CHANGING FACETS OF ETHICS IN ALTERNATE DISPUTE RESOLUTION MECHANISM

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ABSTRACT

As rightly mentioned by Richard Cobden, "ADR is more rational, just and humane than the resort to the sword." We have witnessed since times immemorial that ethics has been an integral part of our culture, the laws in our country have majorly evolved from the customs and the ethical practices. Ethics have been an important tool to evaluate one's character on a personal as well as professional front. The lawyers being the torch bearers of the noble profession have to be extra cautious while conducting themselves, especially in front of the clients. They also face the ethical dilemma of choosing between the competing values and unethical contradictory practices of dispute resolution. The Advocates have been regulated by the courts upon their behaviour with the help of various rules framed by the Bar Council of India in relation to courts, clients, opponents and colleagues. Alternate dispute resolution being one of the trending ways of resolving legal disputes needs to be protected stringently. This needs to be done so that the litigants build trust in this better way of dispute resolution. This paper will be focusing on the role of ethics in an advocate's life and how it is important not only in court proceedings but also in alternate dispute mechanisms. Also, it will be discussing the grey areas on which some stringent governing rules should be made and their nature. This paper will also trace the journey of ethics in alternate dispute mechanisms and suggest possible ethical practices to be followed by the advocates while handling alternate dispute resolution matters.

Keywords: Ethics, Alternate Dispute Mechanism, Bar Council of India, Trust, Litigants.

1. INTRODUCTION

As rightly pointed out by Richard Cobden "ADR is more rational, just and humane than the resort to the sword." Ethical issues evolving in Alternate dispute redressal are not paid much heed in comparison to the issues arising in normal litigation matters. This could be because the area of ADR is less travelled by the legal practitioners than the litigation areas, ADR being a developing area has the potential of having new ethical issues depending upon the role of the litigator. This phase being less travelled has the scope of new issues and ethical dilemmas which might arise in front of the lawyers associated with it. When faced with difficult choices in life, the bulk of the time we are torn between the correct and incorrect paths, each with equally compelling arguments to select from. When there is a "choice of opposing ideals offering a variety of incompatible ways of conduct," a moral dilemma occurs. People who advocate face situations on a daily basis where they must choose between an ethical practice that may or may not be correct, as well as the easy option of manipulating the law itself, and picking a wrong course of unethical behaviour such decisions are usually difficult, and this is where the morally acceptable decision-making process comes into play.

The field of ADR involves more tangled legal matters therefore, Advocates while dealing with such disputes often face a lot of difficulties. As it is a new area, they also require time and experience while becoming habitual to a developing and non-litigious role. Clients are more prone to more risk as the legal practitioners themselves are not sure how to conduct themselves like they are well worse in litigation matters. ADR is considered to be a rapid and expeditious process and is comparatively a recent one and also comes along the new risk factor is simultaneously which are unpredictable by the people of the legal fraternity. Through this paper, the author would try to discuss the legal and ethical issues involved in ADR highlighting the rules governing the advocates and the applicability of some new ethical practices involving ADR.

2. ROLE OF ETHICAL VALUES IN ADR

The law relating to ADR has grown significantly over time, and many people prefer it since it is believed to be more pleasant and cost-effective. There was a time when legal consultants who dealt with ADR were thought to have a decent, spiritual, and humane conscience because they wanted to provide quality solutions to their clients that were supposed to be good and just, but with the passage of time, there has been a transition where they only put emphasis on assessable, expertise-driven, cost-cutting, docket clearing, which has resulted in

institutionalized methods of grievance resolution in the courts and in law firm. Attorneys frequently communicate with their clients with evil motives that are at odds with the original premise and goals of ADR, and they utilise their deception to manipulate the mediation process in order to win. A lawyer's ethical obligations include prioritising his client's interests over all others, assuring fairness and honesty when handling the case, and abandoning their tactful and confrontational bargaining methods. It is not only the lawyer's responsibility to act ethically and responsibly toward their clients, but it is also the lawyer's responsibility to respect the legal procedure as defined by law. The challenge which hangs around an ADR lawyer is to maintain a balance between the process and outcome which does not create any loss towards the client.[1]

2.1 ETHICAL VALUES IN MEDIATION

Ethics simply means the process of deciding whether any action done is correct or not. It is because what's right and wrong may differ from person to person depending upon their own perspective. The most common factors that play a vital role in persuading the decision are: the culture of the arbitrator, beliefs of the arbitrator, or mindset of the arbitrator. So, it can be rightly said that what a party assumes to be an appropriate principle can be completely not acceptable by the other. In order to sail through this unambiguity and uncertainty, some ground guidelines need to be set in order to build uniformity and certainty for arbitrators as well as the litigant.

