Unit-3: Arbitration, Tribunal Adjudication and Alternative Dispute Resolution

Objective: To understand the following concepts: Adversarial System; Investigative System; Alternative Dispute Resolution; Arbitration Agreement; Setting Aside of an Arbitral Award; Enforcement of Arbitral Award; Evaluative & Facilitative Mediation; Conciliation; Administrative Tribunal; Lok-Adalat; Lokpal; Lok-Ayuktas.

A. Adversarial and Inquisitorial Systems

Every legal system in this world can be broadly classified into two models: Adversarial and Inquisitorial. Both the systems aim at dispensing justice, but they differ in their techniques of adjudication and justice delivery mechanisms. Therefore, this classification becomes important.

Let us understand the meaning of each of the systems and the main differences between them.

In an adversarial system, the parties in a legal proceeding develop their own theory of the case and gather evidence to support their claims. The parties are assisted by their lawyers who take a pro-active role in delivering justice to the litigants. The lawyers gather evidence and even participate in cross-examination and scrutiny of evidence presented by the other disputing party. The role of the judge/decision maker is rather passive as the judge decides the claims based solely on the evidences and arguments presented by the parties and their lawyers.

In an inquisitorial system, the judge/decision maker takes a centre-stage in dispensing justice. The role of the judge/decision maker is active as he/she determines the facts and issues in dispute. The judge/decision maker also decides the manner in which the evidence must be presented before the court. For example, the judge may decide for presentation of a specific form of evidence, i.e. oral (witness statement) or documentary (correspondence between the parties through letters/emails) or a combination of both. The judge then evaluates the evidence presented before him/her and decides upon the legal claims. Therefore, this model of adjudication is also known as the interventionist/investigative model. Furthermore, in such a system, less reliance is placed on cross-examination and other techniques often used by lawyers to evaluate evidences of their opposing counsel.

The adversarial system is generally adopted in common law countries. Major common law jurisdictions include the UK, U.S, Australia and India. On the other hand, continental Europe which follows the civil law system (i.e. those deriving from Roman law or the Napoleonic Code) has adopted the inquisitorial system.

Having understood the basic framework of functioning of the two models of legal systems, let us analyse their advantages and disadvantages.

The main advantages of an adversarial system include:

- The use of cross-examination can be an effective way to test the credibility of witnesses presented;
- The parties may be more willing to accept the results when they are given effective control over the process.

The disadvantages of an adversarial system are the following:

- The cost of the justice system falls upon the parties. This creates an in-built discrimination amongst the litigants. Parties with better resources are able to access justice by hiring competent lawyers and presenting sophisticated evidences which may not be immediately available for parties that lack these resources. Accessibility and affordability to justice are important challenges for the adversarial system of dispute resolution.
- The role of lawyers and the procedural formalities, e.g. cross examination may prolong the trial and lead to delays in several matters.
- Judges play less active role; a judge is not duty bound to ascertain the truth but only to evaluate the matter based on the evidences presented before him/her.

Peter Murphy in his book, **Practical Guide to Evidence** recounts an instructive example. A frustrated judge in an English (adversarial) court finally asked a barrister after witnesses had produced conflicting accounts, 'Am I never to hear the truth?' 'No, my lord, merely the evidence', replied counsel.

On the other hand, the advantages of an inquisitorial model include:

- The system offers procedural efficiency as the active role of judges prevents delays and prolonged trials.
- The system preserves equality between the parties as even the stronger party with more resources and expert lawyers may not be able to influence the judges.

The disadvantages of this model include:

- In an inquisitorial system, since the judge steps into the shoes of an investigator, he/she can no longer remain neutral to evaluate the case with an open mind.
- There may be a lack of an incentive structure for judges to involve themselves in proper fact finding.

Activity

- Evaluate the features of the Indian legal system- Is it adversarial or inquisitorial?
- Take four case studies and see if the model would/should change with the change in nature of the case such as civil, criminal. public interest litigation etc.

B. Introduction to Alternative Dispute Resolution

Meaning and Scope:

Alternative Dispute Resolution (ADR) system refers to the use of non-adversarial techniques of adjudication of legal disputes.

The history of ADR in India pre-dates the modern adversarial model of Indian judiciary. The modern Indian judiciary was introduced with the advent of the British colonial era, as the English courts and the English legal system influenced the practice of Indian courts, advocates and judges. Courts in India were established to have in place a uniform legal system on the lines of the English Courts. However, even before the advent of such formalistic models of courts and judiciary, Indian legal system was characterised by several native ADR techniques.

