THE PRIVATISATION OF JUSTICE: ADR IN THE GLOBALISED WORLD

Varendyam Jahnawi Tiwari*
Vidushi Puri**

ADR And Privatisation Of Justice

A. What Is ADR (Alternative Dispute Resolution)?

ADR is a method of solving dispute without recourse to ordinary/traditional method of initiating litigation in the Court; though the Courts may still have the power to review the decisions given out as a result of ADR, nevertheless this practice is less adhered by the courts and usually the decision is binding on the parties. ADR comprises of various methods like mediation, arbitration, negotiation, conciliation etc. [1]

Advantages of ADR:

Following are some remarkable benefits of adopting the ADR over the usual litigation process:-

- It is a fast track method of settling the dispute between the parties,
- It leads to the reduction of time span required to solve the dispute,
- It is also good from the economical perspective for the parties as it reduces cost,
- The parties appoint the arbitrator etc. on their own; on whom they pose trust and confidence,
- More satisfactory outcomes may be expected in ADRs,
- Increased level of compliance with the decision/solution provided,

***Ll.M.- National Law University, Jodhpur .**
****Ll.M.- National Law University, Jodhpur .**

[1] *Alternative Dispute Resolution*, available at: https://www.law.cornell.edu/wex/alternative_dispute_ resolution, last accessed at 1.29A.M on 12th March, 2016.

- Parties going in for arbitration can often chose to be governed by some specific set of rules or industry standards which will not be the case in ordinary litigation,[2]
- In case of ADRs like *mediation* and *arbitration* the parties can chose to have their dispute heard by expert in the relevant field.[3]In a dispute that involves technical matters or requires a particular level of expertise; ordinary litigation may not be that advisable and preferable.

Disadvantages of ADR:[4]

- There is a limited scope of review of ADR decisions,
- Certain kind of safeguards and protections that are available to parties in the ordinary litigation are not there in the ADRs (it is relatively less easy to get evidence from the other party in a lawsuit),
- ADRs are themselves limited in their scope and cannot deal with criminal matters or matters involving passing of title to a party and also in ADRs the parties cannot ask for injunction etc.,
- The decision is usually and final and binding on the parties even though they may not like it,

Kinds of ADR:

- **Mediation** – In this kind of method there is a neutral or impartial third person who helps the parties to arrive at a mutually agreed decision in case of a dispute.

[2] *Advantages and Disadvantages of Alternative Dispute Resolution*, available at: http://www.lorman.com/resources/advantages-and-disadvantages-of-alternative-dispute-resolution-16190 , last accessed at 11.43 A.M on 13th March, 2016.
[3] Ibid.
[4] *See,* Advantages and Disadvantages of Alternative Dispute Resolution, *supra* note 2.

- **Arbitration** – an impartial neutral person is appointed by the parties themselves and is called an "*arbitrator"* .He hears the arguments and evidence from each side and then gives his decision regarding the dispute. Arbitration may be either "*binding*" or "*nonbinding.*"[5]It involves less formal procedure than a trial. The ***New York Convention on theRecognition and Enforcement of Foreign Arbitral Awards*** **(1958)** is a convention that talks about the enforcement foreign arbitral award in the domestic courts. **149** States are signatory to the convention.
- **Expert Determination** – In this method there is an expert who is appointed and he determines the solution for the dispute.
- **Negotiation** – It is a process in which the parties meet and make effort on their own to resolve the dispute between them ; this may be done with or without any help or assistance from a third person.
- **Conciliation** - In this method the parties appoint a person known as conciliator who meets and hears the individual parties separately and assists them to arrive at a settlement but this process does not involve making of an award or calling of witness by the conciliator or presentation of evidence by the parties.

In both *negotiation* and *mediation* it is parties that control the actual and final outcome of the dispute.

B. History of Arbitration:

Arbitration as a mode of alternative method of dispute resolution has its traces in the history and has been practiced since the Babylonian times which were as early as 1894 BC.[6]It was highly popular and was followed as a prominent method of imparting justice in the Ancient Greece and thereafter Romans also adopted the method. This method subsequently was then followed across the

[5] *ADR Types and Benefits*, available at: http://www.courts.ca.gov/3074.htm, last accessed at 12.11 A.M on 13th March, 2016.