Mediation has seen immeasurable growth as a mechanism for resolving disputes promoted by impartial third parties i.e. Mediators are encouraged when they seek to promote informal and voluntary reconciliation of the parties to the dispute. Mediation relies on several key points, such as negotiations, communication, facilitation, and the approach used for dispute resolution. Nevertheless, professional ethical values such as independence, integrity and integrity must be adhered to. The ethical issues associated with mediation are typically:

- **Confidentiality:** The responsibility is on the mediator to keep the whole mediation process completely confidential.
- **Conflict of Interest:** Mediator shouldn't have a conflict of interest with either of the parties to the dispute even with the subject matter involved.

[1] Deeksha Dubey, Role of Professional Ethics in Alternate Dispute Resolution, available at http://jcil.lsyndicate.com/wp-content/uploads/2018/05/ROLE-OF-PROFESSIONAL-ETHICS-IN-ALTERNATIVE-DISPUTE-RESOLUTION-Deeksha-Dubey-5.pdf.

- Tuning: the parties involved should adhere to the few grounds that would expedite them in reaching to settlement.

Fundamental ethics, such as anonymity, impartiality, and integrity, must be adopted everywhere. Ethics plays an important role in mediation since it works as a trust element that both parties in a disagreement rely on. Ethics are those just and fair principles which should be adhered by the mediator and the parties, but it is the task of the mediator to ensure or to run the process on ethically right ground.[2]

With the rapidly growing validity of mediation, the Supreme Court of India has Suo-moto begin to refer to some case laws for this process and has also created specific guidelines regarding it. The Arbitration and Conciliation Act 1996 in India also works hand in hand with the UNCITRAL model, Section 75[3] of this Act talks about the confidentiality in mediation and conciliation According to this provision the conciliator or mediator and the parties shall keep every matter private unless it is mandatory to disclose it. India is trying to maintain the ethics by inculcating such provisions which binds the parties to be honest to each other. Further, the Apex court has also made it secure by making Laws such as Arbitration and Conciliation Act 1996, Court-connected Mediation under the Supreme Court (Civil Procedure) Rules, 2005 to secure parties' trust in mediation.

In the case of Moti Ram (D) Thr. L.Rs. and Anr. vs. Ashok Kumar and Anr[4] the parties were in dispute of a property that Apex Court directed that the dispute be resolved through settlement. The facilitator then submitted a report to the court that included numerous negotiation and proposition offers made between the parties that were kept anonymous. The Supreme Court took a stand on this and said that:

"If the mediation succeeds, by both the parties to the Court without mentioning what transpired during the mediation proceedings. If the mediation fails, then the mediator should only state the outcome in his report and give it to the court mentioning that the `Mediation has been unsuccessful'. Besides that, the mediator should not mention anything which was reviewed, suggested, or done at the time of the mediation proceedings. This is because in mediation, very often, offers, counteroffers, and proposals are made by the parties but until

[2] Akarsh Kumar and Ashutosh Pareek, Mediation ethics in India, available at https://imwpost.com/mediation-ethics-in-india.
[3] The Arbitration and Conciliation Act 1996.
[4] [2010] 14 (ADDL.) SCR 809.

and unless the parties reach an agreement signed by them, it will not amount to any concluded contract. If the proceedings in the mediation proceedings are revealed, it will ruin the privacy of the mediation procedure."[5]

In Rama Aggarwal vs. PIO, Delhi State Legal Service Authority[6] CIC/SA/A/2015/000305 the question that came up before the Central Information Commission (CIC) is whether a party can seek information regarding mediation proceedings under Right to Information Act. The CIC observed the following:

