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Evolution of Dispute Resolution Processes: From Informal to Formal and Back to Informal

Abstract

This article aims to provide information relating to Alternative Dispute Resolution (Informal Dispute Resolution) which is considered a new technique for the resolution of disputes in western countries. Still, from the study, it has been proven that it is not a new technique, and has been in practice in one form or other in different times and civilizations; it is a conversion to new title and system with some modification, but the aim is same as was in ancient time, i.e., the historical evolution of the system from Torah period to present time presents the whole picture of this system. The study highlighted both practices in ancient and present times which shows that the system has been working successfully in all the times. Therefore, it can be applied elsewhere in the world, so the researcher is of the view that this system is more sustainable in any form than the formal system because it reflects the friendly, amicable, long-lasting relationships between parties.

Key Words: ADR, Dispute Resolution, Jirga, Panchayat, Torah, Talmud

Introduction

Among the human being, disputes have been a very important factor linked with their progress and development. Informal Dispute Resolution (ADR) denotes instruments of resolving disagreements without passing through the routes prescribed by law, i.e., through discussions, negotiations or any other process of settlement which should not be time-consuming, lengthy and expensive. Although, the main purpose is to get a resolution of disputes through such processes which should be friendly, amicable, less expensive and unofficial procedures (out of court dispute resolution) and involvement of public involvement can play an important role for this purpose. It is worthy to note that the consent of opposite parties is compulsory to be taken so that a peaceful settlement can be ensured. Such type of settlement of disputes is taken as private, but sometimes it is annexed with the court and sometimes out-side from the court. (Hornle J., 2009). The proposed word by California Task Force for alternative dispute resolution is “appropriate” which is most near to the term alternative to litigation (Gumbiner, 2000).

It is not a coincidence that the formal justice system (court litigation) developed after the emergence of writing because formal court procedure can't work without written laws. Accordingly, the formal judicial system, needing writing down of the decisions, developed in both the oldest civilizations, i.e. Mesopotamia and Egypt during these periods when writing had been developed by them. In later periods, the Greeks adopted this dichotomy of dispute resolution by merging the formal and informal dispute resolution methods (ADR) in their system, which provided for the dispute resolution through court, presided by an official judge who was assisted by a large jury of citizens. And, we find this system even in the present day, in common law systems (Southern, 2008).

The processes of informal dispute resolution (ADR) were in use since 1800 century B.C.E, and the timeline was given therein also shows that Egyptians, Syrians, Phoenicians, Greeks and Chinese were the countries which mostly used informal methods of dispute resolution (ADR) in ancient times. The Indus Valley Civilization relied on Panchayat (village council of elders) system since 500 BC. (Barret, 2009).

Informal Dispute Resolution (ADR) is the need of time because there is a heavy backlog of cases on courts and otherwise litigation is also expensive and lengthy processes. So, to avoid delays in

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providing speedy and less expensive justice to people at their doorsteps, it is necessary to revive the tested system once again (Farlane, 2007).

Research Objective

The purpose of the research is to examine the informal as well as formal dispute resolution historically with the following objectives:

1. To study the ancient dispute resolution processes
2. To explore and highlight the reasons for preferring informal justice system again.

Research Question

The research has fully answered the question for success of Informal Dispute Resolution (ADR) in the legal system, the major factor for adopting the old system (informal justice system), which is more popular due to flexible, inexpensive, speedy and effective process, it reveals power and strength of parties. The members from the legal profession will have to admit the importance of this, along with the legal system.

Research Methodology and Material

The methodology is descriptive and explanatory (qualitative). Both primary as well as secondary tools have been adopted and used for the purpose of data collection and review of the literature. The research was carried out at Lahore by using its vast public library resources.

The main reason for this approach (qualitative method only) is that quantitative method could not be used because such an attempt would have involved sophisticated and expensive logistic set up, but the researcher had no funding source from outside and could not afford survey etc.

Population of Study

The population of the study consists of the journal's articles, different websites, books and Statutes, etc., the period of study covers history from Torah and onward.

Limitation of Study

The research is limited to the study of informal dispute resolution (ADR) and formal dispute resolution (court litigation), and the article has been written only in the English language which can be translated in any other language with the permission of the author.

Results

From the study, it is very much clear that informal dispute resolution (ADR) is has gained popularity all over the world and is also going successful everywhere in the world, even in Pakistan also.

