
ALTERNATIVE DISPUTE RESOLUTION METHODS: MAKING JUSTICE EASIER TO ACCESS AND DRIVE SOCIAL CHANGE WITHIN THE LEGAL SYSTEM

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ABSTRACT

In this article, the author will evaluate the efficiency of Alternative Dispute Resolution processes in fostering social change, inclusivity, and justice access. Alternative Dispute Resolution (hereinafter 'ADR') refers to a wide range of approaches for settling disputes other than litigation. The section 89 of the Code of Civil Procedure, 1908 (hereinafter 'CPC') reflects the legislative mandate to the court to refer civil disputes to the different ADR mechanisms such as Arbitration, Mediation, Conciliation or Lok Adalat, where suitable. The ADR system assists in providing parties with affordable, easy, rapid, and accessible justice. If the primary objective of all matters is to reach an agreement, why not choose methods that can be reached amicably by compromise? These strategies will help foster a culture of settlement among the parties, which is essential in today's society. Despite such significant aims, the section is ineffective due to various problems in its drafting and implementation. As a result, this research attempts to assess the efficiency of Section 89 of the CPC and offer some suggestions for improving its effectiveness. Law relating to ADR and social transformation are inextricably linked, with ADR methodologies playing a crucial role in transforming how societies manage conflicts and disputes. ADR, which includes mediation, arbitration, negotiation, and restorative justice, provides an alternative to traditional litigation, which can be contentious, costly, and time-consuming. The emphasis on collaboration, communication, and individualized, consensual solutions distinguishes ADR with the traditional legal system.

I. INTRODUCTION

Any civilized society's foundation and goal is 'Access to justice', and the pursuit of justice has been an ideal to which humanity has aspired for eons. Our Constitution's preamble expresses such ambition as 'justice-social, economic, and political.' Article 39-A of the Constitution¹ guarantees equal access to justice. Justice administration entails the protection of the innocent, the punishment of those who are guilty, and the proper resolution of disputes.

The world has learned that adversarial litigation is not the only way to resolve matters. The current court infrastructure in India is insufficient to resolve the growing litigation in a timely manner. The congestion in courtrooms, shortage of staff and resources, as well as delays, costs, and procedures, are some of the factors which indicates that there is a need for improved options, approaches, and outlets. Despite ongoing attempts, an ordinary man may find himself imprisoned in litigation for as long as a lifetime, and in some cases, litigation extends even to the next generation. As a result of the chain reaction of the litigation process, civil cases may even give birth to criminal cases. The timely disposition of cases and the delivery of high-quality justice are long-term goals for all those involved in the administration of justice.

But ADR is only a click away. That's why there's a pressing need to complement the existing court infrastructure with ADR processes. In addition to streamlining the functioning of the judicial system, there's an increased focus around the world on providing ADR systems for settlement of pending disputes as well as for the pre litigation phase.

“Shri P.V. Narasimha Rao, India's Prime Minister, inaugurated the International Centre for Alternative Dispute Resolution (ICADR) in 1995, observing:”

“While reforms in the judicial sector should be undertaken with necessary speed, it does not appear that courts and tribunals will be in a position to hear the entire burden of the justice system. It is incumbent on government to provide a reasonable cost as many modes of settlements of disputes as are necessary to cover the variety of disputes that arise. Litigants should be encouraged to resort to alternative dispute resolution so that the court system proper would be left with a smaller number of important disputes that demand judicial attention.”

¹ The Constitution of India, art 39-A.

There are several social, economic, and political factors which pose several challenges to the Indian Judiciary:

- 1. Delay in disposal of cases** – This delay causes a huge backlog and increases the pendency of cases in High Courts and Trial Courts. When one speaks of delay, what is usually alluded to or regarded is the time that a case is pending before a court. For instance, if a suit filed is decreed after five years, this five-year period is considered the period of pendency. However, for a plaintiff, what matters is relief rather than a decision. This means that when discussing delay, the emphasis should be on a party receiving relief for which he or she seeks a court, rather than the time necessary to obtain a formal decree.

