption of Alternative Dispute Resolution (ADR) mechanisms like Lok Adalat, arbitration, mediation and conciliation was thought and subsequently practiced. Equal opportunity mandates access to justice. Being treated equally is not sufficient, regardless the prevalent inequalities. Law must function in such a way that every individual have access to justice despite of the economic disparities. It refers to any type of obstacle for the people to have a practical and usable way to realize their legal rights. ADR is the dispute resolution process through which the disagreeing parties come to an agreement short of litigation. It is generally an alternative to the formal court hearing and litigation. It is a process through which the parties can settle disputes, with or without the help of the third party. This paper critically analyses the ways in which Alternate Dispute Resolution mechanism has ensured access to justice to the poor and marginalized people. It focuses on the alternative methods through which society gets access to justice.

**Keywords:** alternate dispute resolution, arbitration, mediation, conciliation

### 1. Introduction

Alternative Dispute Resolution means the way of settling disputes mutually and without going through the legal procedure. ADR is the dispute resolution process through which the disagreeing parties come to an agreement short of litigation. It is generally an alternative to the formal court hearing and litigation. It is a process through which the parties can settle disputes, with or without the help of the third party. It is a set of techniques which are aimed to permit the resolution of disputes outside the courts. It is a process in which a neutral facilitates the resolution of disputes instead of going for a formal adjudication. The key benefits are the reduction of the transaction costs as this process is less-expensive and speedy. This technique has been used by many countries to provide effective mechanism to resolve dispute. Alternate Dispute Resolution can be considered as central part of a multi-door courthouse where the disputes are directed into several rooms offering various processes for dispute resolution. It is less adversarial and provides speedy justice and is less expensive as compared to a lawsuit. These alternatives provide relieve to some of the pressures which are obstructing the performance of judicial system. The main objective is to resolve the dispute in a manner that the mutual relations of the parties to the dispute remains the same as had been before the dispute.

The aim of the study is to analyse the ADR mechanism which is the easiest solution to enhance the access to justice. The aim of the study is to undertake a detailed study of ADR mechanism in comparison with the court process.

### 2. Alternate Dispute Resolution

ADR is the dispute resolution process through which the disagreeing parties come to an agreement short of litigation. It is generally an alternative to the formal court hearing and litigation. It is a process through which the parties can settle disputes, with or without the help of the third party. The object of Alternate dispute resolution is to avoid confusion, expense and delay in the procedure but to promote the ideal of “access of justice”. ADR mechanism seeks to provide cheap, quick, simple and accessible justice. The basic idea of ADR was to appropriate the dispute resolution process which matches the needs of the parties.

The term ‘Alternative Disputes Resolution’ directs various modes for settlement of disputes like Mediation, Lok Adalat, Negotiation, conciliation and arbitration. It involves a third party called neutral and a skilled helper who assists the parties in a conflict to reach at a decision by the agreement or facilitates in arriving at a solution to the problem between the parties to the dispute. This technique has been used by many countries to provide effective mechanism to resolve dispute. Alternate Dispute Resolution can be considered as central part of a multi-door courthouse where the disputes are directed into several rooms offering various processes for dispute resolution. ADR provide citizens with more fast and affordable ways of settling the dispute.

It is not possible for many individuals to go through the litigation process by filing the law suits as it is expensive and generally the justice is delayed. The Courts are also burdened with the pending cases which result in the delay of

justice for many years. This helps the parties to resolve the disputes speedily and at their terms or mutual terms. The aim of ADR is written itself in the Preamble of the Indian constitution, which urges the state: “to secure to all the citizens of India, justice-social, economic and political-liberty, equality and fraternity”.

### 3. Objective of ADR

The main objective is to resolve the dispute in a manner that the mutual relations of the parties to the dispute remains the same as had been before the dispute. It also includes the settlement of dispute from the negotiation in which the disputants negotiate directly with each other, to the arbitration that look very much like a courtroom process. The ADR does not intend to replace the need for public adjudication but to balance and preserve the judiciary. These alternatives provide relieve to some of the pressures which are obstructing the performance of judicial system. It avoids confusion, expense and delay in the procedure but to promote the ideal of access of justice.