The Vedic age in India, witnessed the flourishing of specialised tribunals such as Kula (for disputes of family, community, tribe, castes, races), Shreni (for internal disputes in business, corporation of artisans) and Puga (for association of traders/commerce branches). In these institutions, interest-based negotiations dominated with a neutral third party seeking to identify the underlying needs and concerns of the parties in dispute. Similarly, 'People's courts' or 'Panchayat' continued to be at the centre of dispute resolution in villages.

A typical view of village panchayat in India

Did you Know?

The ancient position of ADR outside India was akin to the submission of disputes to the decision of private persons - recognised under the Roman Law by the name of Compromysm (compromise). Arbitration was a mode of settling controversies much favoured in the civil law of the continent. The Greeks attached particular importance to arbitration. The attitude of English law towards arbitration fluctuated from stiff opposition to moderate welcome. The Common Law Courts looked jealously at agreements to submit disputes to extra-judicial determination.

Source: Russell on Arbitration, 22ndEdn., 2003, p. 362, para 8-002

In the modern era, several new and sophisticated forms of ADR techniques have developed. The different forms of ADR models/techniques are discussed in the subsequent parts of the chapter.

Benefits of ADR

The ADR methods are speedier, informal and cheaper modes of dispensing justice when compared to the conventional judicial procedure. ADR provides a more convenient forum to the parties who can choose the time, place and procedure, for conducting the preferred dispute redressal process. Furthermore, if the dispute is technical in nature, parties have an opportunity to select the expert who possesses the relevant legal and technical expertise. It is interesting to note that ADR provides the flexibility to even refer disputes to non-lawyers. For example, several disputes of technical character e.g. disputes pertaining to the regulation of the construction industry are usually referred to engineers rather than lawyers.

ADR is also encouraged amongst the disputants to reduce delays and high pendency of court cases. The rise of ADR is further supported, as the law courts are confronted with following problems, such as:

1. The lack of number of courts and judges which creates an inadequacy within the justice delivery system;
2. The increasing litigation in India due to increasing population, complexity of laws and obsolete continuation of some pre-existing legal statutes;
3. The increasing cost of litigation in prosecuting or defending a case, increasing court fees, lawyer's fees and incidental expenses;
4. Delay in disposal of cases resulting in huge pendency in all the courts.

In the light of the apparent need and benefits provided by ADR, it has emerged as a successful alternative to court trials. Further, the rise of the ADR movement in India

indicates that it is contributing tremendously towards reviving the litigant's faith in justice delivery mechanisms.

Activity

'Any settlement before the estate was exhausted-would have provided greater benefit to the parties than interminable litigation'

Excerpt from- Jarndyce v. Jarndyce (a fictitious legal case in Charles Dickens' novel, The Bleak House).

Does ADR create a better model of dispute resolution than the adversarial techniques such as litigation? Analyse with reasons.

C. Types of ADR

1. Arbitration

Meaning:

Arbitration is a term derived from the nomenclature of Roman law. Arbitration is a private arrangement of taking disputes to a less adversarial, less formal and more flexible forum and abiding by judgment of a selected person instead of carrying it to the established courts of justice.

