Journal of Law & Social Studies (JLSS)
Volume 4, Issue 4, pp 574-583
www.advancelrf.org

Alternative Dispute Resolution: The Limitations of Mediation and Effectiveness of Conciliation in Settlement of Public Policy Issues

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Abstract

Alternative Dispute Resolution (ADR) is an alternative process to court proceedings and is a process that amicably resolves disputes. ADR has various methods for the settlement of disputes including arbitration, mediation, conciliation, ombudsmen, and med-arb. This research article qualitatively explores the concept and scope of ADR and inspects whether ADR is an effective tool for the resolution of disputes. Thereby, this piece highlights how followers of ADR ineffectively and mythically divide justice into various categories. This article scrutinizes the difference between mediation and conciliation to pinpoint the intricacies and limitations of mediation and its ineffectiveness in the resolution of public policy issues. This article critically examines the effectiveness and suitability of conciliation and focuses on the requisites that are necessary for its applicability of it in settling public policy issues. The research article inspects the quantifications and functions of ADR experts as well.

Keywords: Alternative Dispute Resolution (ADR), Arbitration, Mediation, Conciliation, Ombudsmen, Med-arb, Public Policy

Introduction

Government has the authoritative control over the public and it has the function of governing the people. The issues that are concerned by the public or are related to the public or public have a specific interest in any matter, the governments particularly protect public interests related to such issues. It is a fact that governments usually create public policy matters like foreign policy issues, public finance issues, and many more. The most significant issues regarding the public are the issues related to civil rights, environmental issues, health issues, police issues, and community issues. The government takes interest in the issues that are highlighted by the public. The public highlights the issues by lobbying it through the interest group with the purpose to stimulate the matter and giving it the status of being a public issue. ADR is a process that can be helpful in the resolution of public policy issues by fulfilling the reasonable needs of the public and government.

For this purpose, firstly, the article provides a brief discourse on the basic concept of ADR as well as scrutinizes the methods of ADR including arbitration, med-arb, ombudsmen, mediation, and conciliation, and pinpoints why the followers of ADR mythically divide justice into categories rather than aiming the dispensation of expeditious justice via ADR. Moreover, this piece endeavors to highlight the need for Alternative Dispute Resolution in the resolution of public issues and inspects

the differences between mediation and conciliation to pinpoint the intricacies and limitations of mediation and the effectiveness of conciliation in settling public policy issues. The research article inspects the essentials that are required for the applicability of ADR in the resolution of public policy issues and investigates what are the qualifications and functions of the ADR experts while settling such issues. In the end, the paper provides a very reasonable conclusion.

Alternative Dispute Resolution and Myth of Justice

The simple way of establishing a more accurate, precise, and clear-cut definition of ADR is that any technique used for the resolution of disputes or conflicts outside the courtroom is called ADR. The origin of ADR exists in conciliation, mediation, and arbitration. Of all these processes, the most ancient is arbitration. However, this technique is complex and costly and is very similar to the proceedings of the courts. Arbitration is also a kind of litigation in the private sector. *Northern Regional Health v Derek Crouch* can be cited in this regard. The complex and imprecise nature of judicial arbitration has encouraged the legal fraternity to establish any other technique for the resolution of disputes.

The phrase Alternative Disputes Resolution suggests that it provides an alternative method other than the procedures of the courts. The processes of ADR include arbitration, med-arb, ombudsmen, conciliation, and mediation. All these processes are part of the judicial system. However, not formally but informally a legal procedure is followed when any dispute is settled through arbitration, conciliation, ombudsmen, and mediation.

