

ALTERNATE DISPUTE RESOLUTION IN CRIMINAL JUSTICE SYSTEM*** NOMA TARIQ****Introduction**

The traditional legal system in India is nowadays suffering from congestion due to pendency of multiple disputes. Alternative Dispute Resolution mechanisms are in addition to courts and complement them. The procedures used in Alternative Dispute Resolution are flexible and informal in contrast to the formal and rigid procedures followed in the ordinary process of dispute resolution in courts of law. These processes thus facilitates access to justice.¹In working out a plan for Alternative Dispute Resolution a scheme should be such that it must provide a remedy for the problems that the traditional litigation faces and must also ensure that the basic tenets and pillars of justice do not disintegrate in the name of Alternative Dispute Resolution Mechanism. All Alternative Dispute Resolution mechanisms can be divided and sub divided into various categories and as a matter of logic, it follows that it is not viable to compile an exhaustive list. The advance methods of Alternative Dispute Resolution techniques are Negotiation, Arbitration, Mediation and Conciliation and their hybrids.²

Negotiation is a non-binding process involving direct interaction of the disputing parties wherein a party offers a negotiated settlement drawn on an objective evaluation of both parties.³ Mediation is a process where a third party tries to resolve a dispute by determination of interest and has no authority to make a binding decision. Conciliation on the other hand refers to a process wherein the parties to a dispute consent to use the service of a conciliator who interacts with both the parties separately with an aim to settle the dispute. Arbitration, according to Black's Law Dictionary⁴, is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding. Alternative Dispute Resolution Mechanisms are also becoming key tools for improving the poor state of criminal justice delivery. The poor states of civil and criminal justice sectors in India calls for the adoption of mechanisms and practices that will help reduce the case load. Alternative Dispute Resolution processes, if fully mainstreamed can

¹ Rubin, J.Z., Pruitt, D.G., Kim, S.H. *Social conflict: Escalation, stalemate and settlement* 89 (1994).

² B.R. Agarwal, *Our Judiciary*, 152-155, 158 (3rd ed.,1993) ; Nishita Medha, *Alternative Dispute Resolution in India- A study on concepts, Techniques, Provisions, Problems in Interpretation and solutions*, 10-22 (2006) available at http://www.fdrindia.org/old/publications/AlternativeDisputeResolution_PR.pdf last visited on 29/04/2016

³ Dr. Anupam Kurlwal, *An Introduction to Alternative Dispute Resolution (ADR)*, 16 (2011).

⁴ Black's Law Dictionary, 119 (4th ed., 1891)

provide the necessary relief. There is no doubt that adequate legal frameworks already exist for the use of Alternate Dispute Redressal in civil cases but the applicability in criminal cases in India is still very much controversial as in order to maintain rule of law and justice in a civilised society there are certain basic steps that need to be taken by the state. Keeping in mind the pendency of disputes the Law Commission of India in its 142nd Report⁵ suggested reform which included introduction of Plea Bargaining as an alternative to resolving criminal disputes and to give effect to this report the draft Criminal Law (Amendment) Bill, 2003 was introduced in the Parliament.⁶ This paper seeks to look into other resolution mechanism which may be helpful in resolving criminal disputes and will be complementary to the traditional courts.

Alternate Dispute Resolution: A solution to Litigation explosion

Alternate dispute resolution mechanisms are particularly needed today because of the explosion of litigation in our courts.⁷ In the case of *Trustees for the Port of Madras v. Engineering Construction Corporation*⁸, the Honourable Supreme Court expressed its concern about protracted, time consuming, and expensive court trials. With the need and existence of specialised tribunals, Alternate dispute Resolution mechanisms are further helping to disburden the traditional courts and deliver speedy justice. Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to the formation of The Arbitration Act.⁹ Further, in connection with exasperating and atrociously expensive court trials, *Justice D.A Desai* of the Honourable Supreme Court in *Ramji Dayanara & Sons (P) Ltd v. Invest Import*¹⁰ expressed his anguish by stating that one should arbitrate and not litigate. Arbitration being a mode of litigation by a judge of the choice of the parties was considered preferable to adjudication of disputes by courts. Alternate Dispute Resolution mechanisms provide solutions that a traditional court of law may not be able to offer. Firstly, in many cases a major advantage is