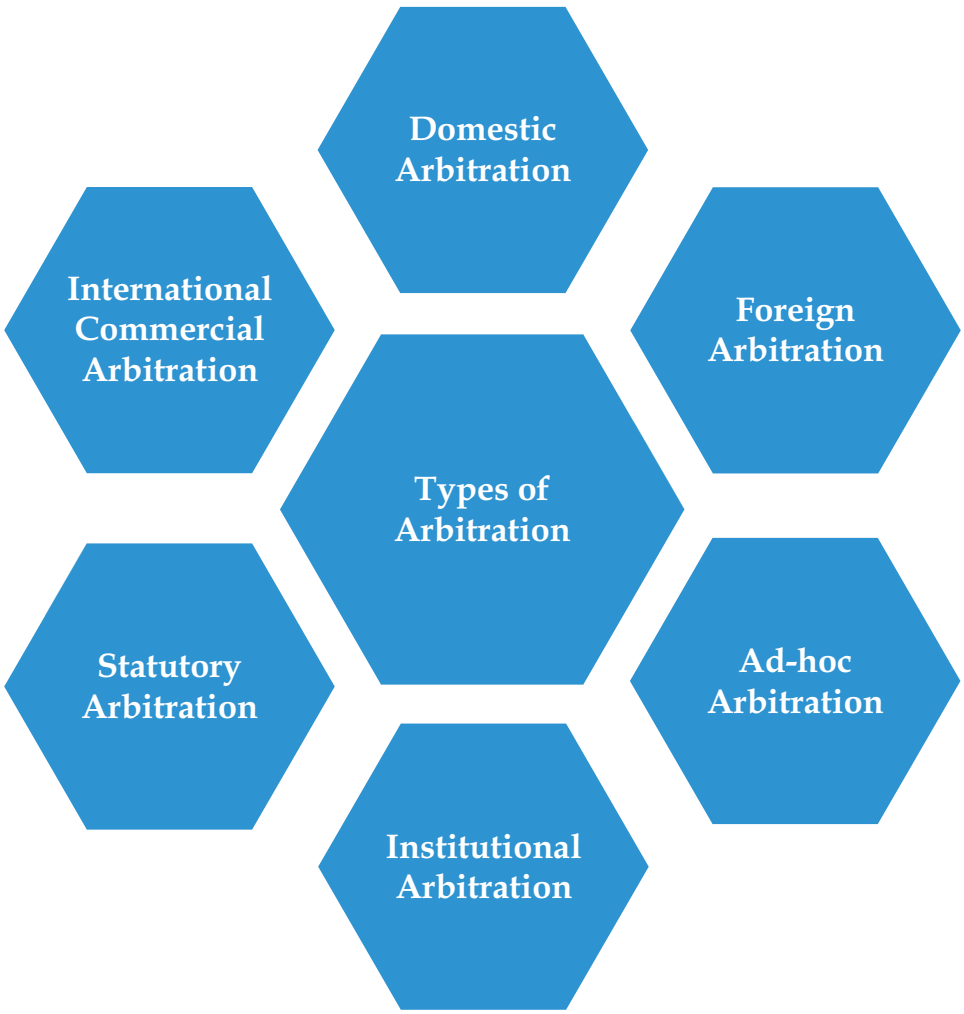
Process of arbitration

Arbitration can be chosen by the parties either by way of an agreement (Arbitration Agreement) or through the reference of the Court (Court Referral of Arbitration- See Glossary). The parties in an arbitration have the freedom to select a qualified expert known as an arbitrator. The process of dispute resolution through arbitration is confidential, unlike the court proceedings which are open to the public. This feature of arbitration makes it popular especially for commercial disputes where business secrets revealed during the process of dispute resolution are protected and preserved. Similarly companies can maintain their commercial reputation, as they can prevent the general public or their customers from discovering the details of their on-going legal disputes.

The decision rendered by an arbitrator is known as an arbitral award. Similar to a judgment given by a judge, the arbitral award is binding on the disputing parties. Once an arbitral award is rendered, it is recognised and enforced (given effect to) akin to a court pronounced judgment or order. In addition to an arbitral award, the arbitrator also holds power and authority to grant interim measures, like a judge in the court. These interim measures are in the nature of a temporary relief and may be

granted while the legal proceedings are on-going in order to preserve and protect certain rights of the parties, till the final award is rendered. Therefore, an arbitral award holds several similarities with a court order or judgment. However, unlike a judgment rendered by a judge in the court, the award does not hold precedential value (see the doctrine of stare decisis which means "stand by the decision") for future arbitrations. Arbitrators are free to base their decisions on their own conception of what is fair and just. Thus unlike judges, they are not strictly required to follow the law or the reasoning of earlier case decisions.

Types of Arbitration



- **Domestic Arbitration -** An arbitration with Indian parties, where the place of arbitration is in India and rules applicable are Indian.

- **Foreign Arbitration** - An arbitration where proceedings are conducted in a place outside India and the award is required to be enforced in India.
- **Ad-hoc Arbitration -** An arbitration which is governed by parties themselves, without recourse to a formal arbitral institution. It may be domestic or international in character.
- **Institutional Arbitration -** An arbitration where parties select a particular institution, which in turn takes the arbitration forward by selecting an arbitrator and laying out the rules applicable within an arbitration, e.g., mode of obtaining evidence, etc. There are several institutions to govern arbitration. Examples of prominent institutions of arbitration include, The London Chamber of International Arbitration (LCIA) which has its offices across the world, including New-Delhi, India.
- **Statutory Arbitration -** An arbitration which is mandatorily imposed on the parties by operation of a particular law or statute, applicable to them. For example, the Defence of India Act, 1971 is one such legislation that mandates a recourse to arbitration in case of any dispute arising within the Act.
- **International Commercial Arbitration -** An arbitration in which at-least one of the disputing parties is a resident/body corporate of a country other than India. Arbitration with the government of a foreign country is also considered to be an international commercial arbitration. This form of arbitration has been defined specifically under section 2(1)(f) of the Arbitration and Conciliation Act, 1996.

