UNIT 11 ALTERNATIVE DISPUTE RESOLUTIONS

Structure

11.1 INTRODUCTION

There are two broad categories of approaches to solve disputes: Violent and peaceful. Often violence carries a connotation of reproach or disapproval from an ethical or religious authority. Buddhism and Jainism are two examples which prohibit adoption of violence as a means of resolving any issue. Also, violence is becoming increasingly non-feasible, non-practical, counter-productive, and, indeed self-destructive in the nuclear age. As civilisation spreads and rational approach expands, violence gives way to debate and discussion, bargain and sharing, peaceful coexistence and peaceful competition. In the present world more and more peaceful methods are being explored and employed to resolve conflicts through peaceful rather than war-like or violent methods, internationally and domestically.

Aims and Objectives

This Unit would enable you to understand:

- The concept and meaning of alternative dispute resolution (ADR)
- ADRs in the domestic sphere and abroad
- ADRs in India.

11.2 VIOLENT OPTION

Since conflicts are universal, efforts made to solve them over the centuries across the world, have been plenty and variegated. Depending upon the gravity, nature, extent and urgency, conflicts have been resolved or attempts made to resolve, successfully or otherwise. Until recently- that is the turn of the twentieth century- violence or war was accepted as a normal, legal and final way of settlement of disputes among the community of nations. Within the domestic sphere violence had a limited but nonetheless significant application. The State had

a right, almost monopolistic, of violence against its own citizens who had transgressed the laws of the land etc. Also 'civil violence'- that is violence unleashed by one set of civilians against others- without the permission of the State, was a common phenomenon everywhere. Though laws and politics were supposed to tackle it, civil violence could not be anticipated, eliminated or even managed successfully by the State or other civilian organisations. Movements, political and social, strikes, protests and frustration over State inaction, ethnic and territorial claims, attacks by criminal/terrorist elements, and sabotage were all but few of the causes of occurrence of violence in the domestic sphere.

Nonviolent efforts to contain, manage, reduce and eliminate violence in society have to be differentiated. At the international level it may be simpler to evolve a mechanism to tackle violence as there are, nearly always, only two parties (the states) to the dispute. At the national/state level the answer to violence has to be found in a much more complex manner. In the following pages, some details are discussed, in a comprehensive manner, about the various means adopted to tackle conflicts first at the international level and later at the national one.

11.3 NEGOTIATION

Through the long usages of customs, practices and conventions, one learns that violence or resort to violence in Inter-State affairs was not the first option. Either on their own or at the behest of others, states in conflicts tried their hands at peaceful methods of settlement of disputes.

Time honoured and practicable way out of any conflict is to talk to the opponent. Of course it is a difficult and complex process of opening the talks. Who should talk to whom, at what level of authority, what should be aimed at, what portion of the structured problem should be addressed, should the talks be open, confidential or back-channelled (totally non-formal), should the solution be claimed as a compromise, victory for one side or merely a tactical arrangement for the time-being, and how far are the steps/process of implementing solution binding on the parties, etc. are the questions which needed to be asked and settled if the talks are to be of any meaning.

In the process of talks, the substance of the dispute has to be identified clearly by both the parties first and then attempts have to be made to sort out the differences between them. This is popularly known as negotiation. Reasoning or logical argument may pave way for an amicable settlement of the dispute. Mutual trust has to be established and then a mutual give-and-take has to be arranged; finally an open or partially open statement of settlement has to be announced. Often a series of rounds of talks, held sometimes away from the public glare, has to be held. It is also true that many a time strenuous, quiet diplomatic rounds of talks are held which lead to durable solutions.

If the substance of the conflict/dispute is complex, technical or multidimensional (like GATT/ WTO/Nuclear Weapon Control/Climate Control etc.), it is necessary to involve technical experts in the negotiations. In the earlier centuries, the subject of inter-state dispute used to be more often than not political. Now-a-days the disputes are complex in nature, be it economic, technical or military. Not only would there be a multi-layered but also multilateral and multi-dimensional understanding of disputes. The official ambassadors or diplomats apart, there might be appointed special negotiators and technical experts attached to the negotiating team. Now-a-days the holding of conferences for multilateral negotiations involving a large number of delegates, stretched over a number of years, with an army of hospitality and

secretarial assistance has become a lucrative business indeed (in Geneva and New York, especially). The United Nations hosts or calls for several such conferences every year.

It is also noticed that in these days of complex negotiations the main burden of holding talks falls on the professional diplomats and technical experts. Yet, there is a great need to get back to the authorities at the headquarters to authorise changes in the basic position of negotiations. The mass media and the academia also exert enormous pressure on the negotiating posture. Not only political and technical but also psychological aspects of a negotiation need to be studied carefully. If, back home there be democracy with an active opposition and mass media, the task of 'selling' a negotiated settlement, although reasonable, would turn out to be difficult.