[6] "The History of Arbitration", online: Australian Arbitration http://www.australianarbitration.com/historyarbitration>

Europe during the *Medieval Period* or the *Middle Age*.[7]In England arbitration was used to resolve commercial disputes and was used by the merchants and the traders as a mechanism to avoid the normal court litigation. The law of arbitration in written form in England dates back to 1698.[8]

The genesis of the law of arbitration in India was in the form adopted by the Panchayat system which comprised of some wise men taking decision on behalf of the parties to settle disputes amongst them and which was often regarded as binding. Thereafter it was incorporated in the Indian Arbitration Act 1940; and as of the present it has been embodied in the Arbitration and Conciliation Act 1996.

C. The instinct to arbitrate and privatization of justice:

The rationale behind popularity of arbitration lies in the fact of binding decision accepted placidly by those who have chosen to be governed by the decision of the arbitrator; in whom confides the special trust of the parties appointing them. Arbitration is an idea or a paradigm of a free society as it is combination of freedom of parties along with its reconciliation with the law. The *modern rule of arbitration* suggests that in an arbitral process the finding of the fact or the conclusion both will be binding on the parties however inappropriate it may have been found to be by the highest court of law as there is no provision for appeal against an arbitral award.

The urge to arbitrate arises from want of *our* law. The parties opting for arbitration have no thirst for legal orthodox or traditional procedure except for one that is of a fair hearing. It is natural for the arbitrators to defy the law and to flout with it. They cannot assert jurisdiction without judicial control

[7] In the history of Europe, the "***Middle Age*"** or the "***medieval period***" is referred to as the period between 5th Century to 15th Century.
[8] Julian D. M. Lew, Loukas A. Mistelis & Stefan Kröll, Comparative International Commercial Arbitration, (Kluwer Law International, 2003) at 19.

nor can they opt not to follow the principles of due process or disregard the public policy.

But the courts may be reluctant to accept such a decision because they believe that public justice must be objective, distant and impersonal. Arbitration is more of a private act and leads to privatization of justice.

"We want rule of law and not rule by law."[9] The restriction on arbitration is not only intended to protect the parties from harming the public interest but also to protect them from themselves. While one argument that stands in favor of arbitration is the respect for private arrangement but again the private parties which are free to decide; may not always act wisely and efficiently.

What Arbitrant's want: For the *arbitrants* there is no necessity of any appetite for law. Law is a possible means but not the only one or the best one to solve the dispute. The *arbitrants* want fairness and it is perceived that purpose of arbitration is not to achieve compliance with the law. Though if arbitration is legally justified it will only enhance of the acceptability of the same though it may not necessarily be construed as the prime objective. Also arbitration and law should not been seen as paradox to each other as arbitration attaches itself to fundamental principles of law.

The Arbitrator as archetype:[10] The term "Archetype" was first used by Carl Gustav Jung who stated that this signifies a part of collective unconscious and it forms a part of almost all cultures, stories, myths and eras. Archetypes are neutral and have both positive and negative effects. It represents collective and repeated eternal behaviors of all persons. We see arbitrator as an archetype and we appoint him for a simple reason that we

[9] Jan Paulsson, THE IDEA OF ARBITRATION, 2 (2013).
[10](As per Jung's philosophy),archetype means-
A collectively inherited unconscious idea,pattern of thought, image, etc., universally presen t in individual psyches, available at : http://www.dictionary.com/browse/archetype?s=t.

wish to be judged by someone who is known to us and is wise rather than the one who is clever, capable and strange.

Archetype of dispute resolution: When we want to shift our focus and divert ourselves from conventional and mainstream litigation method to privatized dispute resolution mechanisms then we are trying to adhere to the alternative of the conventional method. But the ground of justification that the parties give for it is nothing but they very fact that they have lost faith in the transparency, effectiveness and the working of the conventional litigation.[11]

Arbitral virtues: There are certain virtues that the arbitrator as archetype needs to adhere to. Not only is the arbitrator required to judge the cases on individual basis but also he must show ***commitment*** to the task of arbitration assigned to him so that the parties can trust him for bringing the dispute to an appropriate end. The arbitrator must possess the ***capability*** to understand the dispute well. He must be ***active towards the consequences*** of the dispute and the decision thereon including the proportionality of the cost whether emotional or material. It is also assumed that an arbitrator has the sense of ***condignity***[12] which means a merited/deserved/appropriate award or punishment.

