VOLUME 20 ISSN 2456-9704

SHOULD ADR BE APPLICABLE IN CRIMINAL CASES?

By Aastha Aggarwal
From Indore Institute of Law

Introduction

In India, the courts have many pending cases. Suits have been increasing with each passing day, Alternative Justice Resolution (here in after referred as ADR) gained extreme importance in almost every civilized indulgence. ADR defined under the Section 89 of CPC includes negotiation, mediation, arbitration and conciliation where the parties depends on a neutral third-party which helps in reaching a binding decision. In the process of negotiation, the lawyers of the respective parties work together to settle dispute and come to a conclusion. Mediation is a process where a neutral third party known as mediator brings both the parties to a voluntary settlement.

Alternative Dispute Resolution (ADR) is a process which are out of the court proceedings and conclusions. Due to the fact that pendency of suits and cases in the court have increased over the time, ADR practices are being prevailed and appreciated. It becomes a must to recall the famous words of US President Abraham Lincoln focusing the deep significance of ADR: To overcome the problems of formal judicial system a new strategy was evolved which is known as ADR which aims to resolve disputes outside the courts.

Overview on Alternate Dispute Resolution Mechanism.

Alternative Dispute Resolution is a newly developed mechanism for settlement of grievance of parties against each other. These methods are used as substitute of litigation. However, these mechanisms derive their authority from the judicial wing of a country and the working of the same is done under the supervision of the superior statute.

As ruled by the Courts in New York,

"Alternative dispute resolution (ADR) refers to a variety of processes that help parties resolve disputes without a trial. Typical ADR processes include mediation, arbitration, neutral evaluation, and collaborative law. These processes are generally confidential, less formal, and less stressful than traditional court proceedings."[1]

With the growth of disputes between the general subjects of law, the normal proceedings of judiciary is overburdened, if it was not criticized enough for being expensive and stretches to indefinite longer span of time. In such a scenario, it becomes necessary to establish such machinery for resolution of disputes that shall be effective enough to speedily dispose of cases and be easy on the pockets of the parties to dispute.

Some of the alternate mechanisms recognized within the legal systems are herein briefed[2]:

1. Arbitration

"An arbitration is the reference of a dispute or difference between not less than two

[1]New York Courts, U.S. govt.,(April 12,2020, 12:20pm), https://www.nycourts.gov/ip/adr/What_Is_ADR.shtml.

[2] Explained by the Courthouses in New York, U.S. govt.,(April 15,2020, 01:00pm), https://www.nycourts.gov/ip/adr/What_Is_ADR.shtml.

parties for determination, after hearing both sides in a judicial manner, by a person or persons other than the court of competent jurisdiction"[3] [4] Thus, it can be said that arbitration is an out of the court settlement process where the parties themselves decides the neutral third party (arbitrator) who helps both the sides in coming to a binding conclusion. It is more of a relaxed and less formal process than the court proceedings.

2. Case Conferencing

This is a simple process, where the judge or some representative on behalf of the judge meets the parties and their lawyers to resolve dispute before entering the court procedures. Participation of the parties are limited as this meeting is held for narrowing down of the dispute or resolving it altogether.

3. Mediation

Mediation is a non-binding procedure where an impartial neutral party (mediator), assists the parties in coming to a settlement. The mediator does not have any authority to make a binding decision rather helps the parties to come to a conclusion without any court proceedings or adjudication. It is mostly effective in family matters, small disputes between business partners, etc. Mediation becomes inappropriate if a party has any significant advantage or control over the other.

4. Summary Jury Trials (SJT)

In this adversarial dispute resolution process, each side presents its case in a shortened form to a jury. The jury makes a decision, which is only advisory, unless the parties request it to be a binding decision. A summary jury trial gives parties an overview of a probable verdict should be if the case goes to trial. SJTs are available in limited jurisdictions only.

- ADR mechanism can be divided into 5 major parts, i.e.,[5]

Preventive ADR	Facilitative ADR	Advisory ADR	Determinative ADR	Collective ADR	Court-based ADR
Negotiation	Mediation	Conciliation	Arbitration	Ombudsman Scheme	Early Neutral Evaluation
Partnering		Collaborative Lawyering	Adjudication		Court Settlement Masters
ADR Clauses			Expert Determination		Court referred ADR
					Small Claim

[3] Dharma Prathisthanam v. Madhok Construction(P) Ltd, (2005) 9 SCC 689, the essence of arbitration without assistance or intervention of the court is settlement of the dispute by a tribunal of the own choice of the parties.

