

**APPROACHES IN ALTERNATIVE DISPUTE RESOLUTION MECHANISM: AN  
INSIGHTFUL ANALYSIS**

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**Abstract**

The justice delivery system of a country plays a primary role in ensuring preservation of public interest and maintenance of order in the society. In India, for years, the judiciary has been overburdened with unending pendency of cases owing to the enormous population and the subsequent rise of disputes. With the introduction of various methods of Alternative Dispute Resolution, an informal mechanism aiming to provide speedy justice as an alternative to the formal legal system, people witnessed positive changes with respect to cost efficiency and the reduction of judiciary's burden. However, when employing the rights and power-based approaches to dispute resolution in negotiation and other modes of ADR, instances of visible inadequacy has been leading to ambiguity regarding the standard of justice maintained through these approaches. This research therefore, aims to dive into three core issues, firstly, whether the standard of justice maintained through the various approaches of ADR appears to be on par with standards maintained under the formal judicial proceedings. Secondly, whether the means of implementation of these approaches are justified when subject to scrutiny and critical examination and thirdly, whether Mediation with its ideal interest-based approach is the most viable solution in overcoming the deficiency and inadequacy experienced through the other approaches.

**Keywords:** *ADR; Mediation; Negotiation; Right, Power, Interest based Approaches.*

**1. Introduction**

The notion of assuming courts to be the principal forum for the resolution of dispute has been challenged and eroded through the introduction of the alternative mode of dispute resolution. It would be an appropriate observation to say that these ADR forums act as private adjudicating authority. ADR is often seen to be evolving into a private judicial system that closely resembles the litigation it aims to prevent the parties from approaching<sup>1</sup>. The mechanism is largely accepted in a country like India owing to the fact that ADR does provide speedy justice, in addition to reducing the burden of the court with its huge number of pending suits. The companies that have reaped the benefits of these methods of dispute resolution from ADR forums often witness the quick resolution of dispute, including results in awards that also preserve and improve business relationships in numerous cases.

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When we talk about the approaches and the methods used in such resolution of dispute, there are various contentions regarding the legitimacy of the approaches used and the standard of justice maintained through the application of these approaches while resolving a dispute through ADR. There is also an ambiguity regarding the standard of justice expected from ADR when the dispute is to be resolved in an ADR forum, independent of the primary dispute resolution method of court proceedings in a country like India.<sup>ii</sup>

While discussing the process of resolution of disputes through the approaches based on power, rights and interest of the parties to the dispute. It is recognised that the existing power struggle, the system of assertion of the rights of the parties and the fulfilment of their interests has a striking effect on the consequence of such a process in terms of a decision.<sup>iii</sup>

A discourse on the power-based approach is incomplete without the foundational explanation of the meaning and purpose of such an approach, therefore power, in its ordinary sense refers to the capability and potentiality of having one's own way in opposition to the desire of another. It is observed time and again, the unwillingness of the parties to give in when there is coercion and imposition of another person's will.<sup>iv</sup>

The right based approach on the other hand, focuses on the ability and capability of a third party to determine whether a party may take measures against the demand and wishes of the other party. This approach is largely observed in the conventional judicial system, with the changing times, the same has been used in various alternative dispute resolution to a large extent. Explaining the same unambiguously would require the elaboration of the process that involves naming, blaming and claiming.<sup>v</sup> The process starts with a party identifying the violator that has carried out contended violations and infringement, the same is followed by an establishment of a link or connection between the violator and the infringement and injury caused on the aggrieved party. The process is then leading to claims comprising of a demand for compensation or redressal.<sup>vi</sup>

Interest is defined as the preference of the parties to the conflict, the contented interest that one wishes have had satisfied through the process of an alternative dispute resolution method. It would be incorrect to assume for interests to consistently be monetary in nature, there are interests of such nature that may also include the party's desire to have their pain, suffering and other grievances addressed and compensated through the interest-based approach.<sup>vii</sup>

Therefore, this research work shall progress into areas firstly, in the initial chapters into determining whether the standard of justice maintained through the various approaches of ADR appears to be on par with standards maintained under the traditional adjudication involving court proceedings. Secondly, it aims to provide details into the violation of rights of parties through the approaches and methods used in ADR forums.