Arbitral omnipotence: The arbitral omnipotence may tend to advance arbitral irresponsibility. There is no prescribed qualification for a person to be capable of becoming an arbitrator. An arbitrator is conferred great power by the agreement signed by the parties. But the arbitrator may tend to misunderstand the facts or may even have flawed sense of the fundamental principles of law; and still the award would be without any appeal just like the verdict of the apex or the supreme court of the nation. Here the arbitrator

[11] *Alternate-To-Alternatives Critical Review of the Claims of ADR*, available at: http://www.nujs.edu/workingpapers/alternate-to-alternatives-critical-review-of-the-claims-of-adr.pdf, last accessed at- 00.25 A.M on 16th March, 2016.
[12] Jan Paulsson, THE IDEA OF ARBITRATION, 9 (2013).

becomes omnipotent though may be deprived of the basic understanding of the law in comparison to the trial judges who are well versed in law with requisite qualification.

The quest for balance: One of the views that need consideration here is that to embrace arbitration means to run away from the formalities of the law and once we legitimize arbitration it means going back to the law. The parties can be two-faced when it comes to interpreting arbitration. If the process has favored them, they would rejoice saying that they managed to escape the formalities of the law and the delay and if they lose then they would call the judges as last bastion or bulwark of justice maintaining their individualistic principles and imposing them on the parties. Therefore it is desirable not to have a lawless arbitration but the positive law established by national law-makers and enforced by the courts.

Untidy realities: If the underlying mechanics of the arbitration is voluntariness of the parties then what about compulsory arbitration? Arbitration which is now incorporated as an essential clause of dispute settlement in most of the standard contracts and in the cases of compulsory arbitration, where parties do not have any option but to follow the lead of the dominating party also fails the argument that it is a participatory and a consensual process.[13]It is also important to ascertain the ground on which the arbitrator has taken the decision. The arbitrators tend to focus less on the formal law or laws made by the legislature and more on the fact that what would the parties want as likely decision/outcome; and are highly governed by their own experiences and insights than basic principles of jurisprudence.

[13] *ALTERNATE-TO-ALTERNATIVES CRITICAL REVIEW OF THE CLAIMS OF ADR*, available at: http://www.nujs.edu/workingpapers/alternate-to-alternatives-critical-review-of-the-claims-of-adr.pdf, last accessed at- 20.45 P.M on 16th March, 2016.

The Concept of Good Courts-the nobler objective: The prime objective of public justice is to make the public and all members of society as its beneficiaries which are much worthier than the urge for people to privatize justice in the name of freedom. The level of difficulty involved in establishing public justice and good courts is rather a nobler aim and universal and inclusive than those like-minded groups going in for privatization of justice by establishing their exclusive enclaves and entering private arrangements being frustrated by the technicality and the formalities of the litigation method.

Additional issues for consideration:[14] Also some of the vital questions that need clarification are to what will the state lend its authority and power? Is it correct to say that the law of a single jurisdiction may give effects to awards? Can arbitration function without the support of the law of a particular state? These questions are crucial and become more tangible in the international context. There are four propositions to examine these issues:-

According to the ***territorial thesis*** the law of arbitration is national and that it lives or dies according to the law of the place of arbitration. The *lex arbitri* cannot be law of any country other than of the place where the arbitration has been conducted; the rationale being the act of the parties can be given legal effect only by the sanction of the legal system.[15]According to ***pluralistic thesis*** arbitration may be given effect by more than one legal order, none of them being essentially inevitable. But again it is contested that the legal order of place of arbitration may play no role in the practical outcome. Arbitration is not dependent upon the manifestation of any national legal order other than the diffused interest and dilemma of the parties as to what law may be called upon. Also one of the assumptions is that arbitration is a product based on an

[14] Jan Paulsson, THE IDEA OF ARBITRATION, 30 (2013).
[15] *To Quote*, Peter Sanders, ed.,International Arbitration,n.4,161;cited from Jan Paulsson,THE IDEA OF ARBITRATION,33(2013).

autonomous legal order accepted as such by arbitrators and judges. The contrary proposition to this is the one that states that arbitration may be effective even under an arrangement that does ***not depend on any national legal order or the judges of a particular country*** itself. This proposition combines with and makes an attempt to widen the scope of the pluralistic thesis.