[4] Indian Oil Corpn Lts v. Raja Transport (P) Ltd, (2009) 8 SCC 520, it is a binding voluntary alternative forum chosen by the parties.

[5] www.lawreform.ie.

					Cou rt

Advantages[6]

The **advantages** of this system are many which can be listed as:

- Reliable information as an indispensable tool for adjudicator. Court proceedings make less progress due to reluctance of parties in providing information. ADR diminishes this drawback as it is less formal and more approachable for the parties. Therefore, ADR proceedings becomes more successful in terms of gathering information for better conclusions.
- In the process of mediation or conciliation parties themselves comes to a decision as they know their respective positions.
- The proceedings are less formal and cost effective.
- The process of ADR is much speedy in comparison to the court proceedings. The basic object for establishing the concept of ADR was to reduce the work load of the courts and to minimize the delay and expense as well as increase the approach of the proceedings.
- ADR is a distinct process from the normal court process, under this , disputes are settled by the assistance of third parties, agreed to, by the parties.
- ADR functions to resolve the disputes fast with less expense of time and money. The decision making process with maintaining confidentiality of the subject matter. Summarizing it, ADR aims at providing justice for resolving dispute as well as harmonizing relation between parties.

In general mediation procedure a confidential consensual form of dispute resolution is facilitated by a retired judge who is trained in conflict resolution. Generally, sessions are attended by the parties in dispute and their legal representatives. It involves various stages.

These stages are neither rigid nor inflexible, which can be formed to achieve the desired out-come. The stages consists:

- The mediator first makes clear to the parties that he is a neutral person and the entire proceeding is confidential that nothing of their discussion will be advanced as evidence in the court if mediation fails.
- The parties open their cases in the next stages. They explain their cases according to their own perceptions and interests.
- The gist of the statements of both the parties is noted. The major issues involved in the disputes are sorted out.
- The process of mediation starts after that, which might proceed with private meetings between the mediator. The mediator tries to narrow down the disagreements between the parties and encourage a final agreement for settlement.
- Finally, the mediator will try that the parties move to an agreement which is a voluntary settlement between the parties for resolving their issues.

From the above mentioned structured process it can be concluded that mediation does not involve rigidity of procedure. The mediator conducts the proceedings in an informal manner considering the fundamental principle that his role is neither to advice nor to adjudicate.

[6] http://www.lawreform.vic.gov.au/sites/default/files/Chapter%2B4%2C%2BChapter%2B5.pdf(April 15,2020, 05:30pm).

Applicability of ADR in criminal cases

The concept of Plea bargaining

Plea bargaining is a pre-trial negotiation technique between the accused and the prosecution, where the accused agrees to plead guilty in exchange for certain compromises by the prosecution. It is a bargain where a defendant comes clean as guilty to a lesser charge and the prosecutors in return drop more serious charges. It is not provided for all types of crime e.g. a person cannot claim plea bargaining after committing heinous crimes or for the crimes which are punishable with death or life imprisonment.[7]

Plea bargaining can be defined as an agreement within a criminal case between the prosecution and the defense by which the accused changes his plea from not guilty to guilty in return for an offer by the prosecution or when the judge has informally made the accused aware that his sentence will be minimized, if the accused pleads guilty. In other words, it is an instrument of criminal procedure which reduces enforcement costs (for both parties) and allows the prosecutor to concentrate on more important cases.

Plea Bargaining in India

Plea Bargaining is not an indigenous concept of Indian legal system. It is a part of the recent development of Indian Criminal Justice System (ICJS). It was inculcated in Indian Criminal Justice System after considering the burden of long-standing cases on the Judiciary.[8]

Section 265A to 265L, Chapter XXIA of the Criminal Procedure Code[9] deals with the concept of Plea Bargaining. It was inserted into the Criminal Law (Amendment) Act, 2005. It allows plea bargaining for cases:

1. Where the maximum punishment is imprisonment for 7 years;
2. Where the offenses don't affect the socio-economic condition of the country;
3. When the offenses are not committed against a woman or a child below 14 are excluded

The 154th Report of the Law Commission was first to recommend the 'plea bargaining' in Indian Criminal Justice System. It defined Plea Bargaining as an alternative method which should be introduced to deal with huge arrears of criminal cases in Indian courts.

Then under the NDA government, a committee was constituted which was headed by the former Chief Justice of the Karnataka and Kerala High Courts, Justice V.S. Malimath to tackle the issue of increasing number of criminal cases.