It's not about the length of time it takes to get a decree in the litigation, it's about how long it takes for a civilian litigant to get relief. Many people get a decree but don't get the benefits of it because of appeals or execution delays. For example, a person gets a decree in 5 years, fights an appeal filed by their losing party for 5 more years, and then executes the decree in 5 more years. In this case, the true pendency is 15 years, not 5.

- 2. Lack of access of justice** - Every unresolved grievance of the poor, the marginalized, and the downtrodden is a call for justice that has a direct impact on their lives, liberty, livelihoods, food security, shelter, security, or safety. The primary obstacles to justice are poverty and ignorance. Financial support, legal training, and easy access to justice with dedicated and high-quality legal services can eliminate these obstacles and give them a fair chance to get justice.

When people are subjected to injustices and inequalities and are unable to obtain effective and timely justice, they tend to take the law into their own hands. As a result, some conflicts that might have been resolved through civil litigation end up as criminal offenses.

Under the Indian Legal Services Act, the 'Legal Service Authorities' are responsible for providing legal services to every poor and disadvantaged person (in the list of weaker sections) in any case or in any legal proceeding in any court and tribunal. The legal service authorities are controlled and run by judges at the national level, state level, district level and taluk level (although there may be members from outside). Unfortunately, the people who get legal services are not satisfied with the quality of the legal services, either because the legal aid

counsel is not competent, there is no choice of legal counsel, or the officials of legal service authorities are hostile/unfriendly (or because human nature perceives any free service as inferior).

- 3. Inadequate use of ADR Process** – If there is a dispute over the outcome of a lawsuit, there is bound to be bitterness, hatred and enmity, and the losing party will continue to hold grudges against the winning party. In a law-abiding society, parties should accept judicial decisions with courtesy and respect. In reality, especially in family member separation, neighbour conflicts, partner conflicts, and marital conflicts, post litigation enmity may lead to further litigation and further frictions. However, if a settlement is reached (through conciliation, mediation or other means), neither party will be the loser because there is no decision but rather a settlement that is acceptable to everyone. Therefore, it is said that a contest choice creates two enemies, while a settlement creates two friends.

Various legal service authorities and mediation committees have attempted to raise knowledge about ADR methods. Special workshops are held to educate judicial officers on the relevance and value of ADR processes, as well as the importance of referring pending cases to court-annexed ADR processes. The CPC requires all courts to refer pending cases to the ADR process. The government is pushing ADR in situations involving critical services, pensions, and so on.

- 4. Maintaining the credibility of the Judiciary** – The Supreme Court in “*K. Veeraswami v. Union of India*²” observed that, “*The judiciary has no power of the purse or the sword. It survives only by public confidence and it is important to the stability of the society that the confidence of the public is not shaken.*”

Judiciary, like every other important institution, has become unwieldy, lethargic and inefficient with its growth. It is struggling to keep up with the rising demands. As more Judges are being appointed, there is a good chance that some of them will lack integrity, impartiality, and judicial temperament, while others would lack efficiency and insight. When the number of Judges increases rapidly, there is a risk of confidence and trust eroding in an institution where the highest level of probity, independence, and impartiality is expected. Loyalty, gratitude, and

² *K. Veeraswami v Union of India* 1991 (3) SCC 655

friendship, which are regarded good qualities in ordinary people, are deemed weaknesses of a Judge if they interfere with his judicial tasks.

II. ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS UNDER THE FRAMEWORK OF CIVIL PROCEDURE CODE

Mediation, Conciliation, and Arbitration were historically older than the current Anglo-Saxon adversarial legal system. Various forms of mediation and arbitration were popular among merchants in India prior to British rule and have grown in favour over the years.³ The current discussion on the need to develop ADR procedures lays emphasis on the extensive almost unmanageable backlog of litigation before Courts. As understood in the previous chapter, the justification for ADR is viewed as minimizing case arrears in Courts.⁴

Section 89 of the Code of Civil Procedure, 1908 requires the court to refer disputes to the various ADR mechanisms mentioned in this section whenever necessary, in order to resolve disputes in a timely manner and to resolve the problem of case pendency through much more well - established dispute resolution methods other than litigation. This section is important even after the litigation has concluded since it recognizes numerous ADR processes that the parties may opt to accept rather than going through a lengthy time-consuming process.

Thus, at the post-litigation stage, the court may refer the parties to arbitration, conciliation, mediation, Lok Adalat, or judicial settlement in accordance with Section 89 of CPC.

The Law Commission of India⁵ proposed the establishment of conciliation courts and emphasized the relevance of conciliation/mediation as a mechanism of ADR. The Malimath Committee⁶ had also urged for amendment in the law to allow for the implementation of ADR mechanisms. The Code of Civil Procedure (Amendment) Bill was introduced in 1997, based on the recommendations of the Law Commission of India and the Malimath Committee.

In *Salem Advocate Bar Association v. Union of India (II)*⁷ the Supreme Court stated that the

³ Mediation Training Manual of India, The Mediation and Conciliation Project Committee, Supreme Court of India, Chapter I, at 3-4.

⁴ Law Commission of India, 'Mediation – Realizing the potential and designing implementation strategies' can be accessed at http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf.

⁵ Law Commission of India, Urban Litigation: Mediation as Alternative to Litigation (Law Com No. 129, 1988).

⁶ The Malimath Committee Report (Aug., 1990).

⁷ *Salem Advocate Bar Association v Union of India (II)* AIR 2005 SC 3353

legislature's intention behind enacting Section 89 of CPC was that where it appears to the Court that there are elements of settlement that may be acceptable to the parties, they shall be made to apply their minds in order to opt for one or more of the five ADR methods mentioned in Section 89, and if the parties do not agree, the court shall refer them to one or more of the said modality.

In *Afcons Infrastructure Ltd. V. Cherian Varkey Construction Co. (P) Ltd.*,⁸ the Supreme Court went into great detail about Section 89 of CPC which requires courts to encourage parties to settle their disputes through alternative dispute resolution. Despite the fact that the Supreme Court concluded that the provision is incorrectly worded after reviewing Section 89 of CPC and the provisions of Order X CPC, and various flaws in legislative drafting to that effect were pointed out, the Bench applied the rule of interpretation to make it workable.

OTHER PROVISIONS OF CIVIL PROCEDURE CODE SUPPORTING THE SETTLEMENT MECHANISM

If the court is satisfied that the claim has been satisfied or modified in whole or in part by a legally acceptable agreement or compromise between the parties while the issue is pending, it is permissible to issue a decree under the terms of **Order 23 Rule 3**⁹ of CPC. This provision empowers the Court to register a legitimate agreement or compromise and to issue a decree for it.

Order 27 Rule 5B of CPC¹⁰ requires the court to assist in reaching a settlement in a case brought against the government or a public officer. In a dispute in which the government or a public officer is a party, it is the Court's obligation to assist the parties in reaching an agreement at first instance, whenever possible given the facts of the case. If the court believes that there is a reasonable chance of a settlement at any stage during the proceedings, the court may adjourn the proceedings to allow for settlement efforts.

Order 32A of CPC¹¹ deals with "Suits relating to matter concerning the family. And, it is generally felt that, in case of personal relationships which are of sensitive nature, the usual and ordinary judicial procedure is not ideally suited. They require a special approach to look into

⁸ *Afcons Infrastructure Ltd. v Cherian Varkey Construction Co. (P) Ltd.* 2010 (8) SCC 24

⁹ The Code of Civil Procedure, 1908 (5 of 1908) Ord 23, r 3

¹⁰ The Code of Civil Procedure, 1908 (5 of 1908) Ord 27, r 5B

¹¹ The Code of Civil Procedure, 1908 (5 of 1908) Ord 32A

such matters of serious and emotional nature. And, with keeping the same in mind, “family counselling” as a method of achieving the object of preservation of family is kept in forefront. As a result, Order 32A attempts to emphasize the importance of taking a different approach when it comes to family matters, including efforts to reach an amicable settlement.