⁵ 142nd Law Commission of India Report, *Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any Bargaining* 1991

⁶ State of Uttar Pradesh v Chandrika 2000 Cr.L.J 384

⁷ Avtar Singh Chadha v MCD (1998) 2 RAJ 111; A Ramakrishna v Union of India, CPWD, (2004) 3 RAJ 554

⁸ AIR 1995 SC 2423

⁹ AIR 1981 SC 2075

¹⁰ AIR 1981 SC 2085

that the person adjudging the matter is an expert in the field of the dispute such that the entire procedure can be conducted even without the intervention of legal advisers or other representatives. Secondly, many disputes may be resolved on the basis of documents alone and do not require a hearing. Thirdly, the risk of costs and delays is minimal. Fourthly, the hearing when it takes place and any preliminary meetings can be held in the place of the parties' choice and lastly, parties can represent themselves and can choose to be represented by anyone of their own choice.¹¹ It is disheartening to note that the current case overload in the criminal justice system and the consequent over congestion of the prisons can be attributed largely to this attitude that every case must go through the whole of the criminal trial process. Alternate Dispute Resolution mechanisms have to be looked up with all earnestness so that the litigant public has faith in the speedy process of resolving their disputes by this process.¹² They are more concerned about the future than passing judgment on past errors. The Honourable Supreme Court, in its judgements, on various occasions has stated that by speedy trials we mean reasonably expeditious trial is an integral and essential part of fundamental right to life and liberty enshrined in Article 21.¹³ Thus, irrespective of the nature of the dispute, it is the right of an individual to get speedy justice irrespective of him being at fault or being innocent.

Arguments against applicability of Alternate Dispute Resolution mechanisms to Crimes: Privatizing Public Harm?

Success of Alternate Dispute Resolution mechanisms with respect to civil matters all across the world has been witnessed over the past few decades. With growing application of Alternative Dispute Resolution mechanisms around the world, many scholars and philosophers have given their views both for and against the applicability of these procedures. While there is no doubt about the general categorization of Alternate Dispute Resolution processes, much controversy still exists as to the proper place of these processes in criminal justice administration¹⁴ as most of the traditional theories of criminal justice, on the other hand, view criminal offending as largely a matter between the offender and the state.¹⁵ In this

¹¹ Justice Dr. B.P. Saraf, *Law of Arbitration and Conciliation*, 45 (4th ed., 2006)

¹² State of J & K v Dev Dutt Pandit (1999) 7 SCC 339, 349

¹³ L Babu Ram v Raghunathji Maharaj and ors AIR 1976 SC 1734

¹⁴ KN Nwosu, *Role of Traditional Rulers and Community Leaders in Criminal Justice Administration*. 181(ed.,2010).

¹⁵ R Sarre and K Earle, *Restorative Justice in R Sarre and J Tomaino* (eds), *Key Issues in Criminal Justice* (2004) 144, 145.

traditional model, crime is defined in legal terms and is removed from its moral, social and political context.¹⁶ In contrast, restorative justice views crime as the violation of one person by another, and focuses on problem solving, dialogue, repentance and forgiveness.¹⁷

One argument against it is that Alternative Dispute Mechanism advocates naively painted “settlement as a perfect substitute for judgement” by trivializing the remedial role of lawsuits and privatizing disputes at the cost of public justice.¹⁸ Scholars also claim that these mechanisms leave the society at large remedy less while they provide a remedy only to the victim. However, on the other hand, some jurists also argue that a restorative Alternative Dispute Resolution system is what is needed to address the realities of social foundations of criminal jurisprudence while holding high public norms as well as individual responsibility. This argument is against the scholars who believe that Alternate Dispute Resolution mechanisms lead to privatization of disputes thereby failing to deliver justice to the public at large who vest their rights in the state.