Undoubtedly, it is a fact that ADR provides a roadmap that is an alternative to the proceedings of the court. To this end, the process that does not lead the conflicting parties to knock on the door of the court for dispensation of justice and amicable resolution of the disputes is ADR. Relying on this argument, it is submitted that ADR is not a novel technique for the settlement of disputes. Arbitration is an expensive method, but the commercial world accepts this method for dispute resolution. Arbitration is a process of ADR in which the conflicting parties choose an arbitrator for an amicable settlement of the disputes. Usually, the conflicting parties on their own select and appoint the arbitrator. Moreover, the court and various other institutions can also appoint an arbitrator. Arbitration is of two kinds –legal and non-legal– legal arbitration includes legal issues. Legal issues are of different types like the breach of the contract, rights of the parties, and award of remedies. The arbitration will be called non-legal when it discusses the "facts related issues."

What would be the reason behind it? In many circumstances, in the United Kingdom, a matter of a very simple nature could be easily resolved in the courts, but the parties prefer arbitration. Could it be possible if the courts start resolving the cases expeditiously, the litigation system will be revived, and ADR would be grounded? This question is a mystery.

Med-arb is a technique of ADR in which the procedure for resolution of the dispute contains the elements of arbitration as well as mediation. That is why it is called Med-arb as Med in it depicts mediation while *Arb* stands for arbitration. In this process of ADR, the parties agreed to resolve their conflict through mediation and if the mediation fails, arbitration will be the second process that the parties will seek for an amicable conclusion to the dispute.

Ombudsmen are officers of an independent nature. They investigate the complaints, listen to the aggrieved parties, and make orders. They used to investigate the complaints regarding the "procedural departures as well as maladministration" done either in the public or private sectors. Ombudsmen try to resolve the conflicts by highlighting the flaws and strengths of the conflicting parties and try to

convince them to settle their issues. When the ombudsman fails to convince the parties, the matter is referred to the court.

Whether or not ADR is an effective method for the resolution of disputes. To answer this query, there is a need to elaborate on the difference between formal and informal justice. However, this is a myth of dividing justice into various kinds as justice is justice. How could justice be formal or informal? The people that promote ADR, divide justice into these two categories. In order to dispense justice, it is impossible to ignore the application of the law. However, it is possible to change the environment. Consequently, ADR provides the best informal environment for the settlement of disputes as well as the principles of justice cannot be altered or substituted while utilizing the technique of ADR for the dispensation of justice.

Whether for acquiring justice, the legal principles are avoided or not. The dispensation of justice is seen when the legal rights of an individual are protected, and the legal remedies are awarded. Whether ADR assists the dispensation of justice by following the protocols of justice. Compromise is a technique of ADR. When compromises are concluded, the law is not concerned, could this affect justice because justice can never be coupled with compromises?

The techniques of ADR are informal, there is a need to describe what this 'informal' means or ADR is informal about what. It is supposed that ADR follows informal procedures. It resolves the disputes amicably; making this a ground then that can be acquired with or without implementation of the law. However, when the law is involved in the settlement of disputes, justice is dispensed formally. The matter is resolved according to the enlightenments of law and justice is dispensed accordingly but in an informal environment. An informal environment means an environment that is outside of formal courtrooms and court proceedings.

It is to submit that the main aim of ADR is to dispense justice by protecting the rights of individuals and awarding the proper remedies to them. This purpose cannot be fulfilled by claiming the techniques of ADR should be entirely non-legalistic. Although it provides an informal environment it should also follow legalistic approaches. If the purpose of ADR is to protect rights and award remedies that is why it should not be regarded and considered as a method that had enough legal dimensions. ADR must defend the rights and provide the remedies by adequately following the relevant legislation. ADR must not mislead the conflicting parties from the relevant legislation. Hence, justice should be dispensed amicably by following the relevant legislation and enlightenments of law.

Mediation and Conciliation in the Settlement of Public Issues

Education, public good and welfare, health, and issues related to housing and the environment are public policy issues. These issues have great significance in civilized and democratic societies. These issues are on priority because the public is directly involved in them and they are taking interest in such issues. There are two approaches in which the foundation of public policy is rooted. These approaches are: first, the government takes a serious step and recognizes the problems and tries to solve them. However, the governments usually for attaining popularity used to getting involved in the issues, or sometimes genuinely the government takes serious steps in the public interest. Second, social groups sometimes take serious steps as well.