When negotiations are stuck with an impasse or deadlock, it has now become fashionable to hold a summit-meeting that is the heads of governments concerned would meet to take stock of the situation and give modified instructions so that progress in negotiations is made. Summit-conferences have of late become popular; they have given good results, no doubt. But at times they tend to make things difficult when prior preparations are not made properly. Often, the personality clashes too occur, and cause a setback to the process of negotiations. Kennedy-Khrushchev meetings in Vienna and Nehru-Ayub or Nehru –Chou-en-Lai meetings could be cited as examples of "Summit-backfire". The 1972 Simla meeting between Zulfikar Bhutto and Indira Gandhi too has been cited as an example of unwarranted summit diplomacy which could have been better avoided and the normal diplomatic negotiations could have achieved better results.

Those negotiated settlements are better which are backed, on both sides, by a clear understanding of (a) basic issue and (b) the barter of give and take. Hasty, ambiguous, pressurised and highly personalised solutions are no substitute for properly researched, widely consulted and fair settlements. It is important that a conducive atmosphere should be built when negotiations are held.

Usually, negotiated settlements end in the announcement of a joint agreed communiqué or, if the matter is significant, in a treaty/agreement. The United Nations expect that all treaties/ agreements reached between states are filed with the Secretary-General's office. All agreements reached after negotiations are expected to be implemented in good faith by all the parties concerned. This is one of the principles in the international law.

In the new age inaugurated by nuclear weapons, the significance of negotiation has increased considerably. In the earlier times wars were feasible and called frequently. But having made war almost obsolete the nuclear weapons have pushed negotiations, including those with a tinge of deterrence, to the fore. For, no State today is in a position to say: "I'll declare war unless my terms are met". No State can achieve its objectives through a nuclear war as it would perhaps have got in the pre-nuclear age. War was a continuation of a policy by other (that is violent) means as Von Clausewitz stated so succinctly. But now negotiations are almost the only means of solving inter-state disputes. The space vacated by war is occupied by "more negotiations". After a series of brushes with adventurism both the nuclear superpowers U.S. and U.S.S.R. learned to live peacefully without further testing the nerves of the statesmen on the launching of nuclear warfare (1962).

Before ending this portion on negotiations as a normal and favourite technique of conflict-resolution, it may be worthwhile to remember why negotiations fail many a time. To quote the summary of a study made in this regard by I.William Zartman (The Sage Handbook on Conflict Resolution, 2009):

"Probably the most challenging issue of the time concerns the profound change in negotiation brought on by a changing nature of the parties. Negotiating with armed bands, terrorists, anti-globalist movements, among others, are not the neat two party negotiations that current analysis so often assumes. Not only does it involve internal politics (as do all negotiations) but the other party frequently does not exist as a corporate body. There is no leader who can make a decision and hold an agreement, and no delegates who represent the central organization. Furthermore, the "party" frequently does not know what it wants… Finally these "parties" usually do not know how to negotiate and often have to be taken aside and given training, as in Darfur, Mozambique and Sri Lanka in recent conflicts. Negotiating with or between amorphous parties needs entirely different models to capture its process in concept and in reality."

11.4 MEDIATION

If the parties to a dispute/conflict talk with each other it is described as negotiation. Sometimes it is not possible for a variety of reasons for states to take up talks with the opposite party directly. They may be willing or half-willing and yet they are not in a position to open negotiations. Under such circumstances, it is fortuitous if a friendly state/entity/institution or even a person of standing were to come forward and bring the parties to the dispute to a negotiating table. Use of good office, offer of an honest broker and hosting a goodwill conference may be some of the forms of bringing friends together so that they may overcome their initial reluctance and begin to talk. The part which facilitates this process is called mediation. Through this method of mediation, negotiations are given a fillip and a solution is facilitated without resort to war.

Mediation: Definition and Characteristics

In a brilliant study of mediation as an instrument of conflict resolution by Jacob Bercovitch (The Sage Handbook of Conflict resolution, 2009), the following points emerge.