Rule 3 requires the Court to make every attempt to reach a settlement by offering aid where possible. The Court may also adjourn the matter if it believes it is necessary to allow an attempt to be made to effect a settlement where a reasonable likelihood of settlement exists.

III. SOCIAL TRANSFORMATION AND ALTERNATIVE DISPUTE RESOLUTION (ADR)

The term ‘social transformation’ refers to deep and long-lasting changes in a society's social, cultural, economic, and political characteristics. It frequently entails modifications in norms, attitudes, beliefs, and behaviours that result in major improvements or alterations in how a society runs. Social transformation can be influenced by a variety of circumstances and emerge in a variety of ways.

ADR plays a critical role in social transformation by providing an effective and constructive alternative to the traditional legal system for resolving conflicts and disputes. The tendency towards ADR is similar to a social movement in many ways, but it is not a social movement because there is no agreement on its overarching aim.

ADR is founded on a broad problem and employs a common set of approaches and a general terminology. It is also founded on a broad ideology. The common theme of the many ADR strategies is negotiation. It arose in response to critiques levelled at lawyers and courts, and it emphasizes the concepts of empowerment and voluntarism. ADR, like the alternative health movement, has an ambiguous attitude toward professionalism. It has been chastised for its tendency toward professionalism and commercialism, as well as for its overly simplified views of disputes. ADR is also accused by critics of perpetuating disparities in political and economic power and of encouraging agreements when one party is ethically wrong.

1. SOCIAL CHANGE THROUGH ADR MECHANISMS

The question of whether ADR can be utilized to effect societal change, particularly social

justice, is not new. This debate is connected with the development of ADR in the Anglo-American context, and various solutions reflect varying ideas on the purpose and value of ADR, as well as how to best achieve a more just society.

On the one hand, ADR can be considered as a natural response to overburdened courts. According to this point of view, the fundamental value of ADR is its lower cost and better efficiency, while the broader social benefits of ADR include additional conflict resolution options for customers and a more efficient court system.

Another school of thought holds that the roots and purposes of ADR in the Anglo-American context are closely tied with the social justice movements of the 1950s and 1960s, which were concerned with social disparities and related scepticism of established institutions. ADR was regarded as not just a more accessible, but also a 'superior' method of resolving disagreements. Historically, ADR was considered as a means of 'grass roots democratisation' in a variety of domains, such as the Community Mediation and Community Justice Centre movements, which not only dealt with individual conflicts but also built neighbourhoods and promoted self-governance and empowerment. It was proposed that mediation could have aggregate societal repercussions involving shifts in power relations.

While the terminology of structural change and group/community empowerment is uncommon in mainstream ADR today, several types of ADR practice reflect the idea that ADR can have an impact on individuals who can then influence groups and society in general. According to many practitioners, individual empowerment and the awareness of diverse views can emerge in an ADR process and then be carried over and deployed to the larger networks of individuals involved in the conflict. In fact, the social change goals of some specific areas of ADR are quite explicit.

However, the ability of ADR to genuinely influence social change, particularly social justice, has been questioned from a variety of perspectives.

Because of the personal and private nature of disputes involved and resolution parameters, ADR's ability to effect social change is viewed to be very limited. This secrecy prevents the construction of legally enforceable precedents and the formation of public norms that could lead to social change. As a result, some opponents of ADR argue that formal court proceedings are a more effective way of addressing public interest issues and advancing social justice.

Procedural imbalances can be detected and corrected within the legal system, and positive public norms can be developed.