There is always a need to notice when the second approach is preceded whether in the name of public policy, the interests of a specific group are preserved, and the other groups are usually neglected. However, it is a fact that the safeguarding of the interest of that specific group could be one dimension or an aim of public policy. It is also a fact that public policy saves the interest of the

public. This definition does not bind the making of only general policy for the whole public; rather a policy can be made to protect the interest of any group in society.

Whenever a difference of opinion arises between the government and the public on a single policy then the participation of the public at large becomes obvious and controversy is generated. This is commonly observed in democratic societies. Moreover, in such societies, the difference in perception between the social groups and authorities of the government on a public policy is also obvious and the conflict between both is inevitable. Consequently, there must be the development of a formal structure.

ADR is a reasonable mechanism for settling the conflicts that have been generated on public policy issues. ADR offers the conflicting parties to air their opinions and grievances in which they can describe the pros and cons of the public policy. Now the question arises why the such opportunity is usually not provided by the courts and why such issues must not be settled in the courtrooms.

The ADR techniques more specifically the procedures of conciliation and mediation provide an opportunity for the government to reconsider any step with the purpose of whether such step may be contrasted with any public policy. Moreover, this opportunity might lessen "the incidence of the court proceedings in the form of judicial review." Two basic advantages can be elucidated in utilization of the conciliation and mediation regarding the settlement of public policy issues. First, the court proceedings are too expensive, so, utilization of conciliation and mediation can be the least expensive. Second, public policy will undoubtedly be determined by the principle of democracy.

Of course, mediation and conciliation have got the status that they can establish understanding between the parties. No controversies or conflicts will arise when the parties will be ready to resolve their difference through mediation and reconciliation and both parties will be ready to take care of their interests. But the parties would be obliged to make a clear description of their objectives. However, their objectives would be different from each other, but their differences can be lessened by mediation and reconciliation.

To increase the effectiveness of the mediation and conciliation, the policy should be promoted, and public awareness of the issue will be a necessary condition. The policy should be promoted to a level that the public considers a heralded initiative and they should generate a very balanced view on all these issues. It is submitted that mediation and conciliation will not be treated as a legal solution to the settlement of public policy issues. It will only be a societal solution to the issue due to which the government will be able to acquire maximum benefit for society. It is a fact that maximum benefit can be acquired by it. Moreover, mediation and conciliation can tackle any public issue and amicably settle the differences between the governments and social interest groups.

Intricacies and Limitations of Mediation in Settling Public Policy Issues

The mediator and the conciliation are the processes in which there is the active intervention of a third party. In mediation, the third party is called a mediator while the conciliator is the third party in conciliation. Many scholars say that it is wrong to use mediation to describe conciliation. The rest of the scholars say that mediation has all the attributes of conciliation. However, there are certainly some differences between mediation and conciliation.

Mediation has been promoted in recent times. This method has been highly acknowledged and accepted in many countries for the resolution of conflict in a more amicable manner. A responsive environment is provided in the mediation process as it has no complexities and no direct correspondence with the adversarial legal system. Additionally, the courts are not concerned and are not coupled with it.

The mediator is an expert and a neutral party that suggests a solution to the problem and hopes that the conflicting parties will accept his suggestions. The conflicting parties have the power to choose the mediator. The mediator tries to facilitate a voluntary settlement of the dispute of the conflicting party. The mediator communicates with the conflicting parties and identifies and examines the basic problem and attempts to give his opinion for the amicable settlement of the conflict.

If the traditional concept of mediation and conciliation is elucidated, then it is demonstrated that conciliation is a more reliable method for dispute resolution than mediation. The reason is that conciliation is a method that is more interactive and acceptable because it tries to persuade the parties to seek their faults. Commercial and industrial disputes are easily resolved by conciliation. However, mediation is a process of dispute settlement of political nature or boundary segregation or demarcation. It is not guaranteed whether the conflicting parties accept the views of the mediator.