### 4. Need for Alternative Dispute Resolution Mechanism

The major function of Indian judiciary is to resolve the dispute which is equally important for a stable society. Various norms and institutions are established to secure the social order and to attain the ends of justice. The alternative mechanism delivers speedy justice to the people. It is our Constitutional obligation to ensure that the backlogs of cases are reduced and the efforts are made to ensure speedy disposal of the cases <sup>[1]</sup>. The judicial process is not only expensive for an ordinary person but also takes many years to deliver the justice. To overcome the problem of delay in justice delivery, the method of Alternative Dispute Resolution (ADR) mechanisms like Lok Adalat, arbitration, mediation and conciliation was adopted. The Family Court Act, 1984 was enacted with the aim to establishment of Family Courts and to promote conciliation and secure settlement relating to the marriage and family matters by adopting an approach radically different from those ordinary civil proceedings <sup>[2]</sup>. Also, in the judgment of the Supreme Court of India in Salem Bar Association vs. Union of India <sup>[3]</sup>, the Supreme Court has requested to prepare a model and draft the rules for the Alternative Dispute Resolution and rules for mediation under section 89(2) (d) of Code of Civil Procedure, 1908.

The Courts resolves the dispute by applying legal and equitable principles to the findings of the case. It is governed by rules of pleading and evidence. With a backward-looking approach, the outcome of Court efforts depends largely upon discovering the truth about something that occurred in the past. Subject to rigid procedural and evidentiary rules, Courts provide legal answers to questions of entitlements and of rights <sup>[4]</sup>.

**There are certain drawbacks due to which the judicial system as well as the people face the certain problems enumerated below**

#### a. Lack of Awareness

There is a general lack of awareness among the people regarding their legal rights and remedies available which acts as a barrier to access the formal adjudication machinery.

#### b. Delay and Pendency of cases

The law in India is like a snail as the cases proceed at the speed which would be considered as slow as a community of snails. On an average, a civil case takes 20 years to settle. This problem is due to the extended role of advocates in the litigation process. The judges are not accountable to dispose off the cases as early as possible. Despite being officers of the Court, they do not have any accountability towards the expedient disposal of cases.

#### c. Overburdened courts

The courts are already overburdened with the pending cases. The backlogs of the cases are increasing as compared to the disposal of the cases.

#### d. High cost involved

The cost of litigation is very high. As the cases drag for many years, the costs also increase with it. In a country like India, where a majority of population is still below the poverty line, it is impossible for them to afford the litigation process. In the society there is lack of faith on the Indian judiciary.

#### e. Mystification

The language of the law is difficult and very complicated, which makes it mysterious even to the educated or literate person. But it is the language with which the courts and lawyers are comfortable. Very little attempt has been made to simplify the language of the law and making it easily comprehensible.

### 5. Benefits of Alternate Dispute Resolution Process

Alternate Dispute Resolution encourages the person to participate in the dispute resolution process as it provides an opportunity to the parties to resolve the conflict with mutual understanding and in a peaceful manner. The resolution of disputes takes place in private and is more feasible, economic, and efficient <sup>[5]</sup>. The basic advantage to choose Alternative Dispute Resolution process is that the dispute remains under the control of the parties. The Alternative Disputes Resolution process actively involves the parties in dispute by which they can more effectively settle the dispute.

#### The benefits of ADR are enumerated below

- a. **Suitability:** Suitability for disputes where two or more than two parties are involved.
- b. **Flexibility of procedure:** The process is determined by the disputing parties. The dispute remains under the control of the parties. It allows the disputing parties to opt the procedure which fits in the nature of the dispute.
- c. **Lower costs:** As compared to the litigation cost ADR is less expensive. Litigation continues for more than a year which increases the litigation expenses. If negotiated is used than the cost is too less.
- d. **Practical solutions:** Practical solutions are tailored to the parties need and interest but not on the wants and rights as perceived by them.
- e. **Confidentiality:** The Dispute resolution takes place

<sup>1</sup> Brij Mohan Lal Vs. Union of India & Others (2002-4-Scale-433)

