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ARTICLE ON NEW CONCERNS REGARDING MEDIATION AS A DISPUTE RESOLUTION METHOD

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Abstract

Mediation, as a widely recognized alternative dispute resolution method, is facing emerging concerns that challenge its effectiveness and fairness in resolving conflicts. This abstract explores these concerns, which include power imbalances, enforceability, legal protection, accountability, and access and inclusivity. Power imbalances pose a significant concern in mediation, as parties with unequal resources or influence may face coercion or unfair outcomes. The enforceability of mediated agreements is also a worry, as they lack the same legal standing as court judgments, potentially undermining confidence in the process. Additionally, concerns about legal protection arise when parties unknowingly agree to terms that contradict their legal rights. Confidentiality, while preserving privacy, restricts transparency and accountability in mediation. This raises concerns about potential misconduct by mediators, which may go unnoticed or unaddressed. Furthermore, access and inclusivity are problematic, as some individuals may lack the resources or understanding to navigate the mediation process effectively. Certain types of disputes, such as those involving power imbalances or domestic violence, may also be unsuitable for mediation due to safety and fairness concerns. To address these concerns, promoting awareness and education about mediation pitfalls is crucial. Training for mediators, ethical guidelines, and improved screening processes can ensure fairness, neutrality, and accountability. Enhancing enforceability and legal protections, especially in complex cases, is necessary. Furthermore, research and evaluation of mediation practices can identify areas for improvement, ensuring that mediation remains a viable and effective dispute resolution option.

Keywords: Alternate Dispute Resolution, Mediation, Arbitration, Legal Proceedings, Third person.

I. Introduction:

Alternative dispute resolution (ADR) is a diverse method for resolving conflicts outside the traditional courtroom. Its purpose is to facilitate the resolution of disputes between parties without resorting to legal proceedings. ADR applies to a wide range of conflicts, such as civil, business, industrial, and familial disputes, when negotiations have reached an impasse. Typically, an impartial third party assists in ADR by fostering communication, conflict resolution, and dialogue among the involved parties. This approach fosters harmony, and social order, and minimizes animosity by providing individuals and groups with an opportunity to amicably resolve their differences. ADR is particularly useful for addressing less severe disputes, allowing courts to concentrate on more substantial offenses and ensuring the prompt and efficient administration of justice.[1]

[1] https://viamediationcentre.org/readnews/NTY2/Alternative-Dispute-Resolution-in-Modern-Era

1. Alternative Dispute Resolution (ADR) Methods are:

i. ADR refers to a collaborative approach to resolving disputes, where parties work together to achieve the most favorable outcome for all involved.

ii. By alleviating the strain on the court system, ADR offers a comprehensive and fulfilling experience for disputing parties.

iii. It enables the exploration of creative solutions and collaborative negotiations, allowing for the expansion of possibilities and the fulfillment of underlying interests that drive their respective demands.[2]

II. Historical Perspective:

Arbitration has a rich history in India and has undergone various legislative advancements. The introduction of the British Arbitration Act in 1899, influenced by the English Act, laid the groundwork for arbitration laws in India. The Model Law approved by UNCITRAL in 1985 greatly influenced Indian law, leading to the incorporation of its provisions in the 1996 Act.[3] Before British colonization, arbitration flourished in India through panchayats, which are now acknowledged in the Indian Constitution. In 1923, the Geneva Convention was ratified by the League of Nations, bringing in arbitration provisions. The 1940 Arbitration Act replaced the earlier Section 89 of the Civil Procedure Code, and the 1937 Arbitration (Protocol and Convention) Act reflected India's participation in the League of Nations arbitration protocols. Recognizing the need for improvements, the League of Nations created the Convention for the Geneva Convention of 1927, formally known as the Enforcement of Foreign Arbitral Awards, had a notable impact on the 1937 Arbitration (Protocol and Convention) Act, which madereferredthe 1899 Arbitration Act. All prior arbitration laws were repealed by the 1940 Arbitration Act. In 1958, the global community established the New York Convention, marking a significant milestone in international arbitration. Subsequently, the 1960 Arbitration Act replaced the 1940 Arbitration Act, and the Foreign Awards (Recognition and Enforcement) Act of 1961 was introduced to complement the 1960 Arbitration Act, drawing inspiration from the New York Convention...[4]