On the contrary, conciliation is, however, different from the process of mediation. In conciliation, the misunderstandings are usually set aside by clarifications. The conciliator plays an important role; he highlights the agreements and disagreements of the conflicting parties on a single issue. He tries to narrow the disagreements by suggesting moderate ways. Consequently, the conflicting parties try to mend their ways without referring the matter to the court. Unlike mediation, in conciliation, the conciliator is not obliged to impose this opinion and views on the conflicting parties. The conciliator only tries to generate understanding between the parties by clarification of their differences. In this way, the conflicting parties resolve their conflicts amicably.

The conciliator resolves the conflicts in a more friendly environment and friendly manner than mediation. He makes the conflicting parties realize their faults. In conciliation, the conciliator must be very active, and he should allow the conflicting parties to participate actively. The conciliator is obliged to listen to every party very keenly. A mediator is a peacemaker while a conciliator helps the parties to pinpoint their differences.

Public policy issues can be resolved through mediation and conciliation. However, mediation and conciliation can resolve only limited public policy issues. There are certain issues in which mediation and conciliation techniques are not sought. When a public policy is based on a 'national interest,' in such circumstances, such policy is not subjected to any technique of ADR. In such issues, the governments are not obliged to get the opinion of the public. Many other issues including defense strategies and relationships with foreign countries also do not require the opinion of the public.

It is submitted that the government can seek mediation and conciliation on some matters while in others there is no need to get the opinion of the public. While formulating the policies regarding education, health, or the environment, the opinion of the public can be considered and discussed and in case of difference of opinion mediation and conciliation can be utilized. Consequently, before seeking mediation and conciliation, the parties must check whether the government can invoke the defense of national interest.

The following elements should be considered before seeking Alternative Dispute Resolution:

- The necessity of ADR and whether it is necessary to seek it.
- After seeking ADR whether any reasonable consequences will be obtained.
- Determination of the parties to ADR and what kind of role will be played by the parties.
- The number of interest groups should also be determined. How will such a group participate and whether there will be any "prospect of reconciling" the interest groups' opinions?
- Whether the government will consider the views or opinions of the interest group and to which extent such views will be accommodated.

- The time frame and expenditure for the ADR.

There is a very important point to consider that the views and opinions of the interest groups should be effectively coordinated so that before the completion of the conciliation, they must not lose their interest. There must be acknowledgment and determination of the commitment of each group. Each group must be notified about how much time will be utilized in concluding. Before seeking conciliation, it is significant that the interest groups must be determined, and they should be ready to provide any kind of assistance or help. They should ensure that they would have a cooperative attitude during the procedure. Such an attitude should be consistently shown till the end of conciliation.

All the groups must also ensure that whenever they would be called, they would surely make their attendance. Whenever any witnesses will be required, he/she will undoubtedly be present on a specific date and time. This step is extremely important and following this step can lead to reasonable and better consequences. Moreover, different interest groups might have different interests and opinions. When they all are combined, they should determine their common problems. They must oppose in a united fashion.

For successful consequences, these points must have to be considered whether it is necessary to refer the issue to conciliation, and during this time the interest of the groups should not die. Moreover, whether during the procedure the operation will not face a financial debacle or funding will not run out. There must be a high level of cooperation among the interest groups.

Public policy issues have a very complex nature. Such issues are amalgamated. Consequently, it is very difficult to conclude these issues amicably because these issues require a universal and balanced conclusion so that such a conclusion will be accepted by every party and group. Before seeking conciliation there are certain essentials that are significant and necessary to be fulfilled or checked before starting the process of conciliation for settling the public policy issues. These issues are enlisted below:

First, the conciliator selected for settling the dispute must be qualified and have great knowledge about the issue and he would be competent and expert. Moreover, all the parties should trust him and have confidence in him. During the procedure, he must not be questioned by any party. The conciliator's procedure should be determined so that he will not be questioned by any party.