<sup>2</sup> A. Abdul Jalees v. T.A.Sahida (2003) 4 SCC 166

<sup>3</sup> (2005) 6 SCC 344

<sup>4</sup>Dr. Chandana Jayalath, Courts and ADR - For a Harmonious Co-habitation, The Indian Arbitration Volume 3, Issue 10, October 2011, p.5, [https://www.arbitrationindia.com/pdf/tia\\_3\\_10.pdf](https://www.arbitrationindia.com/pdf/tia_3_10.pdf)

<sup>5</sup>Sujay Dixit, ADR mechanism in India, The Indian Arbitration Volume 3, Issue 2, February 2011, p.5, [https://www.arbitrationindia.com/pdf/tia\\_3\\_2.pdf](https://www.arbitrationindia.com/pdf/tia_3_2.pdf)

confidentially in a private place and does not disclose the confidentiality clauses.

- f. **Time duration:** A court case usually takes several years to get settled through court proceedings but, if processes like arbitration, mediation and negotiation are used it can be settled quickly.
- g. **Control of Process:** The dispute remains under the control of parties whereas in the court the control is with the judge.
- h. **Choice of Forum:** In ADR the neutral or a third person is appointed who is agreed by the disputing parties while in litigation the choice is judge who will hear the case.
- i. **Wide Range:** The parties come to terms which are suitable to the parties and are helpful in regulation relations in the future.
- j. **Approach:** ADR is constructive and forward-looking process while the Litigation focuses on the past and who was at fault.
- k. **Reduction of Risk:** ADR can be a win-win position for both the parties. The litigation resort to find the winner and loser but ADR is less about finding winner.
- l. **Client Satisfaction:** In ADR clients express more satisfaction as they have a control in the process and are involved for agreeing to the outcome.
- m. **Expand Control over the Process and the Outcome:** In ADR procedures, parties have more chance to recount their side of the story than they do at trial. ADR procedures permit the gatherings to mold innovative resolutions which are not accessible in a trial.
- n. **Client Relationships:** Speedy, practical, and fulfilling resolutions are liable to deliver more content customers and along these lines create rehash business from customers and referrals of their companions and partners.

### Disadvantages of ADR

Alternate Dispute Resolution has several advantages over litigation but still people frequently refer to the legal procedures due to the following reasons enumerated below:

- a. Sometimes the settlement/decisions are biased.
- b. There is interference by the powerful people in the process.
- c. Fear of losing prestige and dignity.
- d. Lack of adequate knowledge and experience about the Alternative Dispute resolution process.
- e. Decisions of the neutral person/third person are not legally binding on the parties.
- f. There is a need to select the right process at right time because if ADR fails it may incur additional costs. It may lead to the delay of time if an ADR process fails.
- g. The judge in litigation decides the case on the basis of public interest so that if in future such dispute arises so the court may resort to same judgment while ADR aims to satisfy the parties rather than giving a clear judgment and is kept confidential.

### Access to Justice

Article 14 of the Indian constitution guarantees 'equality before law' and 'equal protection of laws'. Article 39-A of the Indian Constitution ensures equal access to justice which involves protection of the innocent person and punishment to the guilty. It mandates for the state to promote justice on a basis of equal opportunity and ensures that it is not denied

to any citizen by reason of economic or any other disabilities.

### The term 'access to justice' focuses on the two purposes of the legal system

- a. **Accessibility:** the system must be equally accessible to all the people; and
- b. **Result:** It must lead to the results which are socially and individually just.

Equal opportunity mandates access to justice. Being treated equally is not sufficient, regardless the prevalent inequalities. Law must function in such a way that every individual have access to justice despite of the economic disparities. Other problems like backlog of cases, lack of legal aid and lack of process suited for the collective interests. Access to justice can be complement by improving process and by enhancing empowerment and self-determination. People are not aware of the legal rights and the procedure to be used because the laws are more inaccessible as they are too technical and detailed.

### 6. Modes of Alternative Dispute Resolutions

Alternative dispute resolution mechanism includes arbitration, conciliation, mediation, and other methods for settling the disputes. It is less adversarial and provides speedy justice and is less expensive as compared to a lawsuit. Equality is the basis of administration of justice but a person is unable to obtain access to a court for defending himself against a criminal charge or having his wrongs redressed as justice becomes unequal and laws which are meant for his protection have no meaning and to that extent fail in their purpose.

