



## ORIGIN AND GROWTH OF ALTERNATIVE DISPUTE RESOLUTION SYSTEM IN INDIA

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**Abstract:**

The importance of the Alternate Dispute Resolution cannot be denied. One can witness the rapidly development and acceptance of various ADR methods both at national and international level, which are offering simpler methods of resolving disputes. ADR has been widely accepted and applied now days in India and across the globe and all sort of disputes, may it be matrimonial, consumer, labour, land related or contractual. The best part of ADR is that it has adopted flexible procedure with ultimate aim to serve justice.

Human being is a social and rational animal guided by reason. Being social animal lives in society and is governed by the rules of society. When I say, animal, the animal within human being does not let the human being live peacefully and thus disputes between human beings are evident and unavoidable. However, as the human being is guided by reason, justice prevail. The system which leads to justice was and is always different, depending upon the era and society. Thus, the system to deliver justice is always there in one or other form. Each justice delivery system has its own advantage and disadvantage, and same grows with the experience it has encountered during delivering justice.

Being rational, human beings always give preference to their inner voice and act; decide accordingly, as to what is good or bad for him, his family, society or country. It has been seen that when the conflict arose with other individual, no human being wants to loose and the inner voice is dictated by the other senses of hate, greed, selfishness. Thus, there is always a need of someone who is fair, unbiased, wise, knowledgeable and respectable, who can seat as an umpire and decide the dispute and deliver justice.

In India, since beginning, there as “Panchayats” which are carrying on the work of delivery of justice. These Panchayats are of different kinds, there are Caste Panchayats, which not only decides the disputes, but also do frame rules governing the way of life of particular community. Though this caste panchayats are not recognized today by law in India, however they are prevalent mostly, in Northern India. Whereas, the “Gram Panchayats”, which were composed of the learned and respectable persons of the village headed by “Headman” was the one which are successfully delivering justice, times immemorial. The members of the Panchayats are known as “Panch”.

In words of *Martin, C.J.*, “arbitration was indeed a striking feature of ordinary Indian life and it prevailed in all ranks of life to a much greater extent than was the case of England. To refer matters to a Panch was one of the natural ways of deciding many disputes in India”.<sup>1</sup>

With advent of the British rule in India, the justice delivery system started to be altered on the lines of English Judicial System and courts gained importance. However, the peoples in India had more faith in panchayat systems and used to refer their dispute to “Panchas”. This was the era when the codification of law gained momentum in India. British Government enacted “The Bengal Regulation of 1781”, which imported the idea that it was the tribunal of the parties’ own choice, and thus, the system of “Panchas” or in modern words, “Arbitrator” got legal recognition.

Thereafter the Regulation of 1787 empowered the Courts to refer certain suits to arbitration, but no provision was made in the Regulation for cases wherein difference of opinion among the arbitrator arose. The Bengal Regulation of 1793 (XVI of 1793) empowered courts to refer matters to arbitration with the consent of the parties where the value of the suit did not exceed Rs. 200/- and the suits were for accounts, partnership, debts, non-performance of contracts, etc. In this Regulation, the procedure for conducting an arbitration proceeding was also provided.<sup>2</sup> Similar Regulations were enacted in the provinces of Madras and Bombay, wherein Panchayats were empowered to settle disputes.

The code of Civil Procedure Code, 1859; the Indian Contract Act, 1872 and the Specific

<sup>1</sup> Tewari, O.P, The Arbitration & Conciliation Act with Alternative Dispute Resolution, 2 – 4, 4<sup>th</sup> Edition(2005) Reprint 2007, Allahabad Law Agency, Faridabad

<sup>2</sup> *Ibid*

Relief Act, 1877 was codified, which further provide foothold to the Alternative Dispute Resolution System (ADR) in India. The Code of Civil Procedure mandated that no dispute arising out of breach of contract to be enforced in Court of Law, but be referred to the arbitration.

With the enactment of The Arbitration Act, 1877, the movement of ADR got the real boost. It was a comprehensive act and made rules as to appeals and the Code of Civil Procedure aforesaid was not applicable to matters covered by the Arbitration Act. However, this act was repealed on enactment of The Code of Civil Procedure, 1882, which was further replaced by The Code of Civil Procedure, 1908, which is prevailing now.