Another point of view is that ADR undermines social justice. Some social justice theorists claim that ADR is primarily a weapon of social control in liberal legal democracies, serving to enhance State control over specific types of disputes that raise concerns about fundamental imbalances in capitalism. From this vantage point, ADR gives a feeling of justice and a voice for individuals and groups while dampening dissent and social unrest, all of which are required to achieve true equality in society.

Furthermore, the belief that ADR proceedings cannot develop or advance public values has been called into question. For example, because ADR processes are not constrained by legal forms and technicalities, there is potential for the ADR process to resemble legal norms in more generalized ways and produce norms based on valued social behaviour such as fairness and equity. Furthermore, unlike courts, ADR processes are more likely to facilitate systemic outcomes to disputes since terms of resolution are not restricted by legal conceptions of personalised harm and redress.

The question of how far ADR may be used to effect social change and contribute to social justice is complicated. Part of the intricacy stems from the different ways in which ADR processes might result in societal change. Furthermore, given the variety of ADR processes and the many frameworks within which these processes function, the context of the ADR process will undoubtedly be important to examine. Factors such as how the ADR process is defined, the institutional context in which it is placed, and how practitioners are trained and act will undoubtedly have an impact on the social change potential of these ADR processes.

IV. BARRIERS AND CHALLENGES TO THE INTEGRATION OF ADR WITHIN THE CODE OF CIVIL PROCEDURE

There are numerous challenges that prevent the ADR mechanisms from being widely used successfully in India. One of the biggest challenges is that the general public and even some legal specialists face lack of information and are unable to comprehend the benefits of the ADR process. As a result, traditional litigation becomes more popular, adding to the already overburdened backlog of the court system. A shortage of qualified ADR practitioners is also one of the challenges.

Due to a scarcity of qualified mediators, arbitrators, and conciliators, it is difficult to effectively manage the growing number of conflicts. Furthermore, parties may opt to ignore or delay implementing the agreed-upon resolutions, defeating the point of the entire process and raising concerns about the enforceability of ADR judgements. The cultural predisposition toward adversarial litigation, along with a lack of trust in the impartiality of ADR practitioners, is a barrier to the acceptance and usage of ADR methods.

As a result, the absence of a comprehensive legislative framework directing ADR activities in India results in inconsistent and ambiguous outcomes, limiting the process's effective functioning. To overcome these challenges and foster the growth of ADR in India, greater awareness campaigns, increased training opportunities, enhanced enforcement mechanisms, and a comprehensive legislative framework would be required.

Apart from that, Alternate Dispute Resolution has had various intrinsic behavioural and operational obstacles since its inception, which are as follows:

- **Lack of Awareness** - In the case of ADR, the need for such a resolution aim must be inferred from the circumstances of the dispute. This is an essential requirement derived from Section 89(1) of the Civil Procedure code, 1908. If this is not the case, the parties will continue with the litigation. In order to include these components in the agreement, the parties need to know about ADR and its advantages. Since the parties are not familiar with this process, they opt for litigation.
- **Concerns about privacy and confidentiality** - Even in India, parties lack trust in the courts to protect their right to privacy under Article 21 of the Indian Constitution, as construed in *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.*¹² Because of previous incidents of privacy compromise, it falls short of acquiring trust. Because of this lack of confidence, parties are hesitant to use ADR.
- **Power derived from Arbitration Agreement** - In the case of *Prakash Cotton Mills Pvt. Ltd vs Vinod Tejraj Gowani (2012)*, the Bombay High Court emphasized the significance of the existence of the Arbitration Agreement, as the Arbitration process draws its power from the Arbitration Agreement. There will be no arbitration if there is

¹² *Justice K.S. Puttaswamy (Retd.) & Anr. v Union of India & Ors* AIR 2017 SC 4161

no Arbitration Agreement. As a result of this necessity, the objectives of ADR lose their substance and identity.