#### a. Arbitration

It is a quasi-judicial process in which an impartial neutral person sits as a private judge and resolves the dispute outside the courts in confidential manner. It is governed by statute. The arbitrator issues an award after considering the evidence presented by both parties. Procedures used in arbitration procedure range from informal to rules which essentially mirror the court procedures. Arbitration is a technique for solution of dispute outside the court wherein the parties to a dispute refer it to one or more persons known as the arbitrators whose decision are binding upon the parties.

When disputing parties agree that a dispute between them shall be resolved in a legally binding way by one or more impartial and neutral person in a judicial manner, the agreement arrived after such settlement is called arbitration and the decision made is called award.

### The advantages of Arbitration are as follows

1. It offers speedy dispute resolution than litigation in Court.
2. It is cheaper and flexible than any other process.
3. The proceedings and an arbitral award are non-public. They can be made confidential.
4. The language of arbitration may be chosen, whereas in judicial proceedings the official language of the competent Court will be automatically applied.
5. When the subject matter of the dispute is technical, arbitrators with an appropriate degree of expertise can be appointed but one cannot choose judge having expertise in specific area.

## b. Mediation

Mediation is a process of dispute resolution in which one or more impartial third parties or an independent neutral party interposes in a dispute with the consent of the disputing parties and help them in negotiating a consensual and informed agreement. The third party cannot impose the resolution on the parties as they are free to decide according to their terms. It is a confidential process of negotiation in which an independent third party or a mediator helps in resolving a dispute between the parties. The mediator has no authority to make decision binding on the parties, but using certain techniques and skills he can help the parties to negotiate an agreed resolution without adjudication.

The mediator plays a role to facilitate communication between the parties and also to assist them to focus on the issues of dispute between them and to generate options that meet the respective parties' interests and needs. He sets out alternatives for the parties to reach out an agreement.

The mediator assists the parties to focus on the real issues of dispute and help them to prove the strengths and weaknesses of their legal positions and explore the consequences of not settling the disputes. Mediation result in creative solutions through which both the sides can profited from the settlement. The parties remain the decision makers as they have ultimate control over the decision and the terms of settlement.

### The chief advantages of the mediation are

1. The dispute is resolved without expenditure and great stress;
2. The agreement which is that of the parties themselves;
3. The confidentiality is maintained; and
4. The relationships between the parties are preserved.
5. It works on mutual beneficiary approach.

## c. Conciliation

Conciliation is the process in which the neutral third party assists the disputing parties to reduce the extent of their differences and to arrive at an agreeable settlement a solution. Conciliation is the process where the parties out of their free consent appoint an unbiased and disinterested third party, who persuades them to arrive at an agreement, by way of mutual discussion and dialogue. Conciliation is a process where the conciliator meets with the parties separately in an attempt to resolve their differences. The rational discussion is done under the guidance of the conciliator <sup>[6]</sup>. Conciliation is an ADR process where an independent third party called the conciliator helps people in a dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement <sup>[7]</sup>.

Conciliation does not require an existence of any prior agreement. The conciliator has no authority to call witnesses or seek evidence and can make no award. Conciliation is a voluntary proceeding, where the parties involved are free to agree and attempt to resolve their dispute by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings <sup>[8]</sup>.

<sup>6</sup> definition of \_conciliation 'formulated by the ILO (1983) concepts

<sup>7</sup>NSW Government Justice, accessed on 30/04/2020, [http://www.courts.justice.nsw.gov.au/Pages/cats/courtguide/alternate\\_dispute\\_resolution/types\\_adr/catscorporate\\_conciliation.aspx](http://www.courts.justice.nsw.gov.au/Pages/cats/courtguide/alternate_dispute_resolution/types_adr/catscorporate_conciliation.aspx)

<sup>8</sup> Retrieved from <https://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/> (1/05/2020)

## d. Negotiation

Negotiation is the process in which parties agree upon course of action and bargain for advantage resolve their disputes. It is a procedure in which discussions between the parties are initiated without any involvement of third party, with the aim to arrive at a negotiated settlement of the dispute.