The law of Arbitration in the British Rule in India was comprised in two enactments. One was the Indian Arbitration Act, 1899, which was based on the English Arbitration Act, 1899. Many sections of the Indian Act were the verbal reproduction of the schedule to the Code of Civil Procedure Code, 1908. The Arbitration Act, 1899 extended to the Presidency Towns and to such other areas as it might be extended by the appropriate Provincial Government. Its scope was confined to 'arbitration' by agreement without the intervention of a Court. Outside the scope of operation of Arbitration Act 1899, the Second Schedule to the Code of Civil Procedure Code, 1908 was applicable. The Schedule related mostly to arbitration in suits. The Schedule contained an alternative method also, whereby the parties to a dispute or any of them might file the concerned arbitration agreement before a Court having jurisdiction, which Court following a certain procedure referred the matters to an arbitrator.<sup>3</sup>

Thereafter the Arbitration Act, 1940 was enacted repealing The Arbitration Act 1899, which consolidated and amended the law relating to Arbitration very exhaustively. This Act repealed Section 89, clauses (a) to (f), of sub-section (1) of Section 104 and the Second Schedule to the Code of 1908. The Civil Justice Committee had recommended various changes in the Arbitration Law. Since the Arbitration Act of 1899 was based on the English Law then in force, to which several substantial amendments were affected by the Amendment Act of the British Parliament in 1934. The recommendations of the Civil Justice Committee were scrutinized together and the Arbitration Bill sought to consolidate and standardise the

law relative to arbitration throughout British India in details.<sup>4</sup>

However, it is noteworthy that The Arbitration Act, 1940 governed only domestic arbitration whereas, the enforcement of the foreign awards in India was subject to the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The major drawback of these 2 acts, they provide the procedure for the enforcement of foreign awards only, and failed to deal with international arbitration.

However, The Arbitration Act, 1940 was not effective and practical and was criticized by Supreme Court of India in *Guru Nanak Foundation vs. Rattan Singh and Sons*<sup>5</sup>.

In India after 1991, liberalization policies were being followed resulting in MNCs setting up shops in India. During this period, it was found that the then prevalent The Arbitration Act, 1940 was not capable of gaining confidence of the foreign investment. Similarly, now the world was at the doorstep of India for doing business, however in case of breach of contract, the parties governed by different judicial systems were put to accept the Indian Judicial system. This has resulted in much chaos and sense of insecurity amongst the business community.

In this direction, UNIDROIT's (formally, the International Institute for the Unification of Private Law; French) initiative for the elaboration of "Principles of International Commercial Contracts". The UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems. Since however the Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.<sup>6</sup>

In features of the Principles gave added advantages to the law-makers to adopting and customizing the Principals for the drafting of legislation in the field of general contract law and allowing bigger role of Arbitration as a tool of Alternative Dispute Resolution mechanism.

The General Assembly of United Nations passed a resolution accepting the Model Law and India being a party adopted the Model Law

<sup>4</sup> *Ibid*

<sup>5</sup> (1981) 4 SCC 634: AIR 1981 SC 2073

<sup>6</sup> *Principles of international commercial contracts*, International Institute for Unification of Private Law (UNIDROIT), 6 (1994), available at [http://www.unidroit.org/english/principles/contracts/principles1994/1994\\_fulltext-english.pdf](http://www.unidroit.org/english/principles/contracts/principles1994/1994_fulltext-english.pdf), last seen on 14/03/2015

<sup>3</sup> *Ibid*

in the form of Arbitration and Conciliation Act, 1996, replacing the then prevailing Arbitration Act 1940. Apart from certain major changes in the law, this act introduced for the first time in India the concept of the conciliation. Though all the clauses in the Act are serially numbered, the Act itself has 4 parts. Part I deals with arbitration (an award under this part is considered as a domestic award and this part is to apply where the place of arbitration is in India.), Part II deals with enforcement of certain foreign awards, Part III deals with conciliation, and Part IV contains supplementary provisions about powers to make rules, repeal and saving etc. international commercial arbitration has been defined in Part I of the Act.

This enactment has strength the place of ADR as the part of Justice Delivery system.