Alternate Dispute Resolution mechanism promises a more accessible, harmonious, and efficient form of justice through which parties can maintain control while dealing with the conflict.¹⁹ An essential form of Alternate Dispute Resolution which ensures that these ideals of social norms and individual liability are taken care of are the Victim- Offender mediation programmes that hugely focus on restitution and reconciliation between the parties. Courts deal with only presenting complaints while Mediation deals with underlying causes therefore, it strives for permanent solutions between the parties.²⁰ The Alternate Dispute Resolution mechanisms can be more efficient however the fact that they might fail cannot be negated. No resolution mechanism can be said to be absolute as there always lies an appellate authority unless the decision is by the Apex Court. It is much obvious that one party cannot gain without the other party being at loss and this is when the party at loss becomes again aggrieved and the process goes on. The success of Alternate Dispute Resolution mechanisms depends on the ideology of the disputants i.e. if the disputants have a more court oriented idea of dispute resolution they might consider the mediators/arbitrators/conciliators as impotent

¹⁶ Ibid at 148.

¹⁷ Ibid

¹⁸ Owen M. Fiss, *Against settlement*, 93, Yale LJ., 1073 (1984).

¹⁹ Mark D Bennett & Michele S.G.Harmann, *The Art Of Mediation* 6 (1996).

²⁰ D. Aaronson, B. Hoff, P. Jaszi, N. Kittrie, *The New Justice: Alternatives to Conventional Criminal Adjudication* 34 (1975); J. Cratsley, *Community courts: Offering alternative dispute resolution within the judicial system*, 3 Vermont L. Rev. 1, 14 (1978); F. Dellapa & D. Weiss, *The race to the courthouse*, 172, 178 (1977); Ford Foundation; B. Hoff, *Arbitration as an alternative to criminal courts, final evaluation report*, 7(1974); F. Sander, *Report on the National Conference on Minor Disputes Resolution* 1 (1977); Touche Ross & Co., *Evaluation Report on the Urban Court Program* II-1 (1977); A. Weisbrod, *Alternatives to formal judicial process*, 2,180 (1977).

judges to resolve their matter.²¹ Further, the success also depends on the feasibility of the remedy expected. If the remedy sought for is impractical then in the opinion of the disputants the mechanism might not be useful but the law cannot ensure and serve everyone's interest. The disputants will be more relaxed and open during the proceedings of an Alternate Dispute Resolution mechanism than they would be in a court of law.²²

The Arbitration and Conciliation Act, 1996 under Section 2(3) provides that this part shall not affect any other law in force by virtue of which certain disputes may not be submitted to arbitration. This includes matters pertaining to criminal proceedings excepting matters relating to compoundable offences.²³ Further, in a landmark case decided by the Honourable Supreme Court it was held that referring the disputes to arbitration is not an effective substitute for a criminal prosecution when the disputed act is an offence.²⁴ However, Plea bargaining which is the process whereby an accused person and the prosecutor enter into negotiation towards an agreement under which the accused will enter into a plea of guilty in exchange for a reduced charge or a favourable sentence recommended to the Judge by the prosecutor²⁵ is a well-accepted and constitutionally recognised mechanism. The United States Supreme Court affirmed the constitutional validity of plea bargaining in America in the following words:

*The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of Judges and court facilities.*²⁶ This is a well-recognised principle in our Indian Legal system as well under the Criminal Procedure Code. This disputing fact here is that if plea-bargaining is a constitutionally valid form of resolving a dispute then why would criminal proceedings be exempted from being dealt under Arbitration mechanisms.

²¹ J. Kurczewski & K. Frieske, *The Social Conciliation Committees in Poland*, 76 (1975).

²² William L. F. Felstiner and Lynne A. Williams, *Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations*, 2, *Journal of Law and Human Behaviour*, 223-244 (1978)

²³ Justice B.P.Saraf, *Law of Arbitration and Conciliation*, 154 (4th ed., 2006).

²⁴ *Trisuns Chemical Industry v Ranesh Agarwal* (1998) 8 SCC 686; *S.W. Palanitkar V State of Bihar* (2002) 1 SCC 241

²⁵ A Ibidapo – Obe, 'Restorative Justice and Plea Bargaining Practices: A Tilt toward Customary Criminal Justice'. In: KN Nwosu, (ed), *Dispute Resolution in the Palace*, 226,(2010).

²⁶ *Santobello v. New York*, [1971] 404 US 257 (The U.S Supreme Court)

Alternate Dispute Resolution – As a justice movement for victims?