An overview of the laws on arbitration

The Arbitration and Conciliation Act of 1996 is the relevant legislation that governs the process of arbitration in India. The statute provides for an elaborate codified recognition of the concept of arbitration, which has largely been influenced by significant movements of judicial reforms and conflict management across the world. In this regard, a special reference must be made to an international convention entitled, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985. After the birth of this international treaty, the United Nations General Assembly, recommended that all countries must give due consideration to the said Model law, in-order to bring uniformity in the law and practice of international arbitration. The Indian Arbitration and Conciliation Act of 1996 is similarly modelled on the UNCITRAL model law.

Did you know?

The Arbitration and Conciliation Act, 1996 repealed several pre-existing Arbitration statutes such as The Arbitration Act, 1940; The Arbitration (Protocol and Convention) Act, 1937 and The Foreign Awards (Recognition and Enforcement) Act, 1961. Thus, arbitration has for long been a part of the Indian legal system.

The Arbitration and Conciliation Act, 1996 has ushered a new era of dispute resolution for domestic and commercial legal issues. On these lines, the Supreme Court of India has also affirmed that the Arbitration and Conciliation Act, 1996 was introduced in order to attract the 'international mercantile community'. The Supreme Court has thus emphasised that the Act should be interpreted and applied, keeping the commercial sense of the dispute in mind (Konkan Railways Corp. Ltd. v. Mehul Construction Co. (2000) 7 SCC 201).

Glossary of Terms

Arbitration agreement - An agreement whereby parties agree to submit their present or future disputes/differences to arbitration. This may be in writing or via other means of communication.

Court referral to arbitration - If a party to the dispute approaches the Court despite the presence of an arbitration agreement, the other party may raise a claim before the Court. The Court then must refer the dispute back to arbitration, if it has been previously agreed by the parties. This method of initiating arbitration is known as court referral to arbitration.

Statement of claim - The initial documents filed by the claimants enlisting the issues raised to be resolved in an arbitration.

Counter-claim/defense-Respondent's reply to the claim presented by the claimant.

Setting aside of an arbitral award - An arbitral award rendered in an arbitration may be struck down or invalidated by the courts. The grounds of such invalidation are limited to: incapacity of a party to enter into arbitration agreement in the first place, improper appointment of arbitrator, dispute falling outside the terms of the arbitration agreement, bias on the part of arbitrator, award violating public policy at large.

2. Administrative Tribunals

The 42nd Amendment Act, 1976 added Articles 323-A and 323-B to the Constitution of India. These articles empower the Parliament to set up tribunals for adjudication of specialised disputes. The range of disputes mentioned in the Constitution refers to:

- disputes pertaining to service conditions of the government officers,
- collection and enforcement of tax,
- industrial and labour disputes,
- matters concerning land reforms,

- elections disputes,
- ceiling on urban property, and
- production, procurement, supply and distribution of food-stuffs or other essential goods.

Thus the 42nd Amendment Act ushered the era of 'tribunalisation of Indian judiciary'. Further, the enactment of Administrative Tribunals Act, 1985 took the constitutional objective further and set-up the Central Administrative Tribunal (CAT) and State Administrative Tribunals.

The CAT was set up pursuant to the Act of the Legislature in 1985. The tribunals exercise jurisdiction of service matters of employees covered by it. The appeals against the orders of the administrative tribunals lie before the Division bench of the concerned High Court.

The tribunals are procedurally flexible and this flexibility increases their efficiency. For example, The Administrative Tribunals Act, 1985 allows the aggrieved persons to appear directly before the tribunals. The overall objectives of the tribunals are to provide speedy and inexpensive justice to the litigants. Since government is a major litigant in the courts and government related litigation has increased in the delay and pendency of litigation, such tribunals over the past two decades have significantly contributed in supplementing the role of the courts in adjudication of service disputes. The tribunals however are not meant to replace the Courts. This has been explained by the seven judge bench of the Supreme Court in L Chandra Kumar case [JT 1997 (3) SC 589]where it was held that tribunals would not take away the exclusive jurisdiction of the courts, and their decisions could be scrutinised by the Division bench of the High Courts.

One may also note that these administrative and state tribunals are not an original invention of the Indian political and legal system. Such tribunals are now well established in the member countries of the European Union and the United States.

Did you know?

- Today, CAT has 17 regular benches, 15 of which operate at the principal seats of High Courts and the remaining two at Jaipur and Lucknow.
- The tribunal consists of a Chairman, Vice-Chairman and Members.
- The members of the tribunal are drawn both from judicial as well as administrative streams so as to give the tribunal the benefit of expertise both in legal and administrative spheres.