The Malimath Committee recommended for the plea bargaining system in India. The committee said that it would speed up disposal of criminal cases and reduce the burden of the courts. Moreover, the Malimath Committee pointed out the success of plea bargaining system in the USA to show the importance of Plea Bargaining.

Accordingly, the draft Criminal Law (Amendment) Bill, 2003 was introduced in the parliament and finally it became an enforceable Indian law from enforceable from July 5, 2006. It sought to amend the Indian Penal Code 1860 (IPC), the Code of

[7] https://vittana.org/11-advantages-and-disadvantages-of-plea-bargaining.
[8] *Id* at 5.
[9] https://criminal.findlaw.com/criminal-procedure/plea-bargains-in-depth.html.

Criminal Procedure, 1973 (CrPC) and the Indian Evidence Act, 1892 to improve upon the existing Criminal Justice System in the country.

It is to overcome with excess of criminal cases and overabundant delay in their disposal on the one hand and very low rate of conviction in cases involving serious crimes on the other. The Criminal Law (Amendment) Bill, 2003 focused on following key issues of the criminal justice system:-

(i) Witnesses turning hostile

(ii) Plea-bargaining

(iii) Compounding the offense under Section 498A, IPC (Husband or relative of husband of a woman subjecting her to cruelty) and

(iv) Evidence of scientific experts in cases relating to fake currency notes.

Types

Plea Bargaining is generally of three types namely[10]:-

1. Sentence bargaining;
2. Charge bargaining;
3. Fact bargaining.

Concept	S. No.	Type	Meaning
Plea Bargaining	1.	Sentence bargaining	In this type, the main motive is to get a lesser sentence. In it, the defendant agrees to plead guilty to the stated charge and in return, he bargains for a lesser sentence rather than the described one.
	2.	Charge bargaining	This kind happens for getting much less severe charges. This is the most common form of plea bargaining in criminal cases. Here the defendant agrees to plead guilty for a lesser charge in consideration of dismissing greater charges. E.g. Pleading for manslaughter for dropping the

[10] https://criminal.findlaw.com/criminal-procedure/plea-bargains-in-depth.html.

			charges of murder.
	3.	Fact bargaining	This is normal circumstances not used in courts because it is alleged to be against Criminal Justice System. Fact bargaining occurs when a defendant agrees to lay down to certain facts in order to prevent other facts from being introduced into evidence.

Relation of Plea Bargaining with ADR

1. Fast disposal of cases[11]

- The plea bargaining is beneficial for both the prosecution and the defense because there is no risk of complete loss at trial. It helps the attorneys to defend their clients in an easy way because both the parties possess bargaining power. This is how the long-standing disputes can be resolved and the court would also not need to face encumbrance of case files. Moreover, Plea bargaining helps the courts in preserving scarce resources for the cases that need them most.

2. Less serious offenses on one's record

- In a country like India, society plays a vital role. Once a person is stigmatized by society it becomes very difficult for that person to survive. Many a time stigmatization leads to banishment or exclusion from the society.

- In such scenario, Plea Bargaining allows a person to come clean in order of or no contest in exchange for a lessening in the number of charges or the importance of the offenses. This results in recording less serious offenses on the official court records of an accused. This can be good for the accused when he is convicted in the future.

3. A hassle-free approach[12]

- Indian is known for its long-standing case. Many case proceedings goes for a long period of time, i.e., up to 10 or more years thereby both the parties suffer. There have been instances where accused spent more time in jail than the maximum punishment for which he was accused. Such instances show a grave infringement of their human rights.

- Plea bargaining allows a person to plead guilty without hiring a lawyer. But if they wait for trial, they would have to hire a lawyer, and spend time working with the lawyer to prepare for trial and pay the lawyer. The concept of plea bargaining safeguards the interest of such persons by avoiding the

[11] https://www.nrilegalservices.com/plea-bargaining-in-india/.

[12] *Id* at 9.

hassles and is more pocket friendly, while the case remains pending.

Why ADR should not be applicable in criminal cases

1. Voluntarily adopted mechanism

- As per the legal provision dealing with Plea bargaining, it is a voluntary mechanism which is only entertained when accused chooses it willingly. But the law is silent on the point that in case, the settlement reached is contrary to the purpose of the legal system[13].

2. Involvement of police

- The involvement of the police in plea bargaining also attracts criticism. As India is infamous for the custodial torture by police. In such scenario, the concept of Plea Bargaining is more likely to aggravate the situation.