III. Constitutional Provision:

Arbitration has been a recognized legal means of dispute resolution in India since the late 19th century. The introduction of the India Arbitration Act in 1899, followed by the Arbitration Act of 1940, established arbitration as a well-known alternative to litigation. At first, the regulation of arbitration was under the purview of multiple statutes, including those encompassed in the Civil Procedure Code. However, the 1940 Act suffered from similar drawbacks as the courts, as it necessitated parties to resort to court appeals for minor matters, undermining the purpose of arbitration as a viable alternative to litigation.[5]

1. Main provisions of Alternative Dispute Resolution (ADR):

Section 89 of the Civil Procedure Code, 1908, provides individuals with the chance to explore settlement options beyond court litigation. If the court recognizes the possibility of reachisettlingelineates the terms of the potential agreement and directs the case to Lok Adalat, Arbitration, Conciliation, or Mediation for resolution.[6]

IV. Types of Alternate Dispute Resolution

As the saying goes, “The spirit of the law, not its letter, is what gives life to justice.” By Lord Justice Earl Warren

Types of Alternative Dispute Resolution are:

A. Arbitration:

Arbitration is a dispute resolution method in which parties involved in a conflict present their case to a neutral third party, known as an

[2] https://www.legalserviceindia.com/legal/article-1678-alternative-dispute-resolution-adr.html#:~:text=ADR%20provides%20various%20modes%20of,any%20statutory%20recognition%20in%20India

[3] https://viamediationcentre.org/readnews/MTUy/ADR-in-India-Development-and-Scope

[4] https://www.scconline.com/blog/post/2021/02/07/evolution-of-adr-mechanisms-in-india/

[5] https://blog.ipleaders.in/legal-constitutional-provisions-regarding-adr/

[6] https://www.legalserviceindia.com/legal/article-1678-alternative-dispute-resolution-adr-.html#:~:text=ADR%20provides%20various%20modes%20of,any%20statutory%20recognition%20in%20India.

arbitrator or arbitral tribunal. The arbitrator or tribunal listens to the arguments, reviews evidence, and renders a binding decision, known as an arbitral award, which resolves the dispute outside of the traditional court system.

B. Conciliation:

Conciliation is a dispute resolution process where a neutral third party, known as a conciliator, assists parties in resolving their conflict through facilitated communication and negotiation. The conciliator helps parties explore interests, find common ground, and reach a mutually acceptable solution. Unlike arbitration, the conciliator does not impose a decision but encourages voluntary agreement. Conciliation aims to foster understanding, promote dialogue, and restore harmonious relationships between the parties.

C. Mediation:

Mediation is a voluntary dispute resolution process in which a neutral third party, called a mediator, facilitates communication and negotiation between conflicting parties. The mediator assists the parties in identifying their interests, exploring options, and reaching a mutually acceptable agreement. Unlike arbitration, the mediator does not make a decision but guides the parties toward a resolution. Mediation promotes constructive dialogue, cooperation, and a sense of ownership over the outcome.

D. Negotiation

Negotiation is a process of communication and discussion between two or more parties with conflicting interests, aimed at reaching a mutually acceptable agreement. It involves the exchange of proposals, counteroffers, and concessions to find common ground and resolve differences. Negotiation can take place in various contexts, such as business, diplomacy, or personal relationships, and requires active listening, persuasive skills, and a willingness to compromise.

E. The Lok Adalat:

Lok Adalat is a form of alternative dispute resolution in India that aims to resolve legal disputes through conciliation and compromise. It operates as a people's court, where retired judges, legal professionals, and social activists serve as mediators or conciliators. The Lok Adalat encourages parties to settle their disputes amicably, either through mutual agreement or by receiving guidance from the presiding members. The decisions made in Lok Adalats are binding and enforceable.