## **2. Legal Issues**

- a) The issue regarding the process of resolution of disputes through power, rights and interest-based approach is that, the existing power struggle, the system of assertion of the rights of the parties and the fulfilment of their interests has a striking effect on the consequence of such resolution in terms of the decision.
- b) When we talk about the approaches and the methods used in such resolution of dispute, there are various contentions regarding the legitimacy of the approaches used and the standard of justice maintained through the application of these approaches while resolving a dispute through ADR. There is a prominent risk of power imbalances and lack of equality of arms/ power / financial capabilities, etc. as the parties are rarely equal in status. The absence of legal representation leads to self- representation in front of arbitral authorities, amounting to enormous pressure on the parties.
- c) Negotiation where only the parties involved initiate the settlement of dispute, that often gives rise to the power inequalities and infringement of rights. Mediation, on the other hand with the involvement of a third party focused on facilitating, evaluating and understanding the dispute, provides a much safer and reliable solution with a suitable combination of both right and interest-based approaches.

## **3. Standard of Justice Maintained through the Approaches**

The approaches and the methods used alternative dispute resolution has given rise to various contentions regarding the legitimacy of the approaches used and the standard of justice maintained through the application of these approaches while resolving a dispute. There is also an ambiguity regarding the standard of justice expected from ADR. Therefore, it is the need of the hour to critically examine and assess the role of right, power and interest-based approaches and their effect on the outcome of such dispute resolution. For example, in a matrimonial dispute resolution (not resulting in judgement declaratory in nature), there may be a pre-existing imbalance of power between the parties, resulting from their history of violence or domestic abuse, etc. Therefore, there is a prevalent question on the standard of justice maintained under procedures and principle approaches that ADR depends on.

There is a possibility of manipulation and coercion involved in the approaches that tend to neglect the rights of the parties in order to reach a decision/ award. The outcome could be commanded instead of being consensual. Since there is an absence of legitimate recognition of the tactics used in a power-based approach, there could be unavoidable violation of rights of parties. The nature of alternative forms of dispute resolution, including arbitration mediation and conciliation in the context of International human rights law, the researcher used to provide an insight into developing a right-based approach through the provisions. Thirdly, the question addressed is, whether Mediation with its ideal interest-based approach is the most viable solution in overcoming the deficiency and inadequacy experienced through the other approaches.<sup>viii</sup>The article answers these questions through the perspective jurisprudence, it also talks about how the bulk of the dictation taking place could be solved, the pending cases in the court could be resolved and reduced through the message of ADR on an international level.

The author also talks in detail about the characteristics and types of modes of justice that has resulted in either resistance or the receptiveness of the general public regarding the conventional court proceedings. The author exceptionally covers and summarises the public perception of the courts against public perception of the various ADR methods, that have developed.<sup>ix</sup>, Therefore, there is an absence of procedural safeguards resulting in various forms of unregulated coercion and manipulation, that disrupts the process when the parties are left to decide the outcome on their own in the process of negotiation

On detailed analysis of the approaches, there is an observation that the spectrum of management of the particular dispute can either be imposed like in the cases of various methods like Arbitration and litigation, or the resolution of dispute could be facilitative in its nature, ensuring that the problem solving responsibility is usually handed over to an impartial third party who is not a party to the dispute, such a party involved in this process ensures facilitation of communication between the disputed parties, therefore, Mediation comes off as a solution for avoiding all the numerous rights violated by implementation of imposing approaches that employ a party's power or right based contentions.

The right based approach on the other hand, focuses on the ability and capability of a third party to determine whether a party may take measures against the demand and wishes of the other party. It can be visibly observed that such an approach is not based on a principle of any mutual agreement between the parties, rather it is imposed through rules and regulations regarding the solution that should be adopted by the parties<sup>x</sup>. This approach is largely observed in the conventional judicial system, with the changing times, the same has been used in various alternative dispute resolution to a large extent. Explaining the same unambiguously would require the elaboration of the process that involves naming, blaming and claiming.

The decision of the disputants to adopt an interest-based approach, not only leads to an amicable solution but also ensures positive relationship, commercial and otherwise between the parties. There is an undeniable need for mutual consensus between the parties to adhere and commit to the desired result from their dispute resolution. The article has provided a detailed analysis on the standard of justice maintained through the three approaches of dispute resolution; it can be observed that there is a need for effective implementation of interest-based approach since the interest-based bargaining to conflict resolution is the most viable and efficient solution any dispute. There is development of emotions in the process of negotiations and the impact of the same in the degree of fairness as a result of such procedure.

#### **i) Existing Power Struggle and Imposition of Rules**

The issue regarding the process of resolution of disputes through power, rights and interest-based approach is that, the existing power struggle, the system of assertion of the rights of the parties and the fulfilment of their interests has a striking effect on the consequence of such resolution in terms of the decision. There is a possibility of manipulation and coercion involved in the approaches that tend to neglect the rights of the parties in order to reach a decision/award. The outcome could be commanded instead of being consensual. Since there is an

absence of legitimate recognition of the tactics used in a power-based approach, there could be unavoidable violation of rights of parties.