Restorative Justice is in essence present in most Alternative Dispute Resolution mechanisms and it is a process of whereby victims, offenders, and communities are collectively involved in resolving how to deal with the aftermath of an offence and its implication for the future.²⁷

These programmes focus more on the consequences of the acts of the criminal rather than trial and punishment of the offender.²⁸ The underlying essence is to address some fears or concerns of the victim and to bring the offender in close experience with the extent of the harm caused by his conduct on a fellow citizen. In our criminal jurisprudence we believe that a person is innocent until proved guilty. The onus and burden of proof which the law places so heavily on the prosecutor sometimes provide an academic shield for the offender to escape justice. In the process, the moral and ethical essence of crime is lost due to legal technicalities. Even where the offender knows that he is guilty of the allegations, it is normal for him to resort to the legal rule that “he who alleges must prove” and hence escape justice by technicalities. Persons, who should have had their charges speedily and expeditiously disposed on a plea of guilty, especially when they truly and legally committed the offence charged, now suffers more physical, emotional and psychological damage in the course of a protracted and almost endless trial on a plea of not guilty.

This paper is not in any way promoting any attempt to force the accused individuals to admit guilt if they are innocent, it must always be noted that plea of guilty by an offender is a legitimate legal option open to an accused in a criminal case but it is hardly resorted to and thereby it puts the victim through another traumatic series of events which cannot be undone by any authority. There are numerous instances where the victim and the offender may have to continue in some form of relationship after the criminal case has been disposed. Thus integrating reconciliation as restorative justice does help such future relationship.

Mechanisms like mediation make the redressal mechanism highly personalised. Sometimes the victims feel powerless and twice victimised, once by the offender and again by the uncaring criminal justice system that does not have time for them. Offenders rarely understand or are confronted with the human dimension of their criminal behaviour—that victims are real people and not only objects to be abused. Offenders have many

²⁷ DO Omale, *Understanding Restorative Justice: A Handbook for Criminal Justice Stakeholders*, 10 (2005)

²⁸ Odoh Ben. Uruchi, *Creative Approaches to Crime: The Case for Alternative Dispute Resolution (ADR) in the Magistracy in Nigeria*, 36, *Journal of Law, Policy and Globalization* (2015).

rationalizations for their actions against others.²⁹ However, replication of the victim-offender mediation model requires effective community organizing and program development skills. Most importantly, it requires a deep commitment to restorative principles of justice that empower crime victims and their offenders to resolve their conflict and to let go of the victimization experience.³⁰ However, an argument against this is that in mediation the parties have the freedom to agree as they please and the neutral third party decides nothing, nor imposes his view of what a fair settlement should be. Mediation is not primarily a search for truth or justice so much as for party accommodation.³¹ In countries like Canada, England, Finland and even in the United States, the system of mediation is being used to resolve dispute particularly disputes related with juvenile offenders.³²

Reintegrating the Offender into the society.

Restorative justice seeks to fully reintegrate the offender back into the society in a practical and realistic manner. Restorative justice de-emphasizes punishment and stigmatization of offenders.

Instead, they are given opportunity to continue to see themselves as useful members of the society who can still make positive contributions towards the common good. Using disposal options such as community service, vocation/training, compulsory education and other forms of constructive engagement, the programmes offer offenders real and genuine opportunity of rebuilding themselves materially, emotionally, and psychologically. With a well thought out and professionally implemented restorative justice scheme, a good number of citizens languishing in detention today with no real prospect of reforms can be engaged in some form of productive activity without compromising the integrity of the criminal justice system and the security of the state. The irony is that restorative justice scheme will cost less than what is presently being spent on bogus programmes of prison decongestion. Indian prisons are now crammed with prisoners and in many jails the amenities designed are far less in number than the inmates and these are now being shared disproportionately these inmates.³³ Overcrowding

²⁹ Mark S. Umbreit, *Crime Victims and Offenders in Mediation: An Emerging Area of Social Work Practice*, 38, *The Oxford Journal of Social work*, 69-73 (1993).

³⁰ *Ibid*

³¹ Tom Arnold, *Alternate Dispute Resolution*, 215 (1993)

³² Peggy L. Chown, JD and John H Parham, *Can we talk? Mediation in Juvenile Criminal Cases*, available at <http://www.lectlaw.com/filescjs08.htm> last visited on 28/04/2016

³³ State of Gujarat V Hon'ble High Court Of Gujarat AIR 1998 SC 3164

may be taken care of by taking recourse to alternatives which can impose other sentences based on the severity of the offence.³⁴ This paper is in no way negating the types of punishments as recognised under the Chapter II of The Indian Penal Code but is trying to emphasise on the applicability of the principle of sentencing while it comes to the deciding of the fate of an offender rather than resorting to imprisoning the offender as a matter of rule.