V. Emerging Issues in various alternative modes of dispute resolution:

There are various challenges and issues related to different modes of dispute resolution which have been discussed as follows:

A) Emerging issues about Arbitration as a dispute resolution:

Arbitration is considered the most efficient and successful method for resolving disputes. The Indian government has made several amendments to the Arbitration and Conciliation Act of 1996, aiming to enhance flexibility and address compactness issues in arbitration governance. However, despite changes in 2015 and 2019, certain unresolved problems persist.

Under the Arbitration and Conciliation Act of 2019, if a party believes that an arbitrator has not met the requirements outlined in Schedules 5 and 7, they can challenge the arbitrator through Sections 12 and 13 of the Act. However, the challenge is presented to the same arbitrator who will later decide the dispute between the parties, leaving little recourse if the application is rejected. The award can only be challenged after it has been issued, lacking a pre-award remedy in arbitration.

Another issue arises from the arbitrator's power to determine the jurisdiction of the dispute, based on the principle of competence-competence. When a party applies under Section 16, which addresses the jurisdiction of the competent arbitration authority, the same arbitrator decides on their competence, leading to potential bias and arbitrary decision-making. Unclear language in non-court documents further hampers the effectiveness of arbitral rulings, creating additional obstacles in the arbitration process. Despite modifications, the Arbitration and Conciliation Act of 2019 still

faces numerous challenges, particularly in cases involving oppression and mismanagement with Indian parties and foreign seats. These unresolved issues have led to conflicting opinions in various Indian courts.

B) New concerns regarding mediation as a dispute resolution method although mediation is one of the most fundamental methods of dispute resolution, there are still several problems that need to be resolved and are categorized as follows:

1. Lack of Professional mediators:

The lack of professional mediators refers to the shortage or insufficiency of trained and skilled mediators available to facilitate the mediation process. This shortage can be attributed to various factors, such as limited resources for mediator training programs, low awareness of the benefits of mediation, or inadequate support for the development of mediation as a profession. The scarcity of professional mediators hinders the accessibility and quality of mediation services, impacting the effectiveness and efficiency of the dispute resolution process.

2. Lack of referrals:

Lack of referrals refers to a situation where parties, legal professionals, or judicial bodies fail to consider or recommend alternative dispute resolution (ADR) methods for resolving conflicts. It indicates a lack of awareness, understanding, or willingness to explore ADR options such as mediation or arbitration. This oversight can lead to missed opportunities for efficient, cost-effective, and mutually beneficial resolutions outside of traditional litigation. Promoting ADR awareness and encouraging referrals is crucial for maximizing the benefits of alternative dispute resolution.

3. Lack of Infrastructure:

Lack of infrastructure refers to a situation where the necessary physical, technological, or organizational resources and support systems required for the effective implementation of a process or service are insufficient or inadequate. In the context of dispute resolution, it can indicate the absence or insufficiency of facilities, technology, trained personnel, administrative support, or logistical arrangements needed to facilitate and conduct alternative dispute resolution (ADR) processes such as mediation or arbitration. This lack of infrastructure can hinder the accessibility, efficiency, and quality of ADR services, making it challenging to effectively resolve disputes outside of traditional court proceedings.

4. Absence of Suitable Legislation:

The absence of suitable legislation refers to the lack or insufficiency of specific laws or regulations that adequately address and govern a particular area or aspect of legal matters. In the context of dispute resolution, it indicates the absence of comprehensive and effective laws specifically designed for alternative dispute resolution (ADR) methods such as mediation or arbitration. Without appropriate legislation, there may be uncertainties, inconsistencies, or gaps in the legal framework, impeding the proper implementation, enforcement, and recognition of ADR processes and outcomes, and potentially undermining their credibility and effectiveness.

5. Lack of mediation management:

Lack of mediation management refers to the absence or inadequate presence of structured processes, guidelines, and oversight for effectively managing and administering mediation proceedings. It signifies a lack of formal frameworks, trained mediators, clear protocols, and institutional support, which can hinder the smooth and efficient functioning of mediations and diminish their potential for successful dispute resolution.