Dispute Resolution in Ancient Times

Lipner (2005), has stated informal dispute resolution (ADR) in detail, which depicts the popularity of informal dispute resolution (ADR) about two thousand years ago. According to him, the Torah contains laws, which have been described in detail, and sentences are defined very well. Some laws are very simple, and from today's prosecution, others are more in vague and doubtful. Torah covers both laws (1) societal, 'criminal' and private laws, 'tortious and commercial'.

The popularity of Alternative Dispute Resolution (ADR) is very much clear in the Torah, which contains laws and describes offences in detail and sentences are defined very well. Moses not only enacted the basis laws but narrated the fundamental laws and guided the nation of Israel for dispute resolution. Moses says, listen to the men, and decide justly amongst them, and provide an equal opportunity to low and high, don't be afraid from any person because this is the judgment of Allah's special people and if you find any matter difficult for you to decide then you bring it to me, I will hear and decide it. He appointed judges whose function was to decide the differences impartially with proper presentation of law but the challenging and difficult cases were brought to Moses who sat as August Court and decided the matter (Lipner, 2005).

Talmud was collected and written between 1,600 to 2000 years earlier by scholars in Jerusalem and Babylonia. The meaning of Talmud is “learning”, Talmud describes the laws of the Torah in different ways. The scholars mentioned different methods of dispute resolution (formal and informal) given in Talmud, which is similar to our modern approaches like adjudication and arbitration. Talmud is in favour of the informal dispute resolution processes (ADR) and says that ‘choice’ is to be supported. Scholars interpret Talmud in favour of arbitration because it is the principal rationale offered for the promotion of peace (Lipner, 2005). This is conceivable that formal (court litigation) and informal justice systems were working on a parallel line, and the mode of the settlement was decided according to the nature of the dispute, but preference was always given to informal justice system (ADR).

Before the advent of Islam, the decisions of chiefs were implemented even if parties did not agree to it, and these decisions were taken in both civil as well as criminal matters. The decision taken by the chiefs were publically announced to ensure a fair justice with people, and these decisions were binding on both/all the parties to be followed (Rashid S.K). Arbitration which is also a type of dispute resolution but the processes is initiated only if it has been added/ mentioned in the agreement at the time of writing a contract and parties themselves decide to choose their arbitrator or arbitrators, the processes of arbitration is a settlement of disputes between parties and award is obligatory only in case of consent of parties (Black, Esmaili and Hosen, 2011). The award is mandatory unless it depicts sheer wrong. Thus, subsequent to approval by the judge, the award becomes compulsory to be followed (Ali & Sfeir, 2011). There are many examples in Islam when the tribe of Bani Qarnata was directed by Holy Prophet (Peace Be Upon Him) for settlement of disputes in a peaceful and amicable way through arbitration processes. (Brown, 1999).

San provided that the study of Hindu law prevailing in ancient India is very useful. In villages, Panchayat (people’s court) is a natural process to decide the disputes without the intervention of courts, and it has been in practice from ancient Hindu era. In some specific cases, the Panchayat (people’s courts) acted like courts which were established by the king. The period from 1500 B. C to 1000 B. C is the Vedic period in the history of India, and this is the period when Rigveda, the oldest literary work, was composed and compiled. The Aryans in India used to live in villages during this age. There were two popular institutions called Sabha & Samiti. The Sabha appreciated the performance of judicial functions and was also convinced with Judiciary. There were some other bodies along with these departments such as Vidhata Assembly was connected with civil, criminal and military issues. The structure of Arbitration (a type of informal dispute resolution) was perhaps known to the public of the premature Vedic period. The mediators of disputes were named as Madyamasi. The ruler participated much active in the management of justice & king decided civil disputes himself with the aid of his assistants. Mostly, the decisions were given by king and directions were forwarded to the Adhyaksha. Hence there were also situations in disputes to be discussed with the tribes for the verdict. In the villages, minor cases were entertained by Gramyavadin. The cases regarding boundaries of the property were decided by these Sabha (informal dispute resolution).

Ramayana and Mahabharata, two great epics were drafted in this era. The grand period was projected between 500 B. C and 200 B. C throughout the period and there were a large number of states in Hindustan. The Sabha’s popular benches sustained to flourish during this era because their judgments were often maintained by the monarchs and the processes of arbitration appear to be popular at that time, and the people preferred to resolve their disputes through this procedure (Wikipedia).