"Information regarding the negotiation, mediation, conciliation and counselling will fall under the exempted clause of information of another spouse, being personal and given in fiduciary capacity and, no public interest is established in disclosure, while there is the larger public interest in protecting that information like that would help mediation to flourish, hence such information shall not be disclosed."[7]

In nutshell, the research demonstrates that the regulations established by the Supreme Court, as well as the function of mediation in India in accordance with international norms, could provide some certainty to the client. The Indian courts have played and will continue to play an essential role in improving mediation confidentiality and loyalty. This should aid mediation's growth as a method of dispute resolution and increase people's faith in it. Recently, mediation has also been included as a dispute resolution mechanism in the 2019 Consumer Protection Act. Chapter 5 of the 2019 Law deals with mediation. The present act by providing a separate chapter has made mediation strong as it provides for a stringent mediation the provisions dealing with mediation under chapter v from sections 74-81.[8]

2.2 ETHICAL VALUES IN ARBITRATION

Arbitrators must be objective and independent, according to a slew of regulations, standards, and laws. Their autonomy and impartiality emerge as a fundamental presupposition that unquestionably extends beyond ethics, and as a result, it is profoundly ingrained in arbitration legislation and arbitration standards of numerous organisations around the world. Arbitrators in entities dealing with arbitration, such as the International Chamber of Commerce (ICC), are required to sign a formal proclamation of independence before being appointed to the position

[5] Moti Ram (D) Thr. L.Rs. and Anr. vs. Ashok Kumar and Anr [2010] 14 (ADDL.) SCR 809.
[6] CIC/SA/A/2015/000305.
[7] Rama Aggarwal vs. PIO, Delhi State Legal Service Authority[7] CIC/SA/A/2015/000305.
[8] The Consumer Protection Act, 2019.

of arbitrator. The Codes of Ethics detail the procedures that must be followed in order to keep the arbitration process running well, and they cover a wide range of topics, including:

- Appointment of arbitrators:

While the parties may consult with an arbiter, the advantages of the conflict should not be mentioned. These codes do not impose any obligation on the arbitrator to inform the other arbitrators about the discussion. He should assess his availability before giving his approval, and he should not provide his consent if he is unable to fairly allocate time and attention to the parties. Furthermore, he should not be granted an appointment if he lacks the appropriate language and analytical ability, and he should communicate this with the clients and the arbitral institution in advance.

- The Start of the arbitral proceedings:

The arbitrators at the initiation of the proceedings need to ensure that the parties are aware of the entire arbitration procedure. They should ensure that parties instead of contacting their arbitrator address all questions and duly serve copies to other parties as well.

- The supervision of the arbitral proceedings:

The evaluator owes a duty to the parties, as well as to the arbitration procedure and the commercial community at large, as a sufficient instrument for resolving conflicts.

- Compensation:

Usually, the amount of compensation is determined by the authority through a structured schedule which is pre-established. In some foreign institutions, like the London Court of International Arbitration or Netherlands Arbitration Institute, the arbitrators, however, have to disclose their per hour rate. In every circumstances with so-called 'ad hoc' arbitrations, i.e., when it is done outside institutions, arbitrators have to state their own remuneration.[9] The decision given by the arbitrators does not only have to be proper as per law but has should be able to meet up the requirement of parties.

[9] Code of Ethics for Arbitrators in Commercial Disputes, available at https://www.cpradr.org/resource-center/protocols-guidelines/ethics-codes/code-of-ethics-for-arbitrators-in-commercial-disputes.

2.3 ETHICAL VALUES IN CONCILIATION

The role of the conciliator is vital when it comes to industrial dispute resolution. The conciliator has to adopt different methods and kinds of obligations. The conciliator can perform his duties in a more efficient way if he has specific qualifications as required by the established law. When the participants agree to hire an independent conciliator, they choose someone based on his or her education and know-how, which they are familiar; they choose him precisely because they both have confidence in his ability to assist them. He does, however, have his own amount of knowledge, personal status, and, most importantly, the authority that comes with his position. As a result, the parties normally welcome his intervention. A few of the principles which must be adhered to by the conciliator are as follows:

- **To understand the Parties:**

It is preferable to take a reasoned approach, particularly during heated debates when sentiments tend to take over. Both sides bring their different conceptions to the bargaining table. Although they may use common words, cite similar cases for support, and present similar statistical information, their perceptions may differ significantly.