The task of the mediator is not an easy one. The sea that he sails is only roughly charted. He is a solitary artist recognizing at most a few guiding stars, and depending on his personal powers of divination as Arthur Meyar would put it. Oran young, a renowned scholar in the field, would define mediation "as any action taken by an actor (i.e., State) that is not a direct party to the crisis, that is designed to reduce or remove one or more of the problems of the bargaining relationship and therefore to facilitate the termination of the crisis itself". In simpler terms, it is suggested that Mediation is a form of third-party assistance which involves an outsider to the dispute who, however, lacks power to make decisions for the parties (Linda Singer). It may be a bit naïve to believe that a mediator is altruistic (May be so at times, like our own Pt.Jawaharlal Nehru vis-à-vis Korea). Usually, the mediators have got their own hidden agenda which may not be significant, yet not negligible. The relationship between a mediator and disputants is hardly devoid of political interest.

Considering a number of incidents of mediation in resolving inter-state conflicts, it may be safe to assume that the following constitute the essential characteristics, as brought out by Jacob Bercovitch.

- Mediation is an extension and continuation of peaceful conflict management.
- Mediation involves the intervention of an outsider - an individual, a group or an organisation with values, resources and interests of their own – into a conflict between two or more states or other actors.

- Mediation is a non-coercive, non-violent and ultimately non-binding form of intervention.
- Mediators enter conflict- whether internal or international- in order to affect it, change it, resolve it, modify it or influence it in some way.
- Mediation is a voluntary form of conflict management.

There are quite a number of examples of mediation in international conflicts in the recent years. In the Sri Lanka – LTTE conflict, the Netherlands have assumed this role; the then U.S. president Bill Clinton played a notable role of mediator/facilitator in arranging direct talks between Palestine and Arab parties (and got Camp-David Accord signed by them), Pandit Jawaharlal Nehru/Krishna Menon played a significant role in bringing off a truce between Korea, China and the U.S in 1950-1953 and in the ongoing conflict over Kashmir, several unsuccessful mediations had been sponsored by the U.N.

More often than not, mediations receive a mild and skeptical reception. The outsiders hardly understood the complexity of the issue on hand. Nor do they have a great stake in the resolution of the conflict. Now-a-days the U.S, being the only super power/global power, envisaged a role for itself in resolving any conflict anywhere in the world. The American diplomats are generally well-served by area experts or subject experts. They are also a determined lot. If the U.S. President wills it, it would be pursued relentlessly. Sufficient incentives or penalties are dangled before the eyes of the disputant parties so that the American suggestions are taken up and implemented. However, it is noticed that the U.S policy makers turn their faces away from the issues if their own public opinion is not expressly in favour of role for the U.S. The well-known ethnic atrocity and breakdown of political stability in the former Yugoslavia did not figure anywhere in the first presidential election campaign of Bill Clinton (In the second campaign it was the big issue). When the U.S public is obsessed with its own economy and politics it adopts a divine silence over the "foreign" issues. If, on the other hand, it wishes to bring "order" to the world, the U.S leaders jump into the arena of conflict and wrestle with it whether or not its role is useful to the disputants. Often they leave the field without settling the issue. Hence, mediation, especially by the U.S. is full of uncertainty. In Afghanistan, Pakistan, Iraq and Iran, the U.S mediation through the UN good offices have met with varying degrees of success/failure. Mediation as an instrument of conflict resolution in international sphere has got limited application.

11.5 ADJUDICATION

The United Nations was set up in order to ward off wars and instill in the hearts of men, hopes of peaceful settlement of disputes. In its Charter (Article 33) the U.N envisages almost all the peaceful ways of resolving international conflicts:

"….parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice."

The preferred approach of the U.N. is clear: either a political negotiation or a judicial settlement. Leading scholars in the field of jurisprudence and visionaries ("peace through justice") laid great emphasis, from the times of the League of Nations, upon a judicial settlement of international disputes. Following the Treaty of Versailles (1919), the first ever international forum for adjudication of inter-state disputes, the Permanent Court of International Justice (PCIJ) came up in 1922 at The Hague. According to their belief if the world had to get rid of wars which

were threatening the very civilisation on this earth, there was only one hope and one solution which lay in the hands of an impartial and wise judges of international repute. The PCIJ, however, proved a dampener. Not so much because of its own limitations but because the states were not as yet prepared to hand over to it their political power to decide any issue. The PCIJ existed for 18 years. It ceased its functioning once the war broke out and ceased to exist after the League of Nations, of which it was a part, was formally dissolved in 1946. In its brief existence, the Court handled 29 cases of litigations as well as 27 advisory opinions. It was regrettable that powerful states did not show anything more than lip sympathy to the Court.

When the United Nations was set up in 1945, the International Court of Justice (ICJ) was also brought into existence. Along with the charter of the UN, a Statute on the ICJ was also presented for signing. The Court was made a wing of the UN (Article 7). However, the jurisdiction of the ICJ was not enforced upon the member-states of the UN automatically.