The disputing parties can on their own motion start negotiations through correspondence or through one or two mediators with a view to finding a mutually acceptable solution of the problems. Negotiation excludes the participation of an authority that has the obligation or the right to apply a particular rule to the issue in dispute. It is dependent on the bargaining power of the parties. It saves time and time count goes in favour of the process of negotiation. It maintains confidentiality as it preserves business and personal, relationships, secrets and reputations of the parties and to avoid unnecessary expense.

## e. Lok Adalat

The Legal Services Authority Act, 1987 provides for setting up of Lok Adalat. The objective behind establishing the Lok Adalat is to provide speedy, non-technical and accessible forum for dispute resolution and also to help the courts to reduce the backlog of pending of cases.

Lok Adalat generally means 'the people's court'. Lok Adalat is a forum of ADR where voluntary efforts are made to settle the disputes between the parties. Disputes which include partition suits, damages and matrimonial cases are settled before Lok Adalat through an approach of give and take or simply a compromise.

It is presided by the sitting judge or a retired judicial officer with other two members who can be a lawyer and a social worker. The Lok Adalat resolves the dispute through conciliation and persuasive means<sup>9</sup>. The Lok Adalat can also try the cases pending in the court and the fees paid for these cases will be refunded if the dispute is settled at the Lok Adalat. Resolving disputes through Lok Adalat saves time of parties and reduce the litigation expenditure. The decision of Lok Adalat is binding on the disputing parties.

## 7. Suggestions

Suggestions to make ADR more extensive, effective, and pro-active some initiatives are given below:

1. Establishment of more ADR centers for settling disputes out-of-court. So that the more number of disputes can be settled within short period of time.
2. Creating awareness about Alternate Dispute Resolution and its procedure. The public should be aware about the mechanism and its functioning. They should be aware about the various modes and their benefits.
3. Spreading the success story of ADR.
4. Involving of Bar Associations in ADR.
5. Coordination is required among various institutions and agencies
6. Encourage NGOs to get involved in the Alternate Dispute Resolution
7. Providing training to the mediators.

## 8. Conclusion

Alternate Dispute Resolution has gained acceptance at large. The ADR has gained popularity because of the increasing

burden of traditional courts. The Alternate Dispute Resolution system is the outcome of the shortcomings of judiciary. Courts in India suffer from backlog of cases which is to vacant seat of judges and insufficient infrastructure. Also, the ADR mechanisms are being used to avoid the costs and avoid delays of the formal court. Arbitration has important role as it provides speedy decision and consumes less time and is less expensive. This mechanism should be promoted as it reduces the burden of the courts and provide speedy justice without involving any extra cost. It has been internationally accepted to settle the commercial disputes through arbitration. Persons do not want to get involved in lawsuits due to high costs, unwanted publicity and delays.

ADR mechanisms are inexpensive as comparison to the ordinary legal process. It is highly beneficial to the people who are unable to meet the high expenses involved in the dispute resolution through Courts. The researcher is of the view that to make the Alternate Dispute Resolution Mechanism more effective we have to bring it out from a very limited area of application for that the lawyers have to play active and positive role to widen its area of operation.

## 9. References

1. Dr. Chandana Jayalath. Courts and ADR - For a Harmonious Co-habitation, *The Indian Arbitration*. 2011; 3(10):5. [https://www.arbitrationindia.com/pdf/tia\\_3\\_10.pdf](https://www.arbitrationindia.com/pdf/tia_3_10.pdf)
2. Sujay Dixit. ADR mechanism in India, *The Indian Arbitration*. 2011; 3(2):5. [https://www.arbitrationindia.com/pdf/tia\\_3\\_2.pdf](https://www.arbitrationindia.com/pdf/tia_3_2.pdf)
3. www.uncitral.org (United Nations Commission on International Trade Law)
4. <https://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/>
5. [www.courts.justice.nsw.gov.au/Pages/cats/courtguide/alternate\\_dispute\\_resolution/types\\_adr/catscorporate\\_conciliation.aspx](http://www.courts.justice.nsw.gov.au/Pages/cats/courtguide/alternate_dispute_resolution/types_adr/catscorporate_conciliation.aspx)