ROLE OF PROFESSIONAL ETHICS IN ALTERNATIVE DISPUTE RESOLUTION

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ABSTRACT

Alternative Dispute Resolution is facing a variety of ethical issues which are diluting the original idea of just and fair dispute resolution process. Legal practitioners while dealing with ADR often faces a lot of challenges while becoming familiar to a totally new and non-litigious role. In order to win the case, they use their tactful skills to manipulate the dispute resolution process making it inconsistent with the original idea and goals of ADR. There are various reasons behind these animosities and one of them being the concept of ADR which is totally new. Various other fields of law like criminal procedure or civil procedure has taken more than a century to evolve, while ADR entered in the field of law recently and is only handful of decades old. Without a shared body of common understandings, values and ethics, ADR might fade away as quickly as it appeared if a lack of clear ethical or moral underpinnings causes the public to lose faith in it as a viable alternative to judicial dispute resolution.¹ In this paper, the author has tried to address matrix of ethical dilemma faced by ADR process, concept of legal professionalism and suggestive methods which can resolve such ethical concern. Further, theories of various great philosophers like Aristotle and Kant are also addressed in this paper in order to provide a better understanding of ethical principles and moral behavior.

Keywords: Alternate Dispute Mechanism; Civil Procedure; Criminal Procedure; Professional Ethics.

INTRODUCTION

It often happens when we face tough choices in life and most of the time we are stuck between a right path and a wrong one. Both the paths have equally compelling reasons to choose from. However, sometimes those reasons are not enough to decide the right choice. An ethical dilemma arises when there is a ‘choice of competing values (ideas of goodness)’ which suggests ‘a variety of alternative and contradictory courses of action.’ Lawyer’s everyday faces the same dilemma while deciding between ethical practice which may prove to be not as much fascinating as the easy choice of manipulating the law itself and choosing a wrong path of unethical behavior. Deciding our judgements on the basis of what is ethically right can sometimes prove to be a very difficult choice and here enters the role of ethical decision making.

ADR involves more complicated legal issues than litigation matters. The most plausible reason is ADR being a newly developed field and does not have wide area of legal practice like litigation matters. Legal practitioners while dealing with ADR disputes often faces a lot of challenges while becoming habitual to a totally new and non-litigious role. This often leads to practitioners facing a tough time with various ethical issues arising out of their role from ADR. Clients face more risk in litigation matters as it involves extended cumbersome processes, more financial cost and emotional instability for years until the matter is settled. ADR is often a quick and speedy process and is relatively a new one. Therefore, while working ethically in such a new field can often lead to loss of wealth, cases and clients to practitioner. These loses can prove to be very vital for especially those who have just stepped in this new field and have very little or even no experience.

ETHICAL VALUES ASSOCIATED WITH ADR

ADR is growing rapidly and is now pursued by various people having different goals. There was a time when legal advisors who were associated with ADR were often considered to be having good, moral and ethical conscience. The reason being that one strand of ADR (the one with which I identify-"qualitative"-better processes and solutions) which has always associated itself with pursuing "the good" and the "just," but as the time has changed the other strand of ADR

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2 Julie MacFarlane, ‘Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model’ (2002) 40
(quantitative, efficiency concerned, cost-reducing, docket clearing) which has produced institutionalized forms of dispute resolution in the courts and in private contracts is taking over the former one.³

Lawyers now interact with their clients while having different behavior and intentions which are inconsistent with the original idea and goals of ADR. In order to win the case, they use their tactful skills to manipulate the dispute resolution process. Take for instance negotiation strategies of arriving late to throw off the other side, “take it or leave it” offers, and creating calendar conflicts are all adversarial tactics that may keep the meter running, and usually do not serve the client’s best interests.⁴ This often leads to dilution of qualitative and good and just values associated with ADR. The most appropriate ethics which a lawyer should follow is by keeping their clients interest over their own, by ensuring fairness and honesty in their approach and lastly, by leaving behind their tactful and adversarial bargaining strategies. The lawyers should not only behave ethically responsible towards their client but also hold respect towards the legal process as whole. The crucial challenge which is presented in front of a ADR practitioner is to carefully create a balance between the process and outcome in such a way that doesn’t prejudice or create any loss towards client.⁵

ETHICS AND CODE OF CONDUCT

If we look at various fields of law and its different types of jurisdiction, we will always find one common element which is code of conduct through which all judges are bound in some or the other way. Take for instance the role of an arbitrator, who is also a private judge and this itself underlines the necessity of rules or a binding code of conduct. It is the need of an hour that in order to maintain the sanctity of the branch, a well-defined set of rules and ethical code of conduct should be framed. The quality and fairness of the branch should be maintained so that not only the justice is delivered fairly but also the behaviour of legal practitioners is regulated.

There are also some amendments required in the statues so as to ensure that arbitrators delivering the awards are behaving in a fair, independent and impartial way. Any misconduct or ill practices on behalf of practitioner should also be brought under the ambit of such an amendment. One example for such a code of conduct is a framework operating in Delhi by CIAC (Construction Industry Arbitration Council) or ICA. There is a specific set of rules under CIAC which requires arbitrators to adhere to strict code of conducts for the arbitrator, parties & the counsel/parties’ representative to ensure smooth and environment friendly atmosphere for conduct of arbitration.6

LACUNAS IN EXISTING LEGISLATION

India is lacking a comprehensive legislation which can bring all fields of ADR under one umbrella. It is a severe concern which should be addressed as soon as possible in order to improve ADR practices professionally as well as ethically. Cases involving matter of arbitration and conciliation are covered by Arbitration and Conciliation Act, 1996. But, there is no proper statutory framework or guidelines dealing with any misconduct involved or even a statue dealing with other fields of ADR like mini trial, ENE, med- arb and so on. Even the Arbitration and Conciliation Act, 1996 doesn’t have any specific guidelines dealing with unethical practices by arbitrators or judges. The lack of statutory framework or guidelines is bound to create a barrier in the growth of qualitative and fair ADR mechanism.