Each state, which became a member of the UN, had to register separately its accession to the jurisdiction of the ICJ. However many states have refused to submit themselves to the jurisdiction of the ICJ ("compulsory jurisdiction"). What is worse an important state like the US has withdrawn its earlier consent. A large number of states have accepted the jurisdiction with certain exceptions or conditions which, in effect, take away the effectiveness of the Court. As a result the ICJ has not been an active body worthy to cite for its contribution to peaceful settlement of international disputes.

During 1946-2007 the ICJ, it is estimated, has passed 92 judgments on disputes raised before it and given 25 advisory opinions. Many of the cases referred to it were of minor significance or of no significance. Though the Court's performance has not been brilliant it has nonetheless influenced the evolution, development and codification of international laws especially those dealing with the laws of sea, environment, treaty-interpretation, economic questions and issues related to asylum.

The effectiveness of the ICJ has been affected adversely by the so called big powers like the US and France who have treated it with contempt. Nicaragua complained to the ICJ in 1984 that the US was interfering in its domestic political establishment. The CIA of the US was accused of armed help, training and financing of the 'contras' who were opposing the rule of domestically elected Sandinista government. Instead of proving its innocence or admitting guilt, the US withdrew itself from the jurisdiction of the ICJ and justified its stand by referring to domestic compulsions. The ICJ nonetheless proceeded with the complaint of Nicaragua and pronounced its ruling in May 1984 which indicted the US in no uncertain terms. But its impact was negligible on the outcome of the conflict.

It is noteworthy in this context that India has accepted the findings of the ICJ in two cases it was involved: one over Goa vis-à-vis Portugal and another over the Rann of Kutch vis-à-vis Pakistan.

On the whole the reputation of the judicial mechanism to solve international conflicts is not enhanced by the functioning of the ICJ. It does not have enough work to do, of late. Yet, the glimmer of hope survives. Recently, in 1998, the Rome conference, sponsored by the UN, adopted the Statute of International Criminal Court, which came into force on July 1, 2002. But once again the US threw cold water over its functioning by opting out of its jurisdiction.

There are several international tribunals which have been specialised and been functioning with greater utility. Some of these are: Ad hoc International Criminal Tribunals which dealt with the

occurrences in Yugoslavia (ICTY) and Rwanda (ICTR), International Tribunal for the Law of the Sea, European Court of Justice, European Court of Human Rights, Permanent Court of Arbitration etc.

The over-all situation remained a bit disappointing. Though the scholars and visionaries lay a great store by the judicial institutions, chiefly the ICJ, for solving in a rational manner the vexed problems of international affairs, the performance of the Court as well as the behaviour of the big powers have proved to be a big let-down. One incident of the Court proving itself to be of weak and vacillating mind showed up in 1966 in a case related to the use of nuclear weapons:

"it follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflicts and in particular the principles and rules of international humanitarian law.

However, in view of the current state of international law and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstances of self defence, in which the very survival of a State would be at stake" (1996 ICJ 226)

Many scholars have ridiculed at such a weak-kneed judicial approach to solving conflicts peacefully at the international level. The adage that laws rule over the poor while the rich rule over the laws, comes close to the description of the working of the judicial forums in the community of nations. There is another adage which also comes to mind – the laws are silent when the guns boom.

11.6 ADR IN DOMESTIC SPHERE AND ABROAD

Alternative Dispute Resolution (ADR) has been recent in phraseology but old in concept. In the days gone by, laws were not made by any parliament or even by kings; but were laid down in the scriptures and treatise. Resolution of conflicts/disputes took place, also, in the manner laid down in these books, customs and practices. Naturally there were changes in these methods in keeping with the changing times. But with the coming of modern times of democracy and constitutional governance, the method of judicial pronouncement has become the primary one in the resolution of conflicts in the domestic sphere. Of late that is, in the past few decades the load of work of the judiciary has increased enormously, causing undue delay in dispensation of justice. Also, too many rungs of judiciary can be a cause of delay. The poor and distantly located people find it hard to pursue their cases in law courts through a battery of costly lawyers. Alternative forums which could prove to be cheap and easily accessible have, of late, been tried. These are called Alternative Dispute Resolution Mechanisms (ADRM).

ADR Abroad

In Europe where there existed strong judicial institutions, people were generally disappointed with the slow grinding of wheels of justice. It also proved to be costly and made to suit the skill of lawyers rather than the needs of the parties. In the U.K. the ADR took birth in 1974 in the form of advisory, conciliation and arbitration service. In1995 France expanded the legislative basis for judicial conciliation and mediation. Earlier in the US, following the remarkable dissertation produced by Rosco Pound entitled "Public dissatisfaction with the American Legal System", a wave of judicial reforms took place. The new ADR initiations came in and within a few years nearly 93% of civil disputes were disposed off without going for trial in the normal judicial forums. In Japan the judges intervene extensively during the in-court proceedings.