Nevertheless, it is really an arduous task to apply any of the propositions to define the boundary of arbitration in isolation rather in many situations they may seem to be overlapping. Also it is not less than a paradox that the arbitration seeks cooperation and support from public functionaries and the state from which seeks cooperation and support. So this raises a cardinal question as to whether there is a need of privatization of justice and interference of the parties in the role of state in dispensing in public justice.

Indian Persective:

The United Nations Commission on International Trade Law (UNCITRAL) brought in a model Arbitration law in the year 1985. The law is popularly known as UNCITRAL model law on International Commercial Arbitration and it has helped many countries to improve their arbitration regulations and systems. Though the model law was intended for the purpose of better trade model law but it has also helped the member states to adopt a unified system of domestic arbitration.

It is important to note that the assistance of the courts is necessary for the smooth functioning of the arbitration system since the courts have statutory powers to execute and enforce an order.[16] But at the same time courts should

[16]Available at; http://www.mondaq.com/india/x/357928/Arbitration+Dispute+Resolution/When+Courts+Can+Interfere+In+The+Awards+Passed+By+An+Arbitral, last accessed at- 20.50 P.M on 16th March, 2016.

avoid entertaining applications against the arbitration proceedings because this will render the provision of arbitration infructuous. In India the court role has been minimized by the application of ***Section 34*** which states that the parties can only file an application to set aside the arbitral award and not file an appeal against the same contesting on merits of the case. This signifies that India believes a lot in the effectiveness of the arbitration system to lessen the burden of the court; though provision has been made to assure that there is no adverse effect on the parties due to finality of the arbitral awards. Thus in India there is more inclination towards the privatization of justice as many big MNCs and companies draft arbitration as a standard and compulsory clause.

On the ground of public policy also an arbitral award may be set aside. In India Supreme Court of India has taken care to minimise the possibility of unlimited interference by the courts, on the ground of public policy:-

In, ***Renusagar Power Co* v. *General Electric Company*** [17]the Supreme Court of India held that the courts must assure that there is enforceability of a foreign international award and that it should not give a narrow interpretation to the term "*public policy*" and that a mere violation of Indian laws would not attract the criteria of *public policy* and importance must be given to private international law principles.

It was held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) Fundamental Policy of Indian law or (ii) The interests of India or (iii) justice or morality.

[17] ***Renusagar Power Co* v. *General Electric Company,*** 1994 Supp (1) SCC 644.

But with regard to the International arbitral awards passed in India and domestic awards, the interpretation of the term "Public policy" can be beyond bounds.

In, ***ONGC* v. *Western Geo International Ltd***[18] while expanding the scope of "*Public policy*" stated that the decision on *Public policy* can only be rendered on reasonable grounds.

Criticism:

ADR is seen as the scion of the changing trend in the status of states as a regulatory body and its role in dispensing justice. Privatization can go against the principle of *rule of law*. The major drawbacks of going for privatization of justice are as follows:[19]

a) It is an obstacle in the way of development of law, legal principles and precedents.
b) Publication of judgements and the decisions of the courts ensure better protection of individual rights and guarantee the adoption of a fair process but this is not true completely with respect of ADR because there is no public participation in the process.
c) It is an impediment in the function of courts serving as a medium of conveyance of certain necessary norms and guidelines that can be followed by the general public for public security and welfare. Privatization also lacks accountability to the public.
d) It can give rise to many prejudices within the parties involved and it may lead to unfair treatment of either of them by the arbitrator.

[18] ***ONGC* v. *Western Geo International Ltd*** ,(2014) 9 SCC 263.
[19] Kimberlee K. Kovach, CENTENNIAL REFLECTIONS ON ROSCOE POUND'S THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, 48 S. Tex. L. Rev. 1003, 2007, 1026- 1042.

e) Lack of expertise in the legal field and lack of knowledge of law and procedure in some of the arbitrators who are from some other field may lead to unfair treatment of the parties and also the decision depends a lot on the personal perception of the arbitrators than by being guided by the principles of fairness and justice.

Suggestions:

We must value courts for the very reason that they themselves play a very important role in not only promoting these private dispute resolution methods but also recognizing the award passed in these ADR methods. The courts are not only expository of the rule of law but also function to promote the law and the rights of the parties.