6. Lack of Awareness:

Lack of awareness refers to a situation where individuals, organizations, or communities have limited knowledge or understanding about a particular concept, process, or option. In the context of dispute resolution, it signifies a lack of awareness and understanding of alternative dispute resolution (ADR) methods, such as mediation or arbitration, and their potential benefits as alternatives to traditional litigation.

This lack of awareness can result in missed opportunities for utilizing ADR and its advantages for resolving disputes.

C) New concerns about conciliation as a method of resolving disputes

Although both parties view the conciliation process as a beneficial and legally enforceable agreement for the resolution of problems, there are still numerous flaws with it that make it difficult for the procedure to advance without stumbling upon obstacles.

1. In various countries, such as Australia and the United States, the emphasis on the parties' agreement to select a conciliator is not given top priority. While they may seek early neutral evaluation for settlement, it is not always mandatory for both parties to choose a neutral third party to resolve their disputes. However, India does not have a system of mandatory mediation, also known as early neutral evaluation.
2. Insufficient organization and administration pose obstacles to the efficient functioning of conciliation processes, with a lack of appropriate centers dedicated to conducting conciliation proceedings.
3. Parties involved in a conflict often misinterpret and inaccurately perceive the information presented by the opposing side, leading to more significant negative impacts on their relationship.[7]
4. In the absence of a well-established conciliation procedure, parties involved in a conflict may not take the process seriously, perceiving conciliation as an informal method of settlement.
5. The primary objective of conciliation is to facilitate negotiations for settlement between the parties. However, the process may be disrupted when one party holds a dominant position or possesses significant economic influence or goodwill, ultimately leading to the failure of the conciliation mechanism.

D) New Concerns Regarding Lok Adalat as a Dispute Resolution Method

The emerging perspective raises concerns about Lok Adalat as a dispute resolution method. While it aims to deliver justice swiftly, the expedited nature of the process often results in parties receiving inadequate compensation and being deprived of the opportunity to appeal. Lok Adalat is limited to civil matters and may not be suitable for other types of cases where sanctions and corrective measures are necessary. In such situations, the efficacy of Lok Adalat falls short, and the court is often advised to handle the contested issues. Failure to consider alternative dispute resolution methods like Lok Adalat only leads to unnecessary delays in the legal proceedings.[8]

VI. Conclusion:

In conclusion, the modern era has brought forth new concerns regarding the use of mediation as a dispute resolution method. While mediation has long been hailed as a valuable alternative to traditional litigation, there are emerging challenges that need to be addressed. One concern is the potential power imbalance between the parties involved, where one party may hold significant influence or dominance, jeopardizing the fairness and effectiveness of the mediation process. Additionally, the lack of enforceability of mediated agreements raises questions about the long-term sustainability of the resolutions reached. Without a reliable mechanism to ensure compliance, parties may face difficulties in implementing the agreed-upon terms. Moreover, the increasing complexity of disputes in the modern era demands specialized expertise and knowledge from mediators. In some cases, mediators may lack the necessary understanding of complex legal and technical issues, hindering their ability to facilitate meaningful discussions and reach satisfactory resolutions. In order to tackle these issues, it is essential to improve the training and accreditation programs for mediators, foster

[7] Shubhangi Sharma, Facts to know about Arbitration, Mediation and Conciliation, https://blog.ipleaders.in/arbitration-conciliation-and-mediation/.

[8] https://www.ijlmh.com/emerging-issues-pertaining-to-alternative-dispute-resolution/

transparency and accountability in the mediation process, and investigate methods for enforcing mediated agreements. Additionally, a comprehensive evaluation of the suitability of mediation for different types of disputes is necessary to ensure that it remains a relevant and effective method in the modern era. By addressing these concerns and adapting mediation practices to the changing landscape, we can preserve the value of mediation as a viable and efficient dispute resolution method in today's complex world.

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3. Rajasthan State Road Transport Corporation V. Krishna Kant
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