- **Ethical Authority of the Conciliator:**

The amount to which a conciliator has excelled in winning the parties' faith in his abilities to aid them will be determined by his ability to be neutral, trustworthy, and knowledgeable. Expertise, as defined above, is more than just having a body of knowledge; how you apply that knowledge is truly the secret to being an effective conciliator.

- **Marshalling Pressures:**

A conciliator employs manipulative tactics to achieve his goal at any given time, such as persuading any party to renounce a position or persuading a party to accept a particular point of view, recommendations, or proposition, or agreeing to proposed settlement terms.

3. ETHICAL PRACTICES UNDER BAR COUNCIL RULES

Bar Council of India under Section 49(1)(c) of the Advocates Act have made some rules which govern the duty of an Advocate towards various Class of people namely, the court (rules1-10), the clients (11-33), the opponents (Rules 34 & 35) and the colleagues (Rules 36-39). Duty is also established under these rules towards the society. These rules enshrine the burden of legal ethics on the shoulders of advocates and establish the duty to behave in an ethical manner. This

is so because this profession is treated as a noble profession aiming to bring justice to the aggrieved. The Disciplinary committee established under the advocates act also act as a protector of the clients who are harmed or cheated by the advocates.

- DUTY TOWARDS COURT:

  As per this, the advocates have the foremost duty towards the court. Under these duties, they are not allowed to disrespect the court and its proceedings. They are supposed to be respectful towards the court and the profession, also they should refrain themselves from being in any dispute where they have some pecuniary interest. A proper dress code needs to be followed in order to build a strong character as the officer of the court.[10]

- DUTY TOWARDS CLIENT

  According to these duties, the advocate needs to follow ethical practices and make sure that their clients get justice. They need to ensure that the justice is delivered following the standards of legal ethical practices given under these rules. These rules also prohibit the advocates to act as surety, to lend money to their clients and even not to agree towards their fee as a result of settlement to the dispute. They also need to prepare a full-fledged account of the expenses and fees that has been taken from the client and even should not anytime adjust the amount given back by court towards fee. [11]

- DUTY TOWARDS OPPONENTS

  These rules also discuss the duty of a lawyer towards the opponent lawyer as well as the party. The advocate should never try to settle the dispute with the opponent party without consultation of the opponent lawyer. A duty toward opponents entrusts the responsibility of maintaining dignity of the profession.[12]

- DUTY TOWARDS COLLEAGUES

  Lastly, the duties are given with respect to the colleagues this ensures that there is a healthy competition in market and every lawyer gets a fair chance to establish

[10] Rule 5 of the Bar Council Rules of India Rules.
[11] Rule 25 of the Bar Council of India Rules.
[12] Rule 34&35 of the Bar Council of India Rules.

themselves in the field of law. False and over advertisement has been discouraged under these rules also.[13]

Such obligations which have been made for the advocates who hone within the courts ought to too be appropriate to the legitimate practitioner's honing ADR. Usage of these obligations would offer assistance in building the belief of clients or the prosecutors within the ADR instrument, which in some places not set up moreover. This being so, since ADR lack's a comprehensive enactment which can bring all fields of beneath one umbrella and this can be an extreme matter of concern which needs pressing consideration in arranging to move forward ADR hones professionally as well as morally. Cases including matters of assertion and conciliation do not have an appropriate statutory system or rules managing with any wrongdoing included or indeed a statute managing with other areas of ADR like smaller than expected trial, ENE, med-arb and so on. The enactment on Discretion and Conciliation doesn't have any particular rules managing with unscrupulous hones by mediators or judges. The need for a statutory system or guidelines is bound to make an obstruction the development of subjective and reasonable ADR instruments. On the other hand, intercession doesn't indeed have a statute like Discretion and Conciliation Act, 1996. But still, intervention is prospering in India as compared to assertion. It can be encouraged to create and progress on the off chance that there's a statutory acknowledgement given to this department of ADR. Mediation has created an unused insurgency due to the increment of development in this department and so it'll be profoundly hazardous to stay without any comprehensive system at this incipient arrange.