Conclusion

Any debate on the theories of Punishment and the Indian Legal system would be concluded with the result that Indian Legal system follows a mixture of deterrence, retributory, reformatory and preventive theory of punishment. There can be no specific answer as to which theory can be strictly applicable to our legal system. The various methods of Alternate Dispute Resolution employ the same theories and do not in any way seek to employ any other theory which is alien to our legal frame-work. Thus, integrating these Theories of Justice can be the only amicable solution to issues that our judiciary has to deal with. Indian legal system has been evolving and striving towards improvement ever since its inception and it is very open to positive changes which lead to betterment in terms of delivering justice. Thus, the introduction of Alternate Dispute Resolution Mechanism to the criminal justice system might sound atypical but it will nonetheless deliver results. One important proponent of the application of Alternate Dispute Resolution techniques to criminal ‘disputes’ was *Nils Christie*, a Professor of Criminology from Norway, who asserted that ‘conflicts become the property of lawyers’ and that formal legal processes rob individuals of the right to full participation in the dispute resolution process.³⁵

Christie noted that:

³⁴ Rama Murthy V State of Karnataka AIR 1997 SC 1739 at p 1745

³⁵ N Christie, ‘Conflicts as Property’, *British Journal of Criminology* 1, 4 (1977).

The key element in a criminal proceeding is that the proceeding is converted from something between the concrete parties into a conflict between one of the parties and the state ... The one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena ... She or he is a sort of double loser; first, vis-à-vis the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important encounters in life. The victim has lost the case to the state.³⁶

This paper proposes the application of alternate mechanisms to the criminal justice system. The existence and importance of the traditional courts cannot be negated in any way as they are fundamental in administration of justice and are the guardians of the rights of the citizens. Offences vary in the degree of harm caused and the rights that have been violated by the offenders and this must be taken into account while determining whether a dispute can be resolved by any alternate mechanism or not.

As proposed, restorative justice contains emotional and psychological elements of both retributive and rehabilitative justice...On core elements of justice aims and purposes (example to punish, rehabilitate, provide restitution, repair harm), the oppositional contrast is not appropriate.³⁷

Compared to its civil counterpart, the use of Alternate Dispute Resolution mechanisms in resolving criminal disputes has not been extensively studied, practiced, or institutionalized. This paper through the aforementioned reasons suggests the applicability of these mechanism in order to meet the required concerns of the citizens which the traditional courts have failed to take into account due to over burdening and paucity of time. Disputes concerning the interest of a large scale audience for example environmental issues cannot be dealt with an alternate method as the interest involved is not just of two parties but of the society at large.

As opined by the Law Commission in the 142nd Report it does appear that the rate of acquittals in our criminal trials is very high. The principal reason for the acquittals, which was rightly advanced by several, Session Judges, is the long delay involved in taking up the trials. It was brought to the notice of the Commission that during the interregnum when

³⁶ *Ibid* at 3

³⁷ K Daly, *Restorative Justice in Diverse and Unequal Societies*,4 (1999)

accused are awaiting trials, many manipulations take place. Witnesses who were initially willing to speak truth back out because of the temptations offered on behalf of the accused to retract from the original testimony. Passage of time also affects the veracity of the evidence tendered by the witnesses who are subjected to critical cross-examination. Memories fade during the long time taken for conducting the trial and the witnesses confuse themselves of the actual course of events when they are put to severe cross-examination. It would be wrong to say that most of the trial result in acquittals because the defendants did not actually commit the crimes. The defendants escape convictions because of the aforesaid factors.³⁸ Therefore, it is essential for us to look for an alternative to deliver justice and ensure that the loop holes in our legal administrative system are not used by wrong doers to get away with their acts and leave the victims remediless. The principle where there is a right there is a remedy must be upheld and justice must be expeditious and must guard the rights of the victims at all costs.

³⁸ 142nd Law Commission of India Report, *Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any Bargaining* 1991, 24