The era of Dharmashastras, Yajnavalkya, Manu-Smriti, Narada Smriti and Smriti gives a piece of very imperative information belonging to the informal (ADR) and formal (court litigation) dispute resolution organizations in that era. The era of Dharmashastras is 9th century A. D. The Dharmashastra of Yajnavalkya states three kinds of benches sreni, Kula and Puga. These benches tried only civil disputes (Kane. P.V). And petitions against these benches were challenged to the benches of judges who have been appointed by the ruler.

The Muslims ruled India until the death of Bahadur Shah in 1857, and this era is known as Medieval period, which presented various formal justice systems (court litigation) for dispute resolution in different times, and all the Muslims were ruled by the Islamic rules which were living in India; and dealing with disputes between non-Muslims and Muslims, a combined system of arbitration

regulations was developed to facilitate the people. Babur, Humayun, Jahangir & Shah Jahan considered it their responsibility and provided justice to all aggrieved peoples, the Mughals also followed the administrative, judicial system introduced by Sultans. The Courts of Sadr-us-Sadur were available to decide the religious disputes and Qazi-ul-Qazat to resolve the disputes of secular nature. In the different states, there were officers having their subject matter powers to decide criminal and civil cases. Though the chief judicial power in the provinces was the Qazi & he was supported by the Miradi and Mufti while the Qazi explored the evidence, the Mufti explained the rule by reading books on the law of jurisprudence with the information of disputes which can learn from these judgments, whereas the Miradi described up and marked those judgments ([Zahoor, A](#)).

Judicial management who was running the Marathas was not so much well organized and up-to-date, no set practised for the trial of dispute and codified law was available. The main focus was on the kind settlement of cases only & the Supreme Court was the Court of the ruler, which was called 'Hazir Majlis'. The Court had jurisdiction to entertain the appeals which were filed against the judgements of the lower courts along with trial cases and next to this court was Nyayadhish or Chief Justice who used to entertain both civil as well as criminal cases. The Village Panchayat (Council of Elders), the highest institution in village dealing with civil cases, usually called, "Panch-Parmeshwar", and the Panchas were frequently taken as Ma-Bap, they were given respect with full protocol, and their decisions were implemented instantly and obligatory. The judgments of the Panchayat were compulsory and binding on all the parties ([Wikipedia](#)).

Dispute Resolution in Modern Times

In the 20th century, in the USA, the governments started to introduce the informal legal system (ADR) because they realized that their rights were violated through the legal justice system (court litigation). The American Arbitration Association (AAA) was established in 1926, for the guidance of arbitrators and disputing parties to settle their disputes in a proper way. The Age Discrimination Act, 1975 was also introduced for settlement of disputes with respect to the matters of age discrimination. Warren Burger, a former chief justice, arranged Roscoe Pound Conference ([1976](#)), the main purpose of the conference was to find proper methods to resolve the disputes with the help of lawyers and judges. Martindale-Hubbell started to publish a reference book of ADR for practising legal representatives by providing information to the people relating to ADR practices. Now ADR has become very much popular in the United States, and Alternative Dispute Resolution (ADR) is available at all levels ([King, M, et al. 2014](#)).

During the 1970s, the advisory and determinative procedures were very common in practice, and in Australia, Alternative Dispute Resolution is an acceptable process in civil litigation, and much Alternative Dispute Resolution (ADR) programs are in process in the courts ([Debt Act 1994, Workers Act 1998 & Lease Act 1994](#)). There is a very common practice to refer the matters for one or more Alternative Dispute Resolution (ADR) methods; it is important to mention here that sometimes the consent of parties is important and sometimes it is not such important and proper legislation has been introduced for making mediation compulsory for informal dispute resolution ([French, B, 2007](#)). Australia has adopted informal dispute resolution (ADR) in administrative disputes through the Administrative Dispute Resolution Act, 1975 so that the people can get a speedy resolution of their dispute at any level. It is important to note that even at appellate level ADR is allowed and without any hurdle in Australia.

In the 1990s, the practice of ADR began in UK, family and community mediation center was established in the UK in 1993, but commercial mediation was still a noticeable policy regarding the development of Alternative Dispute Resolution (ADR) ([Brown et al. 1999](#)). Some laws relating to Alternative Dispute Resolution (ADR) in general disputes were introduced in the UK, and the informal resolution of administrative disputes was also introduced in 2007 ([Shipman, Water, Wood 2018](#)) through the Tribunals and Courts, the Act catered for various methods of dispute resolution in cases filed in the tribunals ([Enforcement Act 2007](#)). The use of Alternative Dispute Resolution (ADR) in administrative disputes is slowly emerging in European Union countries. These western countries (the USA, Australia and UK) which are developed countries, have also realized that informal justice system (ADR) is a good option and they have started the practice of informal justice system (ADR) for dispute

resolution which is affordable for people only but also saves the time and expenses of states, costly process (litigation/formal justice system) has been discouraged at government level.