**'Alternative Dispute Resolution' or ADR** is an attempt to devise a 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.<sup>7</sup>

Alternative Dispute Resolution includes methods such as Arbitration, Conciliation, Facilitation and Mediation. It is upto parties involved in dispute to choose the system, with which they are comfortable. It offers flexibility to the parties. Similarly, these systems are not bound by the age old evidence act. The Arbitrator / Conciliator / Mediator have liberty to derive its own procedure, considering the nature of dispute, sum involved in dispute and the technical aspect.

Alternative Dispute Resolution is not new to India, however with the pace of economic growth, the complex natures of the contracts, nature of technical issues involved in the dispute, the technical expert is needed to resolve any dispute arising out of said contract. Apart from the said facts, tiresome processes of litigation, costs and inadequacy of the court system also force the revival and growth of ADR in India. Today, the dispute which arises due to breach of contract does not merely involve legal issues, but it also includes economic and technical issues. Further the parties which are involved in disputes are trans-national, which are reluctant to submit to the jurisdiction of Indian Judicial system, which forced to adopt

ADR as preferential system of justice delivery in India.

Alternative Dispute Resolution system broke through the resistance of the vested interests because of its ability to provide cheap and quick relief. In the last quarter of the previous century, there was the phenomenal growth in science and technology. It made a great impact on commercial life by increasing competition throughout the world. It also generated a concern for consumers for protection of their rights. The legal system did not give any response to the new atmosphere and problems of the commercial world. Thus ADR emerged as a powerful weapon for resolution of disputes at domestic as well as international level. It is developing as a separate and independent branch of legal discipline.<sup>8</sup>

In modern India for the first time where Alternative Dispute Resolution as a method of conciliation has been effectively introduced and recognised by law was in Labour Law, namely Industrial Dispute Act, 1947. Conciliation has been statutorily recognized as an effective method of dispute resolution in relation to disputes between workers and the management. All parties to an industrial dispute who have had the misfortune of going through litigation knew that it is a tedious process and one which could go well beyond the life time of some of the beneficiaries. It is this factor that has contributed greatly to the success of conciliation in industrial relations.<sup>9</sup>

It is noteworthy that with the enactment of "The Arbitration and Conciliation Act, 1996", conciliation has been given statutory recognition as a means for settlement of the disputes in terms of this Act. In addition to this, the new Act also guarantees independence and impartiality of the arbitrators irrespective of their nationality. The new Act of 1996 brought in several changes to expedite the process of arbitration. This legislation has developed confidence among foreign parties interested to invest in India or to go for joint ventures, foreign investment, transfer of technology and foreign collaborations.<sup>10</sup>

<sup>8</sup> Singh, Dr. Avtar, Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 393, 7<sup>th</sup> Edition(2006)

<sup>9</sup> *Ibid.*

<sup>10</sup> Dixit Sujoy, "Alternative Dispute Resolution Mechanism", available at [www.legalserviceindia.com](http://www.legalserviceindia.com) (last seen on 15.03.2015)

<sup>7</sup> *Ibid*

In India, where litigations are time consuming methods and also expensive, it has been observed that due to poverty, poor's are sometime deprived of justice, which is against the letter and spirit of the preamble to our Constitution, which reflects an aspiration as "justice-social, economic and political". Further, Article 39A<sup>11</sup> of the Constitution provides for ensuring equal access to justice. At this juncture, one cannot forget Article 21<sup>12</sup> of the Constitution of India, which guarantees, "Right to Life". There are plethora of judgments by Supreme Court of India, wherein the concept of Right to Life has been interpreted to so inclusive, which includes, right to fresh air, right to way, right to dignity and many other aspect of human life. One of the most important right which is covered by the concept of "Right to Life" is "Right to Speedy Justice" and that "Justice should be served to all, irrespective of his economic status", which has guaranteed that the justice will be delivered to all citizens of India, to whatever economic strata he or she may belong.

The movement towards Alternative Dispute Redressal (ADR) has received Parliamentary recognition and support. The advent of Legal Services Authorities Act, 1987 gave a statutory status to Lok Adalats, pursuant to the constitutional mandate in Article- 39A of the Constitution of India, which contains various provisions for settlement of disputes through Lok Adalat. It is an Act to constitute legal service authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic and other disabilities, and to organise Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity. Before the enforcement of the Act, the settlements of disputes were in the hands of the Panchayat head or the tribal head. But when statutory recognition had been given to Lok Adalat, it was

<sup>11</sup> Art. 39A, The Constitution of India, "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 opportunities for securing justice are not denied to any citizen by reason of economic or other disability."