When we talk about the approaches and the methods used in such resolution of dispute, there are various contentions regarding the legitimacy of the approaches used and the standard of justice maintained through the application of these approaches while resolving a dispute through ADR. There is a prominent risk of power imbalances and lack of equality of arms/ power / financial capabilities, etc. as the parties are rarely equal in status. The absence of legal representation leads to self- representation in front of arbitral authorities, amounting to enormous pressure on the parties. For example, in a matrimonial dispute resolution (not resulting in judgement declaratory in nature), there may be a pre-existing imbalance of power between the parties, resulting from their history of violence or domestic abuse, etc. Therefore, there is a prevalent question on the standard of justice maintained under procedures and principle approaches that ADR depends on.

There is a possibility of manipulation and coercion involved in the approaches that tend to neglect the rights of the parties in order to reach a decision/ award. The outcome could be commanded instead of being consensual. Since there is an absence of legitimate recognition of the tactics used in a power-based approach, there could be unavoidable violation of rights of parties. The nature of alternative forms of dispute resolution, including arbitration mediation and conciliation in the context of International human rights law, the researcher used to provide an insight into developing a right-based approach through the provisions. Thirdly, the question addressed is, whether Mediation with its ideal interest-based approach is the most viable solution in overcoming the deficiency and inadequacy experienced through the other approaches.<sup>xi</sup>

The methods of power-based coercion and manipulation result in emotional effects on the parties leading to an inequitable outcome, the same can be prevented by focusing on fair and equitable principles under the interest- based approaches that ensure fairness and non-discriminatory decisions and resolutions of dispute, beneficial for both the parties to dispute, often resulting in amicable and cordial outcome. It is therefore suggested that the appropriate measures of effective introduction of mediation, the strategies for parties to create awareness and the adoption of its ideal interest- based approach is needed. There has been discussed summarily history and development of the business conflict management methods, the research work elaborates upon how the dispute resolution method of mediation has been largely underused and neglected in conflict management, the emphasis of the research has been laid on the strategies and approaches of such dispute resolution. Often perceived by the general public as the most ideal and effective. The conclusion of this research has suggested the appropriate measures of effective introduction of mediation, the strategies for employers to create awareness and the adoption of its ideal interest- based approach<sup>xii</sup>.

#### **4. Violation of Rights of Parties**

A discourse on the power-based approach is incomplete without the foundational explanation of the meaning and purpose of such an approach, therefore power, in its ordinary sense refers to the capability and potentiality of having one's own way in opposition to the desire of another. It is observed time and again, the unwillingness of the parties to give in when there is coercion and imposition of another person's will.<sup>xiii</sup> When a conflict is resolved through the power-based approach, the limitation of it is that, the decision to choose this method is usually lacking foresight, when the other parties' interests are ignored, there is some sort of a residue which leads to a strained relationship.

The right based approach on the other hand, focuses on the ability and capability of a third party to determine whether a party may take measures against the demand and wishes of the other party. It can be visibly observed that such an approach is not based on a principle of any mutual agreement between the parties, rather it is imposed through rules and regulations regarding the solution that should be adopted by the parties<sup>xiv</sup>. This approach is largely observed in the conventional judicial system, with the changing times, the same has been used in various alternative dispute resolution to a large extent. Explaining the same unambiguously would require the elaboration of the process that involves naming, blaming and claiming.<sup>xv</sup> The process starts with a party identifying the violator that has carried out contended violations and infringement, the same is followed by an establishment of a link or connection between the violator and the infringement and injury caused on the aggrieved party. The process is then leading to claims comprising of a demand for compensation or redressal.<sup>xvi</sup>

##### **i) Interest Based Approach to Dispute Resolution**

When discussing about the approaches that are innately Interest based in nature, it is defined as the preference of the parties to the conflict, the contented interest that one wishes have had satisfied through the process of an alternative dispute resolution method. It would be incorrect to assume for interests to consistently be monetary in nature, there are interests of such nature that may also include the party's desire to have their pain, suffering and other grievances addressed and compensated through the interest-based approach

The importance of analysing a dispute in detail before implementing various methods to resolve the same. There is an in-depth elaboration on the existence of power struggle between parties resulting in coercion, threatening and other extreme unregulated measures. The author has also discussed the injustices a party suffers when unregulated measures of power-based approaches are enforced. The most viable solution that is suggested is, to resolve the existing dispute co-operatively through an interest-based approach that results in satisfaction of both parties to the dispute. The same can be achieved through the implementation of teamwork that is co-operative in nature instead of a procedure that demands competitive hostility between the parties<sup>xvii</sup>.