Archaic Legal Processes - In *Garware Walls Ropes Ltd. v Coastal Marine Constructions & Engineering Ltd.*¹³ the Supreme Court concluded that the arbitration agreement is void only due to non-payment of Stamp Duty. Because of this complicated and antiquated technique, using ADR has become difficult.

CULTURAL AND SOCIAL FACTORS

The dynamics and efficiency of the ADR process can be strongly influenced by cultural and social factors. Understanding these elements is critical for mediators, arbitrators, and practitioners navigating varied cultural situations and facilitating successful ADR decisions. The following are some important cultural and societal aspects that influence the ADR process:

- Communication techniques and customs differ from culture to culture. Some cultures place an importance on direct and assertive communication, while others place a focus on indirect and harmonious communication. To guarantee productive discourse, ADR practitioners must adjust their communication tactics to the cultural situation.
- The orientation of cultures toward collectivism (collective harmony and consensus) or individualism (personal rights and autonomy) varies. ADR practitioners should evaluate how these cultural orientations affect willingness to compromise and perception of fairness.
- Language barriers can be problematic in ADR. Interpreters are commonly used in cross-cultural ADR contexts, and practitioners must ensure successful communication while being cognizant of potential misinterpretations.

In the end, cultural and social variables are essential to the ADR process. To effectively negotiate these obstacles and allow equitable and acceptable dispute resolutions in multicultural contexts, ADR practitioners must be culturally competent, adaptive, and appreciative of diverse perspectives.

¹³ *Garware Walls Ropes Ltd. v Coastal Marine Constructions & Engineering Ltd AIR 2019 SC 515.*

V. CONCLUSION

Contrary to traditional litigation, ADR, which includes mediation, arbitration and conciliation, offers a fast and low-cost way to settle disputes. ADR allows parties to resolve disputes faster, with less financial burden and ease. It also gives participants more control over procedural matters, potentially reducing the burden on the court system. To promote and improve ADR processes, concerted efforts must be made to increase awareness and encourage the use of ADR. Coordinated efforts must include awareness-raising programs to raise awareness about ADR and to encourage its use. The media and NGOs must be involved in order to leverage their resources and influence effectively.

The investigation and inclusion of ADR processes within the CPC has great potential as a catalyst for social change. ADR systems have the potential to revolutionize the legal landscape by making dispute resolution more accessible, effective, and fair. When ADR processes are properly incorporated into the CPC, it is clear that they can significantly enhance access to justice. People and groups who were once excluded or prevented from seeking justice now have access to a range of dispute resolution options that go beyond traditional litigation.

In addition to efficiency and cost savings, alternative dispute resolution (ADR) mechanisms also reduce the time and resources needed for lengthy court hearings, reducing the burden on overburdened court dockets. Both the court system and parties involved in disputes benefit from ADR. By directly involving parties to the dispute in the resolution process, it empowers them. It encourages cooperation and communication, which gives parties ownership over the outcome of the dispute and often results in more satisfactory and lasting solutions.

In addition, adding ADR to the CPC can help speed up cultural and social change. ADR encourages a shift away from confrontational and hostile methods of conflict resolution towards more harmonious and consensus-based conflict resolution methods. This transformation can help create a culture of dialogue, collaboration, and acceptance. This can be achieved through ADR techniques that emphasize open and friendly dialogue between parties that are at odds. This focus on communication creates a culture of dialogue and interaction that has a social impact. It encourages people to hear each other and understand each other's perspectives. These approaches focus on protecting relationships, especially when

it comes to family and community matters. This attribute plays an important role in societies that value social peace and social cohesion.

In conclusion, the inclusion of ADR mechanisms in the civil procedure code has the capacity to bring about innovative social transformation by improving access to justice, its efficiency, and its community-oriented nature. While challenges and obstacles exist, sustained efforts to overcome them and communicate the advantages of alternative dispute resolution can lead to a legal order that not only resolves disputes but also promotes a culture of cooperation and social harmony. This is a step towards a fairer and more equal society.