Arbitration is one form or the other was in practice by the native Indians in the time of British rule. Mahatma Gandhi encouraged for the establishment of arbitration courts on the lines of British law courts in India. Later on, under Arbitration Act, 1940, arbitration became the main informal dispute resolution process (ADR) amongst the disputants, The Arbitration Act, 1940, was based on English Arbitration Act 1934, and the laws relating to arbitration, i.e., the Code of Civil Procedure was also amended. India has enacted many laws regarding informal dispute resolution and has promoted this system through Lok Adalats (courts of people) and mobile courts system with the addition of amendments in many laws, which again depicts the success of system and revival of the old and pre-tested system but with a new name and some modern practices.

The head of the tribe used his powers as Jirga (Almost informal justice system) before the British Rule, and customary law was applied for making decisions in such type of disputes. Jirga had powers to adjudicate upon civil as well as criminal matters. This is so strong that even the courts of any other administrative or executive authority can not interfere within the matters and proceedings of Jirga, and tribal Sardars enjoy judicial powers ([Pcr.LJ, 2004](#)). Due to the successful working of this system (with few exceptions), people prefer to refer their matters to tribal Sardars, and they seem to be satisfied with their decisions also.

At the social level, the system of Panchayat (council of elders) is well-rooted in Pakistan. As pointed out earlier, the panchayat system has been in vogue in the Subcontinent since 500 BC. The panchayat system (council of elders) went into the background when formal courts were established by British rulers and took many decades to have a comeback. The legal cover for this comeback was the Punjab Panchayat Act, 1929, providing a solid base to the informal dispute resolution (ADR), which has remained in vogue through various local government laws up till now. Pakistan has traditional and informal institutions of Panchayat (council of elders) and Jirga (council of heads of the tribe) to manage and control the matters in that area, where the issues are resolved by a council of elders. The opposition parties do not interfere with the declaration or decision of this authority because if they do so, then they have to face not only the hatred from their tribe but also a social distance and even social boycott. The courts can also refer to the civil and compoundable criminal cases to these panchayats (council of elders) and Anjuman's. A similar institution, Jirga, is working in KP ([Local Government Act, 2013](#)).

At present, Alternative Dispute Resolution (ADR) processes are available in disputes between private parties under various laws in Pakistan. In July 2002, the Code of Civil Procedure was amended, and section 89-A was added for informal dispute resolution (ADR), but the amendment and addition remained useless because of many flaws in the provision, and results could not be achieved according to the expectations. Punjab Local Government Act, 2013, and other Provincial-Local Government laws and Arbitration Act, 1940, provides for the conciliation courts in the form of panchayats in rural and Musalahati Anjumans in the urban local government set up, but despite these available forums people are adopting the process of litigation and courts are also entertaining upon the matters without probing or sorting out the matters and referring to the concerned authorities.

Pakistan is with no exception in the adoption of this revised informal justice system. In 2017, an Act titled, 'Alternative Dispute Resolution Act 2017' (applicable only in Islamabad Capital Territory) has been passed by the National Assembly to settle the disputes through informal justice system (ADR) with the aim to reduce the burden on courts and providing speedy justice to people at their doorstep. Recently, a bill was passed by Punjab Assembly on the same lines of Federal law but yet has not been implemented in the province, and it shows that Pakistan is also accepting the success and revival of this system and is trying to apply in the country.

Conclusion

From the study, it is very much clear that disputes in human society are not new, and for the resolution of these disputes, different techniques were being adopted at different times. From the above discussion, it is also obvious that informal dispute resolution is the transcription of ancient practices which can be founded almost all civilizations. The resolution of disputes through amicable and

peaceful processes (ADR) instead of court processes as fixed and explained in different eras is more useful and for it is quite practicable due to many reasons such as informal dispute resolution processes are speedy, less expensive, friendly, and both parties obtain benefits. In some countries, informal dispute resolution is annexed with the judicial process. Whereas in some other countries, the various Alternative Dispute Resolution (ADR) processes are employed on voluntary grounds for the resolution of disputes. It is important to realize and consider that both (informal and formal dispute resolution) processes are equally important, but there is a need to use each process carefully and with full consideration.

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