Source: http://www.archive.india.gov.in/knowindia/profile.php?id=36

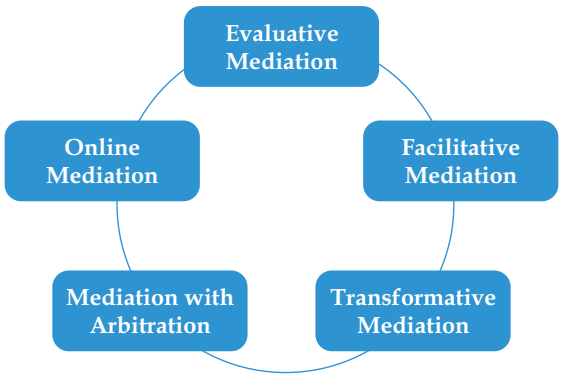
D. Mediation and Conciliation

Mediation: Meaning and Types

Mediation is a method of ADR in which parties appoint a neutral third party who facilitates the mediation process in-order to assist the parties in achieving an acceptable, voluntary agreement. Mediation is premised on the voluntary will of the parties and is a flexible and informal technique of dispute resolution.

Mediation is more formal than negotiation but less formal than arbitration or litigation. Unlike litigation and similar to arbitration, mediation is relatively inexpensive, fast, and confidential. Further, mediation and arbitration differ on the grounds of the nature of an award rendered. The outcome of mediation does not have similar binding like an arbitral award. However, though non-binding,these resolution agreements may be incorporated into a legally binding contract, which is binding on the parties who execute the contract.

Mediation can be classified into the following categories:



Evaluative mediation - Evaluative mediation is focused on providing the parties with an evaluation of their case and directing them toward settlement. During an evaluative mediation process, when the parties agree that the mediator should do so, the mediator will express a view on what might be a fair or reasonable settlement. The Evaluative mediator has somewhat of an advisory role in that s/he evaluates the strengths and weaknesses of each side's argument and makes some predictions about what would happen should they go to court.

Facilitative mediation - Facilitative mediators typically do not evaluate a case or direct the parties to a particular settlement. Instead, the Facilitative mediator facilitates the conversation. These mediators act as guardian of the process, not the

content or the outcome. During a facilitative mediation session the parties in dispute control both what will be discussed and how their issues will be resolved. Unlike the transformative mediator, the facilitative mediator is focused on helping the parties find a resolution to their dispute. The facilitative mediator further provides a structure and agenda for the discussion.

Transformative mediation - Transformative mediation practice is focused on supporting empowerment and recognition shifts, by allowing and encouraging deliberation, decision-making, and perspective-taking. A competent transformative mediator practices with a micro-focus on communication, identifying opportunities for empowerment and recognition as those opportunities appear in the parties' own conversations, and responding in ways that provide an opening for parties to choose what, if anything, to do with them.

Mediation with arbitration - Mediation has sometimes been utilized to good effect when coupled with arbitration, particularly binding arbitration, in a process called 'mediation/arbitration'. The process begins as a standard mediation, but if mediation fails, the mediator becomes an arbiter.

This process is more appropriate in civil matters where rules of evidence or jurisdiction are not in dispute. It resembles, in some respects, criminal plea-bargaining and Confucian judicial procedure, wherein the judge also plays the role of prosecutor.

Despite their benefits, mediation/arbitration hybrids can pose significant ethical and process problems for mediators. Many of the options and successes of mediation relate to the mediator's unique role as someone who wields no coercive power over the parties or the outcome. The parties' awareness that the mediator might later act in the role of judge could distort the process. Using a different individual as the arbiter addresses this concern.

Online Mediation - Online mediation employs online technology to provide disputants access to mediators and each other despite geographic distance, disability or other barriers to direct meeting.

Process of Mediation

The neutral third party facilitating the process of mediation is known as a mediator. Mediation does not follow a uniform set of rules, though mediators typically set forth

rules that the mediation will observe at the outset of the process. Successful mediation often reflects not only the parties' willingness to participate but also the mediator's skill. There is no uniform set of rules for mediators to become licensed, and rules vary by state regarding requirements for mediator certification.

Broadly speaking, mediation may be triggered in three ways:

(i) Parties may agree to resolve their claims through a pre-agreed mediation agreement without initiating formal judicial proceedings (pre-litigation mediation).

(ii) Parties may agree to mediate, at the beginning of formal court proceedings (popularly known as court referrals).

(iii) Mediation may be taken recourse of, after formal court proceedings have started, or even post trial, i.e. at the appellate stage.