<sup>12</sup> Art. 21, The Constitution of India, "No person shall be deprived of his life or personal liberty except according to prescribed established by law."

specifically provided that the award passed by the Lok Adalat formulating the terms of compromise will have the force of decree of a court which can be executed as a civil court decree.<sup>13</sup>

More tooth was provided to the ADR in India, with the insertion of Section 89 in "The Code of Civil Procedure", by way of amendment in 2003, with intention to increase settlement of disputes pending in Court by way of ADR. It gives liberty to Court that in pending suit, if it appears to the Court that there exist possibility of a settlement, which may be acceptable to the parties, the Court shall formulate the terms of the settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of the possible settlement and refer the same for (a) Arbitration, (b) Conciliation, (c) Judicial settlement including settlement through Lok Adalat; or Mediation. The advantage to the parties is that in case, if, the attempt to settle the matter, via Sec. 89 is failed, then the matter will be referred back to Court, where the suit was going on and the statements or submission made during the attempt to settle matter by any of the party u/sec. 89, shall not be considered in evidence. This has helped to reduce the increasing burden on the Indian Legal system and also give an opportunity to the parties in suit to get the matter settled through ADR out of court.

ADR has thus been a vital, vociferous, vocal and vibrant part of our historical past. 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.<sup>14</sup>

In modern days, one new initiative is made parties. Now days, parties who are indulge in the dispute, refer their case papers to a neutral techno-legal expert and try to get his opinion on their chances of winning the case.

<sup>13</sup> Singh, Dr. Avtar; Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 394, 7<sup>th</sup> Edition(2006),

<sup>14</sup> Deshmukh Raosaheb Dilip, J. "Efficacy Of Alternative Disputes Resolution Mechanisms In Reducing Arrears Of Cases", NYAYA DEEP- Vol. X, Issue: 2, 26 - 27 April 2009

During the process, the parties evaluate their legal position, timelines which will be required to get favorable order, expenses to be incurred and shortcomings. If the party found that it can gain by settling with the opposite party at that juncture only, then parties enter into settlement. Thus, it helps to curb the tendency of filing litigation. This method, has not gained much momentum, however, considering its benefit, this will be adopted by corporate world. Apart from the said initiatives, in India, laws relating to resolution of disputes have been amended so as to suit the need of the hour and also in lines of international development in ADR filed. The main aim is to provide cheap and speedy dispute resolution without compromising on quality. It has to be mentioned here that in growth of ADR in India, the Judiciary has immense contribution, it has also encouraged out of court settlements. Time and again Indian judiciary has upheld the decision taken during ADR and has shown its strength and solidarity behind the ADR mechanism.

The importance of the Alternate Dispute Resolution cannot be denied. Once can witness the rapidly development and acceptance of various ADR methods both at national and international level, which are offering simpler methods of resolving disputes. ADR has been widely accepted and applied now days in India and across the globe and all sort of disputes, may it be matrimonial, consumer, labour, land related or contractual. The best part of ADR is that it has adopted flexible procedure with ultimate aim to serve justice. Unlike, judicial system, it is not bounded by procedural laws and law of evidence; this has given ADR an advantage over the judiciary. This fact is also evident from the increasing trend of accepting and incorporating “Arbitration clause” as standard clause in majority of contracts. Thus, we can safely say that in coming days, are days of ADR. In earlier days, it was said that filing of civil suits before Indian courts means grandfather is sowing seeds so that his grandchild would be benefited after his lifetime. However, with ADR in place, one can easily say that person can get justice at his doorstep within few months. ADR shall change the face of Indian system of delivery of justice.

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<sup>3</sup> *Ibid*

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<sup>6</sup> *Principles of international commercial contracts*, International Institute for Unification of Private Law (UNIDROIT), 6 (1994), available at [http://www.unidroit.org/english/principles/contracts/principles1994/1994\\_fulltext-english.pdf](http://www.unidroit.org/english/principles/contracts/principles1994/1994_fulltext-english.pdf), last seen on 14/03/2015

<sup>7</sup> *Ibid*

<sup>8</sup> **Singh, Dr. Avtar**, Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 393, 7<sup>th</sup> Edition(2006)

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