Mediation on the other hand doesn’t even have a statute like Arbitration and Conciliation Act, 1996. But still mediation is flourishing in India as compared to arbitration. It can be further developed and improved if there is a statutory recognition given to this branch of ADR. Mediation has created a new revolution due to the increase of growth in this branch and therefore it will be highly risky to remain without any comprehensive framework at this nascent stage.

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SUGGESTIVE METHODS

An Arbitral Council of India should be created as a statutory body and its composition, functions, powers and responsibilities may be finalized by fusing the best provisions applicable to the Press Council of India and the Bar Council of India. Mandatory enrolment in Arbitral Council of India should be declared for each and every person intending to become an arbitrator. The council should also be kept under check and balances by having a limited power in order to preserve them from becoming unethical and autonomous. The council must also have powers to regulate the malpractices and promote healthy ethical environment by taking strict actions against erring arbitrators.

An Arbitration Division should be statutorily created in the Delhi High Court and every other High Court for exclusively dealing with arbitration related matters so that all disputes can be disposed of as expeditiously as possible and if there are any unethical practices involved, it can be reported under some statutory body. Creating a division or a totally new legislation involves a lot of effort and is not easy but at this juncture it is the need of an hour to take such a drastic step.

It is also necessary that legal institutions should incorporate in their teaching methods, the concept of ethics and its importance in today’s world. It is necessary that institution take it seriously to provide at least the basics of ethical practice so that students from the beginning of their carrier itself are mindful of their future actions. Almost all studies and reports into legal education and the legal profession emphasise the need to teach skills in the context of ethics, values and professional responsibility. Not only there should be a separate ethics course but each and every other subject of law should have at least one unit of ethical practices in it. Also, it should not be retrained to just formal rules of ethical and professional conduct; it should have a practical approach to it. Law schools also have an obligation to impart to students a critical understanding of personal and professional values where relevant values include ‘the lawyer’s obligations to

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8 The Arbitration and Conciliation (Amendment) Bill, 2003
truth, honesty, and fair dealing; the responsibility to improve the integrity of the legal system’, ‘the obligation to promote justice; and the obligation to provide competent representation.\textsuperscript{10}

PROFESSIONAL ETHICS

Legal professionalism is going through a very profound problem in itself. Clients are not satisfied with their own legal advisors, practitioners are critical towards their own colleagues and the entire public is rebuking the whole legal process. So what is the root cause for people being scornful about legal professionalism and this whole animosity?

There can be many different answers but the one visible aspect of it can be the recent deterioration in legal professionalism. So what actually is legal professionalism? There is not one single definition to it and some people have associated it with ‘professional courtesy’ or ‘professionally ethical behaviour’. For some others it means that legal professionals should first serve the society before serving their own profit. That practitioner should treat law as a profession first and business second. But recent unethical scenario has proved to be ironical towards the ideal of legal professionalism as lawyers are trying to manipulate law and statues without thinking about right or wrong.

In terms of professional legal ethics, views of some of the great philosophers like Aristotle and Kant are highly noteworthy. According to Aristotle, in order to have knowledge of ethical principles, we need to first experience and understand "the particulars" of a situation and this theory of ethics differ from moral relativism, which implies that no rational agreement on ethical principles can be reached.\textsuperscript{11} This theory of Aristotle differs from traditional Kantian moral philosophy, as Kant tries to establish the idea of ethics through reasoned investigation of human practices and experiences.


\textsuperscript{11} Lorie M. Graham, Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education, The Journal of the Legal Profession
Hence, reflecting on the ideas of both Aristotle and Kant, ethics is practical which requires a dialectical approach not a scientific one and also deducing moral truths from universal premises cannot take place without looking into the particulars of a situation. Nevertheless, general truths established by reasoned investigations into common beliefs and common practices, along with an understanding of the general constitutions and character of the species, can give a solid, though not a certain, basis for generalizations in ethics.\textsuperscript{12}

Further, in Aristotle’s word –“The man, then, must be a perfect fool who is unaware that people's characters take their bias from the steady direction of their activities. If a man, well aware of what he is doing, behaves in such a way that he is bound to become unjust, we can only say that he is voluntarily unjust”. In simple words a person cannot anticipate to act in an unethical manner while playing his role as an attorney and at the same time also expect to behave like a different kind of person while playing that role. These views of Aristotle and Kant are not only necessary in the field of ADR but in every other legal field which require us to behave ethically right.

CONCLUSION

There are various advantages of choosing ADR over cumbersome and extended litigation processes. ADR is more flexible in nature, involves confidentiality, party autonomy, finality in enforcing awards, speedy resolution process etc. But these qualities are now diluted with unethical practices, recurring interruptions with judicial decisions, unfeasible expenses, and undue delays. This has led to decrease in the growth of effective mechanism of ADR process. One possible solution to all these problems can be institutional arbitration which should be promoted and encouraged in order to save the ADR from becoming another filthy litigation process. As long as, arbitrators, judges, and even common people are aware of their individual ethical duties, the ADR process will flourish and keep evolving to make a healthy contribution

\textsuperscript{12} 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