Second, it is necessary that the appointed conciliator should acknowledge the "public policy issue and the public interest issue." It is not the function of the conciliator that he should support any minority however, he must confirm that the majority view got reasonable attention. Public policy regarding Alternative Dispute Resolution has been appreciated in the United States as well because it covers a broad range of interests. Moreover, it is a fact that the mediators' tasks have become very intricate and complex.

Third, it is essential that there must be a determined time frame for ADR and the confirmed economic sources. However, the significance of this point can be understood when it is asserted that if there is a shortage of funds then the process should not be started because it is impossible to conclude it in absence of funds. It is also true that due to a shortage of funds the parties might surrender in any phase of mediation.

Fourth, it also required the manner of participation of the parties in the ADR procedure should also be determined. Before the start of ADR and during its preparatory phase, the parties are necessarily briefed about their role and participation. As public policy issues have a fundamental nature and have great communal implications, the parties need to be aware of them so that they will be able to uphold

the social cause in a reasonable manner. On the contrary, if the parties will not be well informed then the process of ADR will not lead to better consequences. Moreover, ignorant parties will also affect the role of the conciliator.

Fifth, the issues must have clarity and should not be ambiguous. If it is not done, then most of the time will be consumed fruitlessly. To make the process effective and productive, the advice of a lawyer should also be sought and considered. Moreover, an agenda should be shaped during the preparatory phase of conciliation. The agenda will make the process effective and it will help to ascertain each point of the process. Moreover, it will be one of the causes of better consequences.

Qualifications and Functions of the Expert

There are certain qualifications that an expert in ADR should have. The expert must be a competent person and have a stable mind. He must be able to communicate easily. He must have very good negotiating skills. The expert should have a creative mind that always develops and suggests innovative ideas. It is necessary that the expert should be unbiased and neutral. The only way for expeditious resolution of the issue is to start the public inquiry by an expert who is impartial. Instead of one, more experts can be appointed for settling the public policy issue through conciliation. Many experts should be appointed in a case when there is a complex public policy issue. Moreover, many opinions will also be generated by many experts. They might conclude the solution in a more effective way that may cover various dimensions of the problems.

Undoubtedly, a complex procedure of ADR contains many stages and the expert must determine the sequence of the steps. The sequence of these steps should be like that the first step must contain the identification of the issue and its nature. This step can only be done with the help of the parties. The second step may involve the designing and sequencing of the process of ADR. The third step should encourage the development of a reasonable procedure. The fourth step must involve the creation of an agenda. The fifth step is important and, in this step, the process of concluding an agreement between the parties should be described and established.

Conclusion

ADR is a process and it has various techniques like arbitration, mediation, conciliation, med-arb, and ombudsmen. This process resolves conflicts amicably and it is an alternative to the settling of conflicts through the proceedings of courts. Arbitration, med-arb, mediation, conciliation, and ombudsmen are processes of the judicial system. However, conciliation is considered more reliable than mediation. The purpose of ADR is to dispense justice by protecting the rights of parties and providing remedies to them. Consequently, this purpose could be fulfilled when ADR techniques are devised legalistically.

Alternative Dispute Resolution regarding public policy is the best tool and should gain the attention of the people and government whenever any conflict arises between them related to public policy issues. The public interest would not be appreciated in an encouraging way if conciliation is not considered a panacea for the resolution of public policy issues. It is very necessary to aware the public of their rights before initializing the process of conciliation so that they must take part in an amicable resolution of the public policy issue. The ADR expert should be the conciliator in case of settling the public policy issues, the conciliator should have certain qualities that are very necessary for the execution of a balanced ADR procedure. Furthermore, there is a need to encourage ADR procedure for the settlement of public policy issues in a democratic and civilized society.

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