

Why I Hate ‘Alternative’ in “Alternative Dispute Resolution”

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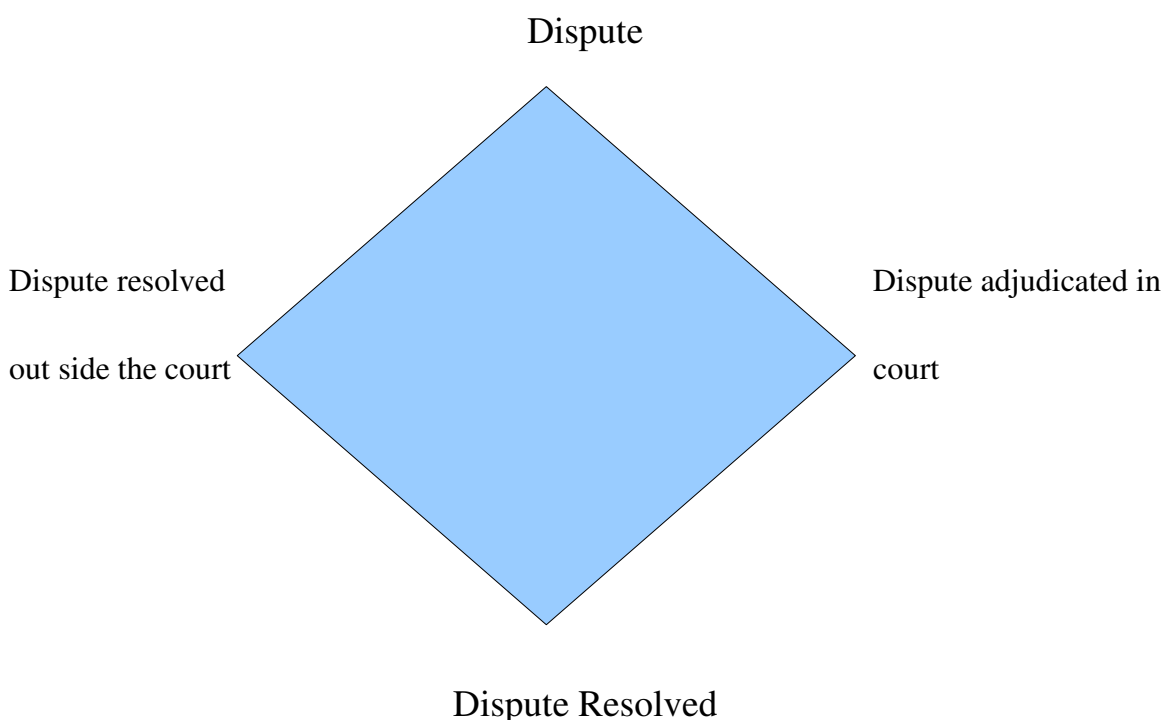
Abstract: *The methods like mediation are described as alternative dispute resolution processes because they are considered as alternative to the litigation and the process of adjudication. It is time to recognize that dispute resolution processes stand in their own right and not as an alternative to any adjudicatory process. Theoretically there is a basis for saying so because there are disputes, which can never be adjudicated but can only be resolved outside the court. The normal adjudicatory process has no answer to such disputes. Experience shows that only a fraction of disputes in the society are adjudicated upon. The vast majority of disputes are in fact resolved by the families and communities themselves. There are communities in India and world over such as tribes and other deprived sections of society who live on the fringes of civil society and have no access to normal court process to get their disputes adjudicated. To say that there are no disputes in existence in such communities would be denying the obvious reality of life. They may have primitive adjudicatory apparatus in place but most of disputes are resolved and not adjudicated in such communities. We need to give dispute resolution processes their due place and not merely consider them as an appendage or alternative to any other process. If the argument that we should adopt dispute resolution process as an alternative to adjudicatory process only because adjudication in courts takes a long time or the cost of litigation is prohibitive is taken to its logical conclusion then it would mean that if the cost of litigation is reduced to zero and the litigations are decided on day to day basis then the need for such dispute resolution process will disappear. This argument is flawed for at least two reasons. One, there will always be influx of some cases in the adjudicatory process, which the system will not be able to adjudicate and therefore there would be requirement for a system to be evolved, which may take care of the cases which can be adjudicated. Two, dispute resolutions in this way have some obvious advantages over the normal adjudicatory process like the cutting down the progression of litigation in the forms of appeals, revisions etc on the one hand and putting an end to prospective litigation between the parties on the other hand.*