4. SUGGESTIVE METHODOLOGIES

With the on-going trend it would be difficult to rely on the already existing laws related to ADR. These laws need to be more stringent and client friendly as is the motive of the ADR itself. Some of the suggestive methods by which the ADR mechanism can be made stronger are as follows:

[13] Rule 36 of the Bar Council of India Rules.

1. A statutory body should be established and its composition, capacities, powers and duties may be approved by the Bar Council of India along with the judges of High Court and Supreme Court.

2. Registration of arbitrators in the above-mentioned statutory body to practice ADR. The board ought to outline rules to direct the misbehaviours and advance a sound moral environment by taking strict activities against the defaulters.

3. Designing a division or a totally new law involves a lot of efforts but at this point it is the need of an hour to take such a major step.

4. It should be made mandatory for the educational institution to provide the nuts and bolts of moral hone so that understudies from the starting of their carrier itself are careful of their future activities. A number of studies shows that there is a need to emphasise on teaching professional ethics, values and professional responsibility to the students.[14]

5. Arbitrators should be selected on the basis of certain pre-established criteria based on some technical skills required in ADR mechanism.

6. The Compensation of the ADR practitioners should also be pre-determined by the statutory authority so that sanctity of inexpensiveness is maintained in this whole process.

ADR has more advantages over badly designed and long case forms. But these qualities are presently weakened with deceptive hones, repeating intrusions with legal choices and unfeasible costs. This has come about in lessening the advancement of the profitable procedure of the ADR strategy. A practical conclusion of these impediments can be regulation intervention which ought to be energized and favourable to secure the ADR from getting to be another degenerate case prepare.

[14] June Chapman, 'Why Teach Legal Ethics to Undergraduates?' (2002) 5.

5. CONCLUSION

To recapitulate, talking about the terms of professional legal ethics one must consider the ideas of the great philosophers like Aristotle and Kant. The theory of Aristotle is different from traditional Kantian moral philosophy, as he tries to manifest the idea of ethics through a well-reasoned investigation of human practices and experiences.

Therefore, contemplating the ideas of both Aristotle and Kant, morals is common sense which needs an argumentative approach not a logical one conjointly concluding ethical truths from all-inclusive premises cannot take put without looking into the particulars of a circumstance. All things considered, common truths built up by contemplated examinations into common convictions and common hones, alongside an understanding of the common constitutions and character of the species, can deliver a strong, in spite of the fact that not a certain, basis for generalizations in ethics.[15] In other words, an individual cannot expect to act unethically while playing the position of attorney while also expecting to act like an unique kind of person. These Aristotelian and Kantian perspectives are essential not only in the subject of ADR, but in any legal profession that requires us to act ethically.

Arbitrators shall make every effort to ensure fair and timely processes. They should, however, deal with the system in a way that aids the parties in resolving the disagreement if they so desire. Arbitrators' decisions must not only be correct in fact and law, but also meet the parties' requirements to the greatest extent possible. In fact, the law frequently allows a variety of options from which the arbitrator must choose the one that best matches the parties' needs and options.

There are a number of advantages to using ADR rather than the time-consuming court procedure. ADR is more convenient in nature, requiring confidentiality, autonomy, finality in award enforcement, and a quick settlement procedure, among other things. However, unscrupulous tactics, repeated pauses owing to judicial decisions, impractical expenses, and unnecessary delays have eroded these qualities. As a result, the increase of the effective mechanism of the ADR process has slowed. Institutional arbitration is one viable solution to

[15] Immanuel Kant, Metaphysical Foundations of Morals, in The Philosophy of Kant, (Friedrich ed. 1940); C.D. Broad, An Introduction to Kant (1978); Immanuel Kant, Lectures on Ethics (trans. Insfield 1978); David E. Schrader, Ethics and the Practice of Law (1988); Rorty, Introduction, in Essays on Aristotle's Ethics, supra note 29, at 1-3.

all of these issues, and it should be pushed and fostered in order to prevent ADR from devolving into another messy litigation process. The ADR process will thrive and continue to evolve as long as arbitrators, prosecutors, and even ordinary people are cognizant of their unique ethical responsibilities.