

Exploring ADR in Higher Education in India

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Introduction

Education is among the utmost important sectors of the Indian economy. The Right to receive Education is now a Fundamental Right¹. It is a segment, which is poised to grow immensely in the near future. With an increasing young population, every year thousands of young students enter various universities all over India eager to pursue their higher education dreams. However, with the growth of the education sector, lies the increase of education disputes especially among students and University administrators. Education disputes in India are a fertile ground for Alternate Dispute Resolutions (ADR). In the recent years, India has witnessed many educational disputes going to Courts whether they are regarding attendance of students, disciplinary matters, suspension etc. This results in high costs to the students and the universities alike leading to wastage of time and efforts of both parties.

The Alternate Dispute Resolution procedure is statutorily recognized in India under the Civil Procedure (Amendment) Act 1999. The Arbitration and Conciliation Act, 1996 (the Act), states the statutory guidelines for the management of independent conciliation and arbitration proceedings outside of the Court, for the first time in India. It also encourages the Arbitral Tribunals to use mediation, conciliation or any ADR procedure during the arbitral proceedings to encourage settlement of disputes.

Higher Education and Expanding Rules

Higher education would include post-secondary education in India including colleges, universities and community colleges. There are governing and legal frameworks, which oversee aspects of higher education. However, with the increase of complicated procedures and ever-expanding litigation in this area, the concept of ADR can be successfully implemented in this area.

Complaints in the education sector have a unique characteristic. Parties to an education dispute want a quick resolution, as it is in the interest of both parties that a student education should not be hampered. Also, the disputing parties desire that the students' best interest should be protected at all times. Therefore, Universities to settle higher education disputes effectively may use the counseling, mediation, conciliation and arbitration ADR methods.

Counseling

There are numerous situations under which a young student needs assistance. Universities are an amalgamation of students from all walks of life, urban-rural or rich-poor. Students may at some point of conflict need the assistance from a trained counselor. Such assistance from a counselor relating to any dispute goes a long way in mitigating any issues. The ADR method of counseling is very helpful in this regard.

In counselling, the parties are primarily focused on their association and the way the parties interact with each other. Counselling is a form of ADR in a sense because the parties are counselled about their relationship and how to cope and communicate better.² Counseling

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is a structured process, which provides guidance to the scholar to attain self-realization and self-direction. It is a corrective and a preventive method helpful for conflict management in institutions of higher studies. Trained counselors in Universities are therefore an important requirement and would help in solving many student-university disputes.

Mediation

Violence is on the rise in India especially among young students. The rising incidents of violence among university students, has made the universities implement latest technology security instruments in universities like cameras, sensors etc. However, violence among the young continues unabated.

Article 3(a) of the European Union (EU) Directive defines mediation as –

“Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the

court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question. Also, Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties.”³

Mediation is a form of ADR, which includes a neutral third party, called a mediator who helps the arguing factions to solve the disagreements, with their free consent. It is a structured process in which the mediator helps the factions to arrive at a negotiated settlement. The mediator uses his skill and negotiation abilities to make the parties come to a voluntary negotiated agreement, which would define their future behavior. Though, the mediator is not empowered to make any binding decision.

This type of ADR is being practiced in numerous American schools and Universities.⁴ Twenty prestigious universities, including Harvard, Syracuse, North-western, and several of the Big Ten State Universities have developed research, educational courses, and practice activities in conflict resolution, and propelled the use of mediation as a dispute system alternative.⁵

Universities in India have many internal mechanisms to resolve such disputes such as disputes between students and administrators. However, mediation offers a holistic method of dispute solving which help students and administrators evolve problem solving skills. The aim is to resolve issues in a peaceful manner. The student is also able to discuss his/her problems in an easy, peaceful atmosphere, which is not adversarial. Mediators work jointly with parents and students to arrive at possible solutions and resolve disputes.