Under the Indian law, contractual dispute (including money claims), similar disputes arising from strained relationships (from matrimonial to partnership), disputes which need a continuity of relationship (neighbour's easement rights) and consumer disputes, have been held to be most suited for mediation.

For example, a suburban homeowner might find that the formal legal system offers no realistic way to deal with his neighbour's overly bright driveway lights that shine in his bedroom window. Such disputes however can be mediated. Mediation gives the participants an opportunity to raise and discuss any issues they might wish to settle. For example, it might turn out that the neighbour lit his driveway because the homeowner's dog went on his lawn, or because the homeowner's tree was encroaching upon his property. Because mediation can handle any number of outstanding gripes or issues, it offers a way to discuss (and solve) the problems underlying a dispute and create a truly lasting peace.

The Supreme Court of India in its judicial decision has expressly clarified the ambit of mediation. According to Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., [(2010) 8 SCC 24] representative suits, election disputes, criminal offenses, case against specific classes of persons (minors, mentally challenged) have been excluded from the scope of mediation.

Activity

Identify a situation in which you would choose mediation as your preferred method of dispute resolution. Why is mediation the best method in this situation? What are the potential benefits and drawbacks of mediation in this situation?

Conciliation: Meaning

Conciliation is a process similar to mediation as parties out of their own free will appoint a neutral third party to resolve their disputes. The key difference between mediation and conciliation lies in the role of the neutral third party. A mediator merely performs a facilitative role and provides platform for the parties to reach a mutually agreeable solution. The role of a conciliator goes beyond that of a mediator. A conciliator may be interventionist in the sense that he/she may suggest potential solutions to the parties, in-order to resolve their claims and disputes.

Laws on Mediation and Conciliation

Both Mediation and Conciliation are governed by Section 89, a provision inserted by the 2002 amendment of the Civil Procedure Code, 1908 (for short, "CPC"). The Code is the primary legislation governing the method, procedure and legal practice of civil disputes. Section 89 of the Code only deals with court referred mediation. Pre-litigation mediation is not yet governed by any law in India.

Similarly, conciliation only finds a reference in Section 89, Civil Procedure Code, 1908. The process and methods within conciliation have been described in the Arbitration & Conciliation Act, 1996. Further, the Industrial Disputes Act, 1947 also provides for conciliation as a viable means of resolving disputes in the labour sector.

E. Lok Adalat

The concept of Lok Adalat (People's Court) is an innovative Indian contribution to the global legal jurisprudence. The institution of Lok Adalat in India, as the very name suggests, means, People's Court."Lok" stands for "people" and the term "Adalat" means court. India has a long tradition and history of such methods being practiced in the society at grass roots level.

In ancient times the disputes were referred to "panchayats" which were established at village level. Panchayats used to resolve the dispute through arbitration. It has proved to be a very effective alternative to litigation. This very concept of settlement of dispute through mediation, negotiation or through arbitral process known as decision of "Nyaya-Panchayat" is conceptualized and institutionalized in the philosophy of Lok Adalat. It involves people who are directly or indirectly affected by dispute resolution. The evolution of movement called Lok Adalat was a part of the strategy to relieve heavy burden on the Courts with pending cases and to give relief to the litigants who were in a queue to get justice.

The modern institution of Lok Adalat is presided over by a sitting or retired judicial officer such as the chairman, with usually two other members- a lawyer and a social worker. A Lok Adalat has jurisdiction to settle any matter pending before any court, as well as matters at pre-litigative stage, i.e. disputes which have not yet been formally instituted in any Court of Law. Such matters may be in the nature of civil or non-compoundable criminal disputes. The salient features of Lok Adalat are participation, accommodation, fairness, voluntariness, neighbourliness, transparency, efficiency and lack of animosity.

The benefits of Lok Adalat include:

- There is no court fee and even if the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat.
- There is no strict application of the procedural laws and the disputing parties can directly interact with the judges.
- The decision of Lok Adalat is binding on the parties and its order is capable of execution through legal process.

Did you know ?

The first Lok Adalat was held on March, 14, 1982 at Junagarh in Gujarat. Lok Adalats have been very successful in settlement of claims including- motor accident claims, matrimonial/family disputes, labour disputes, disputes relating to public service such as telephone, electricity, bank recovery cases etc.

An overview of laws on Lok Adalat

Pursuant to Article 39-A of the Constitution of India, the Parliament has enacted The Legal Services Authorities Act, 1987. The Act provides for various provisions of dispute settlement through Lok Adalat. The Act constitutes legal services authorities to provide free legal aid and competent legal services to the weaker sections of the society. In 2002, the Act was amended to establish permanent Lok Adalats for public utility services.