3. Corruption

- The role of victims in plea bargaining process is also not appreciated. The role of victim in this process would attract corruption which is ultimately defeating the purpose which is sought to be achieved by such action.

4. Independent Judicial Authority

- The provisions of Plea Bargaining do not provide for an independent judicial authority to assess plea-bargaining applications. The in camera examination of the accused by the court attract may lead to public distrust for the plea-bargaining system. The failure to make confidential any order passed by the court rejecting an application could also create biases towards the accused.

5. Not the final solution

- The reasons given for the introduction of plea-bargaining are the tremendous overcrowding of jails, high rates of acquittal, torture undergone by under trial prisoners etc. But the main factor behind all these reasons is a delay in the trial process.

- In India, the reason behind the delay in trials is many e.g. the operation of the investigative agencies as well as the judiciary, personal interest of lawyers etc. Therefore, the need of the hour is not a substitute for trial but an overhaul of the system which can be in terms of structure, composition and its work culture. All these measures would ensure reasonably fast trials.

Plea Bargaining and Judicial Pronouncements

- In ***Murlidhar Meghraj Loya vs State of Maharashtra*** (AIR 1976 SC 1929), The Hon'ble Supreme Court criticized the concept of Plea Bargaining and said that it intrudes upon the society's interests.[14]

- In ***Kasambhai vs State of Gujarat*** (1980 AIR 854) & ***Kachhia Patel Shantilal Koderlal vs State of Gujarat and Anr***,[15] the Apex court said that Plea Bargaining is against public policy. Moreover, it regretted the fact that the magistrate accepted the plea bargaining of accused. Furthermore, Hon'ble Court described this concept as a highly

[13] *supra* note 4.

[14] Murlidhar Meghraj Loya vs State of Maharashtra, AIR 1976 SC 1929, (India).

[15] Kasambhai vs State of Gujarat & Kachhia Patel Shantilal Koderlal vs State of Gujarat and Anr, 1980 AIR 854, (India).

reprehensible practice. The Court also held that practice of plea bargaining as illegal and unconstitutional and tends to encourage the corruption, collusion and pollute the pure form of justice.

- ***Thippaswamy vs State of Karnataka***, [1983] 1 SCC 194, the Court said that inducing or leading an accused to plead guilty under a promise or assurance would be violative of Article 21 of the Constitution.[16] The Court also stated that *"In such cases, the Court of appeal or revision should set aside the conviction and sentence of the accused and remand the case to the trial court so that the accused can, if he so wishes defend himself against the charge and if he is found guilty, proper sentence can be passed against him".*

- In ***State of Uttar Pradesh vs Chandrika*** 2000 Cr.L.J. 384(386), the Apex Court disparaged the concept of plea bargaining and held this practice as unconstitutional and illegal. Here the Hon'ble Court[17] was of the view that on the plea bargaining Court cannot basis of disposing of criminal cases. The case has to be decided on the merit. In furtherance of the same, court said that if the accused confesses his guilt, he must be given the appropriate sentence as required by the law.

- In ***The State Of Gujarat vs Natwar Harchandji Thakor*** (2005) 1 GLR 709, the Court acknowledged the importance of plea bargaining, saying that every "plea of guilty" which is construed to be a part of the statutory process in the criminal trial, should not be understood as a "plea bargaining" ipso facto[18]. It is a matter of matter and has to be decided on a case to case basis. Considering the dynamic nature of law and society, the court said that the very object of the law is to provide an easy, cheap and expeditious justice by resolving disputes.

Conclusion

The concept of plea bargaining is not entirely new in India. Indian has already recognized it when it got its constitution in 1950. Article 20(3) of Indian constitution prohibits self-incrimination. People accuse plea bargaining as violative.

But with the passage of time the considering the burden on the courts, the Indian court has felt the need of Plea bargaining in Indian legal system. When a change is brought it is hard to accept it initially but society needs to grow so is our legal system. Although the concept of plea bargaining would reduce the workload of the courts, it would still be inappropriate as the criminals in order to reduce their true punishment would try to negotiate which would further lead to corruption.

In place of the concept of plea bargaining there should be some fast mechanism within the working of the judiciary system so that the justice is not delayed and the workload reduces.

*****

[16]Thippaswamy vs State of Karnataka, (1983) 1 SCC 194, (India).

[17] State of Uttar Pradesh vs Chandrika, 2000 Cr.L.J. 384(386), (India).

[18] State Of Gujarat vs Natwar Harchandji Thakor, (2005) 1 GLR 709, (India).