Disputes

The disputes can be mere difference of opinion of no consequence. The disputes can take the shape of arguments of scholarly nature. The dispute can also be of the proportions and scale, which may continue to exist for a long a period of time without any end in sight; like the disputes of political nature. The disputes, which we are talking about here, are the disputes, which flow from the legal rights and obligation of the parties. The disputes, which can be agitated in a court of law or enforced by a court of law. In other words, at the moment we are only concerned with legal disputes per se or the disputes, which revolve around legal rights.

What we intend to do with disputes

No civil society wants disputes within. The disputes not only disrupt peace in the society but also hinder its progress. We desire that the disputes in a society should be resolved as early as possible. The disputes can be resolved in a court of law or out side the court of law.



These two channels of dispute resolution exist independent of each other. They can be followed independent of each other. They do not stand as alternative to each other.

The dispute resolution outside the court of law is the main dispute resolution process

The courts of law with all its paraphernalia are the most conspicuous symbol of resolving disputes. We, therefore, tend to believe that this is the main method of resolving disputes. There are innumerable channels, which exist in society outside the court system to resolve the disputes. In fact, the courts are the last resort for most of the people to get their disputes resolved. It is not difficult to find people on the street who may say that they have never been to court in their entire life. It surely cannot mean that they never had any dispute in their lives. It only means that they had their disputes resolved by not going to the court but outside it.

In India and in other parts of the world there are communities like the tribes and other marginalized sections of the society who have no access to the courts of law. The entire court system of resolving disputes is alien to them. To say that they do not have disputes among themselves would be denying the obvious. It cannot be claimed by anyone that their disputes do not get resolved. That is to say their disputes get resolved not inside the courts of law but outside.

The purpose of saying all this is simple. There are far more number of disputes, which get settled outside the court system of adjudication than inside. To call such dispute resolution processes as “alternative” can only be described as a misnomer.

All disputes cannot be adjudicated

If all disputes cannot be resolved outside the court and necessarily have to be adjudicated, then there are also disputes, which cannot be adjudicated, but can only be resolved outside the court. Prime examples of such disputes are the injunctions that cannot be supervised by the court.

The bypass model is flawed

It is more than often said that the alternative dispute resolution processes” are like channels created to decongest the courts. In other words, since there are large of number cases pending in courts therefore we need to have “alternative dispute resolution processes” in place in order to reduce the number of cases in the court. Conversely, as the number of cases in courts goes down, the necessity of having “alternative dispute resolution process” in place would also go down. The other reason given for adopting the “alternative dispute resolution processes” is that it is cost effective. In other words if the cost of litigations is reduced the necessity of “alternative dispute resolution processes”

will also decline. These arguments are flawed for at least two reasons. One that there will be always be influx of some cases in the adjudicatory process, which the system will not be able to adjudicate. Two, dispute resolution processes have some obvious advantages over the normal adjudicatory process like the cutting down the progression of litigation in the forms of appeals, revisions etc on the one hand and putting an end to prospective litigation between the parties on the other hand.

The fact that these dispute resolution processes can also resolve the disputes pending before the courts thus contributing to reduction of cases in courts is a by- product of such dispute resolutions processes and not a reason for their existence.

The existence of large number of cases in the courts, which cannot be adjudicated, is one of the disguised reasons contributing to the ever-increasing number of cases in courts. Therefore, there is a greater need for having these resolution processes work hand-in-hand with court adjudicatory process not as an alternative but complimentary to it.

The dispute resolution process outside the court system in focus

The disputes resolution processes outside the court system were always in existence but they were never in focus of the civil society like they are seen now. These processes are being discussed not only by legal experts but also community leaders and business professionals. The old methods of dispute resolutions are being rediscovered and fine-tuned to meet the requirements of the society and new ones are being evolved. As we realize that these dispute resolution processes outside the court system exist not as an alternative to the court system but independently, it would help us understand and work these processes better. It would encourage greater research and confidence in these processes. They have the potential for being made applicable in all walks of life wherever there exist possibility of any dispute, a potential only waiting to be tapped.