Courts observe due process of law and the judgement is given out only after hearing evidence from both sides by someone who is impartial; rather on the other hand ADR methods except arbitration do not give value to lot of legal formalities and is a process ascertained and controlled by the parties themselves. So in respect to legal rights and responsibilities of the parties it is difficult to know whether the decision/outcome that has been rendered is fair or not; as it is the court which is actually aware of the rights and law more coherently.

Shifting of the responsibility of hearing disputes by a private person such as arbitrator, mediator, and conciliator is the loss of justice performed in public. Administration of justice in courts publicly is encouraged more; over the privatization of dispute resolving because there is lack of motivation for just outcomes because the court is bound to deliver judgement only after analyzing all pieces of evidence and after hearing both the sides by keeping in mind the rights of the parties. This element of motivation and the sense of being bound by strict compliance to legal principles is absent in the processes

of ADR. If there is an urge to avert more towards private settlement then we are only creating more for compromise of our legal rights.

In the process of litigation we judges have an opportunity to convey certain norms to the community. Legal rules must be known and recognized by everyone and the application of these rules should be done publicly and not privately because justice that is open, fair and accessible is the basis of *rule of law*.If privatization goes on to increase then we are lesser precedents and it will lead to fading away of the law and many legal principles.[20]

Jeremy Waldron[21], in stating about importance of the courts mentions that courts are as necessary for a legal system as free elections for a democracy:

"*I do not think we should regard something as a legal system absent the existence and the operation of the sort of institutions we call courts*".

It is the prerogative of the state to deliver and administer justice. Justice should not be privatized but the state must try to prevent any abuse of power by the private parties. We need to analyze that with the vanishing of traditional litigation and privatization of justice; we are also compromising the quality of justice, and ignoring the sanctity of a sound legal system and the faith in judiciary which is appointed after clearing a tough selection procedure and undergoing intense training.

The irony is in the name of being governed by decision of a person chosen by us; appears more just to us than the appropriate legal forum where justice is publicized and also there is a system of appeals in case of any injustice that may accrue to us during the legal process or by the decision of the court unlike arbitration which is binding on the parties and the only remedy left to the

[20]Dame Hazel Genn, WHY THE PRIVATISATION OF CIVIL JUSTICE IS A RULE OF LAW ISSUE, available at https://www.ucl.ac.uk/laws/,last accessed at 20.31 P.M on 16th March,2016.
[21] **Jeremy Waldron,** (Born 1953) is a New Zealand professor of law and philosophy.

parties as per the Indian Arbitration and Conciliation Act,1996 is to file an application under Section 34[22] of the Act to set aside the arbitral award.

Also we must not ignore the long term impact of the non-participation of the court in the development of the law and the legal principles due to privatization of justice; this could even shake the confidence and the faith that the masses pose in the public institutions like the courts which our not only the guarantor but also the protector of our rights.

Conclusion:

The fact that the alternative dispute mechanism is simple, fast-track and less expensive; does not hold true in respect to all the processes of ADR. Choosing to go for arbitration may neither be quick nor would it be less than expensive than the trial process as it involves procuring the services of a specialist in the relevant field which is the matter of dispute. So, basically there is need of harmony in both the methods. Privatization of justice in the name of freedom is not the solution. There is an indispensable need for making both these methods work in consonance in the best interest of justice. Both these methods actually should not been seen as "*alternatives*" but they must *complement* each other. Neither the arbitrators should focus on minimal interference by judges in their realm nor should the judges try to impose their supremacy over the arbitrators.[23]

A better approach will be the one that focuses only on the *idea of justice* rather than by characterizing justice into public justice and privatized justice, ADR method or conventional litigation/trial methods. What is *just* should be done keeping in view the role of state as regulator/administrator of justice and the individual freedoms. Individual freedom should not supersede the state's role

[22] ***Section 34*, THE ARBITRATION AND CONCILIATION ACT, 1996**-Application for setting aside arbitral award.
[23] Jan Paulsson, THE IDEA OF ARBITRATION, 28 (2013).

or hinder with the role of the court in the developing the law and establishing precedents. This does not mean complete abandonment of ADR methods just because it talks about private arrangements and has the element of compulsion attached to it mostly. But rather there is a need to strike a balance between the conventional litigation method and the ADRs; one must not try to find fallacies in the procedure of the other.