Furthermore, the National Legal Services Authority (NALSA), a statutory body constituted under the National Legal Services Authorities Act, 1987 is responsible for laying down policies and principles for making legal services under the Act and frame the most effective and economical schemes for legal services. NALSA is engaged in providing legal services, legal aid and speedy justice through Lok Adalats. It also disburses funds and grants for implementing legal aid schemes, literacy camps

and programs. Similarly, the State Legal Services Authorities and District Legal Services Authorities have been constituted in every state capital and districts respectively.

Activity

'I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter men's heart. I realised that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that the large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul' (Gandhi)

In the light of the aforesaid quote, evaluate the role of lawyers as social engineers. What role do ADR techniques and institutions such as Lok Adalat play in this respect?

F. Ombudsman

Meaning and Role

An indigenous Swedish, Danish and Norwegian term, Ombudsman is etymologically rooted in the word *umboðsmaðr*, essentially meaning "representative".

Whether appointed by a legislature, the executive, or an organization, the typical duties of an ombudsman are to investigate complaints and attempt to resolve them, usually through recommendations (binding or not) or mediation. Ombudsmen sometimes also aim to identify systemic issues leading to poor service or breaches of people's rights. At the national level, most ombudsmen have a wide mandate to deal with the entire public sector, and sometimes also elements of the private sector (for example, contracted service providers). Further redress depends on the laws of the country concerned, but this typically involves financial compensation.

The Government of India has designated several ombudsmen (sometimes called Chief Vigilance Officer (CVO)) for the redress of grievances and complaints from individuals in the banking, insurance and other sectors being serviced by both private and public bodies and corporations. For example, the CVC (Central Vigilance Commission) was set up on the recommendation of the Santhanam Committee (1962–64). CVC has been conceived to be the apex vigilance institution, free of control from any executive authority, monitoring all vigilance activity under the Central Government and advising various authorities in Central Government organizations in planning, executing, reviewing and reforming their vigilance work.

The major advantage of an ombudsman is that he or she examines complaints from outside the offending state institution, thus avoiding the conflicts of interest inherent in self-policing. However, the ombudsman system relies heavily on the selection of an appropriate individual for the office, and on the cooperation of at least some effective official from within the apparatus of the state.

G. Lokpal and Lokayukta

Meaning and Origin

A Lokpal (caretaker of people) is an ombudsman in India. The Lokayukta (appointed by the people) is a similar anti-corruption ombudsman organization in the Indian states.

The institutions of Lokpal and Lokayukta were given formal recognition by the passing of The Lokpal and Lokayukta Act, 2013. The legislation aims to combat acts of bribery and corruption of public-servants—a term that has been given a fairly wide interpretation in the Act. The Act applies to the public servants in and outside India. It is important to note that the Act includes in its purview even the current and ex-prime ministers of India except in matters pertaining to international relations, external and internal security, public order, atomic energy and space. At least two-thirds of the members of Lokpal must approve of such inquiry. It further provides that any such inquiry shall be held in camera and if the Lokpal comes to the conclusion that the complaint deserves to be dismissed, the records of the inquiry shall not be published or made available to anyone.

Besides the Prime Minister, it brings within its purview any person who is or has been a Minister of the Union and any person who is or has been a Member of either House of Parliament. The Lokpal shall not inquire into any matter involved in, or arising from, or connected with, any such allegation of corruption against any Member of either House of Parliament in respect of anything said or a vote given by him/her in Parliament or any committee thereof covered under the provisions contained in clause (2) of Article 105 of the Constitution.

With respect to bureaucracy, it includes any Group 'A', 'B','C' or 'D' official or equivalent from amongst the public servants defined in the Prevention of Corruption Act, 1988 when serving or who has served in connection with the affairs of the Union.

The Act also provides for the manner in which the public-servants must declare their assets.