While there is an elaboration on the major areas of ADR that has been developed in recent times, focusing on the elucidated discussions regarding the history and development of the ADR methods with detailed discussion on the approaches of the resolution used in the courts and the dichotomy that exists when compared with the methods employed in ADR. Another important aspect is also, the strategies and approaches to negotiation and the working of the system of negotiation. The author in its chapters relating to power, right and interest based approaches to ADR discusses the prevalence of inadequacy when power-based approaches are employed resulting in coercion and extreme measures such as threatening between parties, the power struggle has been observed as unnecessary and in need of replacement with more efficient and satisfactory methods such as the interest-based method<sup>xviii</sup>. The effect and consequences of emotions of parties on the procedure of negotiation or any other alternative dispute resolution method. The article deals with issues relating to the development of emotions in the process of negotiations and the effect of the same in the degree of fairness as a result of such procedure. The methods of power-based coercion and manipulation result in emotional effects on the parties leading to an inequitable outcome, the same can be prevented by focusing on fair and equitable principles under the interest-based approaches that ensure fairness and non-discriminatory decisions and resolutions of dispute, beneficial for both the parties to dispute, often resulting in amicable and cordial outcome<sup>xix</sup>.

## **ii) Facilitation by a Neutral Third Party**

On being examined, the development of alternative methods and approaches to conflict resolution through detailed derivations from interest-based approach instead of power or right-based methods that often-left parties with unfulfilled interests at the end of the resolution. Whereas the power-based approach has been suggested to be employed only when the other approaches based on interest and rights of the parties fail.<sup>xx</sup> It is contended by the authors that the interest-based bargaining to conflict resolution is the most viable and efficient solution<sup>xxi</sup>. To discuss the issues of right, interest and power-based negotiation strategies, throughout the research work, there is a focus on the variations of nature of outcomes owing to the different methods of negotiation employed, the result being either one-sided outcome or lack of reciprocity from either party. There is an insight on how these approaches can be employed to provide optimum satisfaction to the parties along with wilful resolution of the conflict. These methods according the authors come into existence as a matter of necessity since the priority or default choice of approach should preferably be interest-based negotiation owing to the fact that the parties shall refrain from using power-based tactics or asserting their rights resulting in a spiral of unending blaming and claiming<sup>xxii</sup>.

There is a persisting question of whether the interference of a third party is a solution to avoid the violation of rights when these approaches as discussed earlier are utilised for the purpose of alternative dispute resolution. In mediation it can be seen that, along with being considered the most affordable, cost-effective way of solving disputes. the authors introduce the political drawbacks of the implementation of various Air methods of Mediation, Arbitration and Negotiation<sup>xxiii</sup>. The article examines the prevalence and further possibility of existence of prejudice when the ADR methods are employed, due to the informal nature of these

proceedings, the unregulated approaches with little legal recognition and demarcation often result in discriminatory and prejudiced decisions when ADR methods are employed. The issues of belonging to a minority community with the differences in power pre-existing, the financially weaker or economically less capacitated party suffers from notions of prejudice which has been highlighted.<sup>xxiv</sup>

## **5. Conclusion**

In the words of Mervyn Malamed “Outcomes that are determined through power or rights are frail. Outcomes determined through interests and needs are sustainable.”<sup>xxv</sup> In India, for years, the judiciary has been overburdened with unending pendency of cases owing to the enormous population and the subsequent rise of disputes. With the introduction of various methods of Alternative Dispute Resolution, an informal mechanism aiming to provide speedy justice as an alternative to the formal legal system, people witnessed positive changes with respect to cost efficiency and the reduction of judiciary’s burden.<sup>xxvi</sup> However, when employing the rights and power-based approaches to dispute resolution in negotiation and other modes of ADR, instances of visible inadequacy has been seen, leading to ambiguity regarding the standard of justice maintained through these approaches

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efficient solution any dispute. There is development of emotions in the process of negotiations and the impact of the same in the degree of fairness as a result of such procedure. The methods of power-based coercion and manipulation result in emotional effects on the parties leading to an inequitable outcome, the same can be prevented by focusing on fair and equitable principles under the interest-based approaches that ensure fairness and non-discriminatory decisions and resolutions of dispute, beneficial for both the parties to dispute, often resulting in amicable and cordial outcome. It is therefore suggested that the appropriate measures of effective introduction of mediation, the strategies for parties to create awareness and the adoption of its ideal interest-based approach is needed.