They remove their formal judicial robes and participate in settlement talks as a friendly mediator. This gesture is appreciated both by the litigants and lawyers. In China the dictates of Confucius on the importance of harmony in family and society have come back to influence the disputants and helped in reducing litigations considerably. In Hong-Kong, the International Arbitration Centre, the biggest in Asia, has gained immense popularity and prestige because it is fair and helpful to the clients.

11.7 ADR IN INDIA

Before the on-set of the British rule India had had a sound and time-tested judicial system. People might have been hierarchy-conscious, caste-ridden and illiterate, even winded by outworn religious beliefs. But all had their own ways of settling disputes. When the British took over administration they found it abominable to go by the traditional Indian practices of resolving disputes. They introduced, rather imposed, a new legal regime here. This gained some popularity among the educated elite. In due course, the new system emerged strong and attained uniformity all over India. However, the workload on the courts and the cost of litigation as well as the long delays in procuring justice even in simple cases, compelled the government to introduce ADRs so as to ease the burden on the judges and litigant public. The lawyers though initially unhappy have come round to appreciate the functioning of the ADR. Some time ago (2006) it was estimated that there were pending 2,53,80,757 cases in the subordinate courts in India. To try these cases were available (if all the posts were filled up) less than 15,000 judicial officers/judges. This ratio between judges to population works out to be 105 judges per one crore population in India whereas it is 509 in the UK, 577 in Australia, 752 in Canada and 1070 in the U.S. This figure does not give a total picture: the litigation cases filed by people are not taken into account. After the ADR was introduced, several thousands of litigations have been disposed off without causing any adverse reactions from any quarter. This experiment was initiated with the passing of the Legal Services Authorities Act 1987 (which has been amended from time to time). In 2002, Section 89 of the Civil Procedure Code was modified to incorporate conciliation, mediation and pre-trial settlement methodologies for prompt and inexpensive resolution of disputes.

11.7.1 Lok Adalat

The origin and importance of Lok Adalat are given above. The salient features of Lok Adalat (People's Court) are mentioned as below:

- Lok Adalats (LA) are legal and authentic forums of justice.
- LA are constituted from time to time in order to solve a number of cases pending before regular courts for disposal. There may be specific LA for cases related to water, electricity, banks, pension, transport etc.
- LA are presided over by a sitting or retired judge along with a social worker and a lawyer
- The cases are transferred to LA from regular courts on demand.
- There is no court fee to be paid to LA (if any fee is paid to the regular courts and the case is transferred to LA the fees already paid would be refunded if the dispute is settled)
- Lawyer's assistance is not necessary, though they may offer help.
- The legal process/procedures are not followed strictly. Flexible and liberal attitude adopted.
- The clients/parties to a dispute can interact with the judges freely – which is not possible in a regular court.

- If the parties to a dispute agree in the LA. to a compromise, the case is deemed settled with no possibility of appeal to a higher court (as it is a judgment by consent).

Following the success of the Lok Adalat experiment in the public domain, private and business organisations too have adopted the model and doing a good job of it. Sometimes the nomenclature is changed to Ombudsman etc. Essentially the concept of Lok Adalat or Ombudsman is to help people to help themselves. Thus the tension is eased and finding a mutually agreeable solution is facilitated by this experiment. Its immense popularity is understandable. It is an eminently sensible and feasible mechanism of peaceful resolution of conflict in a civilised society.

11.8 SUMMARY

There are different ways of conflict resolution. Traditionally war has been treated as a form of settling dispute. But, as civilisation spreads and rational approach expands, violence gives way to debate and discussion, bargain and sharing, peaceful coexistence and peaceful competition. In the present world more and more peaceful methods are being explored and employed to resolve conflicts through peaceful rather than war-like or violent methods, internationally and domestically. Mediation, Negotiation, Dialogue, Arbitration, Adjudication and so on are increasingly being recognised as methods of Alternative Dispute Resolutions (ADRs) that have become more acceptable especially in recent times. In India too, Lok Adalats have been playing a significant role in settling disputes.

11.9 TERMINAL QUESTIONS

1. List the various means of resolution of conflicts.
2. Why is war not a desirable option to solve interstate disputes?
3. Why is negotiation method universally popular?
4. Account for the poor contribution of the judicial approach in resolving international conflicts.
5. Bring out the working and importance of Lok Adalat as a forum of peaceful resolution of disputes.

SUGGESTED READINGS

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