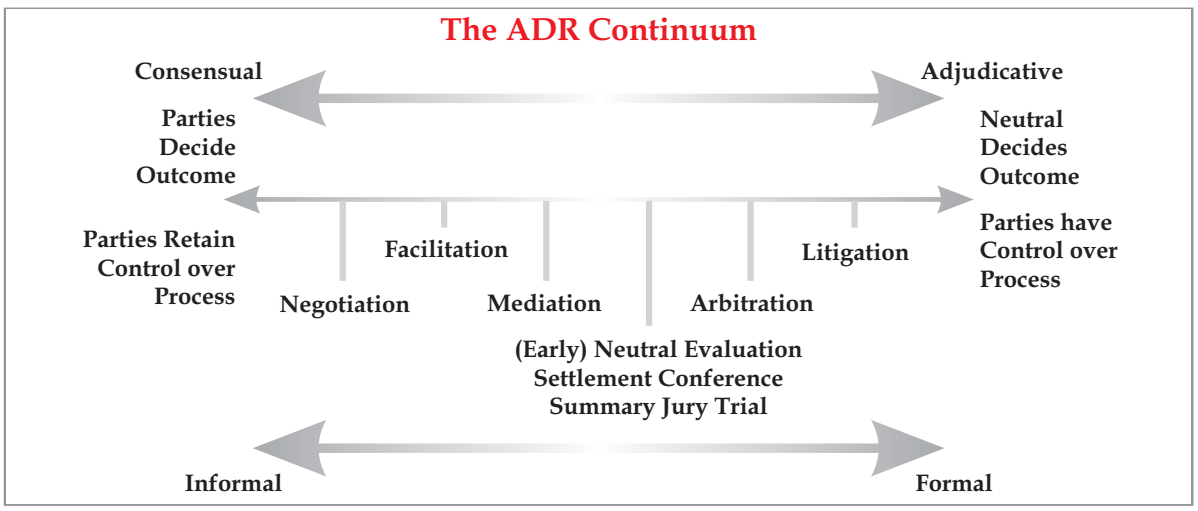
According to the Act, the Lokpal shall consist of:

- A chairperson who has been a Chief Justice of India or is or has been a Judge of the Supreme Court or is an eminent judicial member of impeccable integrity and outstanding ability having special knowledge and expertise of not less than 25 years in matters relating to anti-corruption policy, public administration, vigilance or finance.
- Further, the total members of Lokpal shall not exceed 8, out of whom 50% shall be Judicial Members.

Furthermore, the powers of the Lokpal are extensive, and equivalent to the superintendence, inquiry and investigative powers of the police and the Central Vigilance Commission. The Lokpal shall consist of an inquiry and prosecution wing to take necessary steps in prosecution of public servants in relation to offences committed under the Prevention of Corruption Act, 1988. Further, Lokpal can even recommend the government to create special courts to decide cases arising from the Prevention of Corruption Act, 1988.

Likewise, the Lokpal and Lokayuktas Act, 2013 provides for the establishment of Lokayukta at every state in-order to deal with complaints of corruption against public functionaries. The Act provides that all states must institute Lokayuktas within one year of from the date of the commencement of The Lokpal and Lokayuktas Act, 2013.

It is important to note that even before the enactment of this Act, some states in India, for example, Delhi, Karnataka, Kerala, etc had the institutions of Lokayuktas in place.



Source: Adapted from New York State Unified Court System, http://www.nycourts.gov/ip/adr/images/continuum2.jpg

Did you know?

Only 19 Indian States have Lokayukta. Maharashtra was the first State to introduce the institution of Lokayukta in 1971. There are no Lokayuktas in Arunachal Pradesh, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tamil Nadu, Tripura and West Bengal. The process to set up Lokayukta in Goa is in progress.

Activity

1. Analyse the picture above. Based on your learnings in the module, compare and contrast the features of different ADR techniques.
2. Learn more about the following techniques:
   - Med-Arb;
   - Early neutral evaluation;
   - Mini-trials, and
   - Summary jury trials

H. Exercise

I. Questions

1. T&F

   a) The adversarial system of adjudication is interventionist in nature.

   b) The judge/decision maker assumes a police-like role in an inquisitorial model.

   c) Judges may be more influenced by parties in an adversarial rather than an inquisitorial system of adjudication.

2. What is arbitration? Describe its types.
3. Define the following terms: arbitration agreement; enforcement of arbitral award; setting aside of arbitral award.
4. Define Mediation. What are its types?
5. What are the key differences between mediation and conciliation?
6. What are the different ways in which mediation can be triggered in a given dispute/legal claim?

II. Essay Questions

1. Discuss the advantages and disadvantages of the two models of adjudication within a legal system? Which model do you favour? Explain with reasons.

2. What are the advantages of ADR over traditional forms of dispute resolution? Discuss the similarities and differences between arbitration and litigation.

3. Compare and Contrast the processes of Arbitration, Mediation and Conciliation. Highlight the salient similarities and differences amongst them. Which ADR method appeals to you the most- Explain with reasons?

4. What is the meaning of Ombudsman? Can you identify equivalent institutions within India? Discuss their roles and limitations.

5. Trace the progress and development of the contemporary Lokpal movement in India.