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<sup>i</sup>Jameson, *Employee Perceptions of the Availability and use of Interest-based, Right-based and Power-based conflict Management Strategies*, Conflict Resolution Quarterly, Vol. 19, Issue 5, pg. 2-17, <https://doi.org/10.1002/crq.3890190204> (2007).

<sup>i</sup> *Id.*

<sup>ii</sup> L. Lytle, M. Brett & Debra L. Shapiro, *The Strategic Use of Interests, Rights, and Power to Resolve Disputes*, Negot. J. 31 p. 34 – 40 (1999).

<sup>iii</sup> E. Noll, *Power, Rights and Interests: the “Big Three” of Conflict Resolution*, California Law Review Journal, Vol.14, pg. 32-40, (2012).

<sup>iv</sup> McGregor, *Alternative dispute resolution and human rights: developing a right-based approach through the ECHR*, The European Journal of International Law Vol. 26 no.3, Oxford University Press, EJIL Ltd, (2015).

<sup>v</sup> *Supra* note 2.

<sup>vi</sup> Jameson, *Employee Perceptions of the Availability and use of Interest-based, Right-based and Power-based conflict Management Strategies*, Conflict Resolution Quarterly, Vol. 19, Issue 5, pg. 2-17, <https://doi.org/10.1002/crq.3890190204> (2007).

<sup>vii</sup> *Id.*

<sup>viii</sup> Duff, Rory & Bennett, Anthony, *Towards Mediation: Developing a Theoretical Framework to Understand Alternative Dispute Resolution*, Industrial Relations Journal. 42. 106 - 123. 10.1111/j.1468-2338.2011.00614.x. (2011).

<sup>ix</sup> McGregor, *Alternative dispute resolution and human rights: developing a right-based approach through the ECHR*, The European Journal of International Law Vol. 26 no.3, Oxford University Press, EJIL Ltd, (2015).

<sup>x</sup> *Supra* note 4

<sup>xi</sup> Duff, Rory & Bennett, Anthony, *Towards Mediation: Developing a Theoretical Framework to Understand Alternative Dispute Resolution*, Industrial Relations Journal. 42. 106 - 123. 10.1111/j.1468-2338.2011.00614.x. (2011).

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<sup>xiii</sup> *Id.*

<sup>xiv</sup> L. Lytle, M. Brett & Debra L. Shapiro, *The Strategic Use of Interests, Rights, and Power to Resolve Disputes*, Negot. J. 31 p. 34 – 40 (1999).

<sup>xv</sup> *Supra* note 2.

<sup>xvi</sup> *Supra* note 4.

<sup>xvii</sup> E. Noll, *Power, Rights and Interests: the “Big Three” of Conflict Resolution*, California Law Review Journal, Vol.14, pg. 32-40, (2012).

<sup>xviii</sup> Blake, *Practical Approach to Alternative Dispute Resolution*, Oxford University Press, Ed. 4, (2016).

<sup>xix</sup> Michele Griessmair, *Ups and Downs: Emotional Dynamics in Negotiations and Their Effects on (In)Equity, Group Decision and Negotiation*, 10.1007/s10726-017-9541-y, 26, 6, p. 1061-1090, (2017).

<sup>xx</sup> *Supra* note 3.

<sup>xxi</sup> Duff, Rory & Bennett, Anthony, *Towards Mediation: Developing a Theoretical Framework to Understand Alternative Dispute Resolution*, *Industrial Relations Journal*. 42. 106 - 123. 10.1111/j.1468-2338.2011.00614.x. (2011).

<sup>xxii</sup> Anne L. Lytle, Jeanne M. Brett & Debra L. Shapiro, *The Strategic Use of Interests, Rights, and Power to Resolve Disputes*, 15 *Negot. J.* 31 (1999).

<sup>xxiii</sup> Duff, Rory & Bennett, Anthony, *Towards Mediation: Developing a Theoretical Framework to Understand Alternative Dispute Resolution*, *Industrial Relations Journal*. 42. 106 - 123. 10.1111/j.1468-2338.2011.00614.x. (2011).

<sup>xxiv</sup> Richard Delgado, Chris Dunn, Pamela Brown & Helena Lee, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *Wis. L. Rev.* 1359 (1985).

<sup>xxv</sup> E. Noll, *Power, Rights and Interests: the "Big Three" of Conflict Resolution*, *California Law Review Journal*, Vol.14, pg. 32-40, (2012).

<sup>xxvi</sup> McGregor, *Alternative dispute resolution and human rights: developing a right-based approach through the ECHR*, *The European Journal of International Law* Vol. 26 no.3, Oxford University Press, EJIL Ltd, (2015).

<sup>xxvii</sup> *Supra* note 4