Conciliation

The term ‘conciliation’ is not defined under the Act. According to the Oxford dictionary, it means, “the process of ending an argument or a disagreement”. Conciliation is without recourse to arbitral or judicial proceedings. Therefore, conciliation being consensual, is an

independent procedure to resolve disputes. Under the Act, the parties can resort to conciliation with mutual consent and agreement. If agreed upon, one of the parties can invite the other to commence the conciliation proceeding. The conciliator acts as a facilitator assisting the parties to resolve their disputes in an impartial and independent manner.⁶

In cases where the student and University disputes are such that there is a obligation for an out of court dispute settlement, conciliation may be the answer. Conciliation is an informal process in which the conciliator, the third party, tries to bring the disputed parties to an agreement. The conciliator may do so by lowering tensions, improving communications, listening and interpreting issues and exploring solutions to bring about a settlement applicable to both parties.

A neutral third party carries out conciliation, like mediation. However, in conciliation at some point the parties can seek for a conciliation agreement, which may be binding on the parties.⁷ Students and administration may find this method of ADR very useful to settle disagreements with confidentiality ensured, in case they are facing any difficulties within the campus.

Arbitration Agreements

Arbitration as a method of ADR in institutes of senior education could ensure a flexible, quick and inexpensive way of dispute resolution. However, in Arbitration agreements, it is essential that there is a clause inserted in the arbitration agreement regarding the solving of the matter of dispute by arbitration. Therefore, it is important, that at the student pre enrollment stage, the students are informed about the same and there is mutual consent obtained in writing mutually from the university and students that in case of any dispute the arbitration clause would be invoked. This process is legally binding and recognized and therefore an effective method of dispute resolution. The arbitration agreement mutually consented by both parties

It is also imperative that, the adjudication process is seen as just and fair. The arbitrators who have been appointed should be acceptable to both parties. The arbitrator must also give his consent to act as an arbitrator. The arbitrator may be former judges or adjudicators and they must be absolutely disinterested and impartial. The arbitrator is an extra judicial authority whose decision becomes binding on the parties unless appeal is preferred by any one faction to the Courts.

The arbitral award given by the arbitrators should be in writing and as per requirements under the Arbitration and Conciliation Act, 1996. The making of the award is a rational process and reasons for arriving at the award are recorded. The Act recognizes the autonomy of the award and precludes the need for a judicial review. It also minimizes the supervisory role of the Courts.

Hybrid Models

Institutes of senior education can explore and adopt hybrid models to bring about effective dispute resolutions. It is not necessary for Universities to follow any straight- jacket methods of dispute resolution. To maximize outcomes, hybrid models of dispute resolution should be adopted. For example, wherein a scholar is involved in any substance abuse, counseling and mediation would be an effective method of solving disputes, ensuring a long-lasting effect. The emotionally troubled student may avoid disciplinary proceedings incase he/she chooses to resolve the conflicting issue through ADR. In matters of student disputes, fees, attendance issues etc. hybrid methods of counseling, mediation or arbitration as may be effective to fairly and confidentially resolve the disputes. Foreign student issues can also be handled successfully through the ADR mechanism. Provisions for ombudsman can also be made successfully in Universities.

The Hybrid models successfully have been implemented in many universities in America and developed countries. There are numerous hybrid models, which can be explored to adopt a preventive mechanism for disputes to erupt. Methods like neutral party evaluation, med-arb or mini-trial. Each component of ADR can be "tailored" and adapted to maximize the effectiveness of dispute resolution in Universities.

Need for ADR mechanism in Higher Education

There are many general matters of disputes like fees, marks and attendance, suspension and disciplinary action, children with special needs etc., which need to be resolved effectively and in an unbiased manner.

The ADR mechanism offers many benefits to students for the resolution of any disputes. Regarding the students, there is an inexpensive and impartial way to settle the disputes. The scholars are also ensured confidentiality and an informal, stress-free environment to settle their disputes.

Numerous benefits also accrue to Universities in the ADR process. The University is capable in resolving its disputes with students in a peaceful manner, which may be binding in the case of conciliation and arbitration. The ADR method is voluntary and consensual; so numerous resolutions may be possible.

The ADR method ensures confidentiality to the parties unless it is legally mandated. Expert determination is another mechanism utilized by the groups wherever required. It is also imperative, for the institutes, to ensure standard operating procedures, administrative facilities and structures of responsibility to evaluate the ADR methods.

The ADR process also ensures and lays down obligations that the parties are treated with equality and full opportunity is given to the parties to present their case. Any agreed procedure that violates the fundamental principle of fair hearing, equal treatment or full opportunity to present their case would be null and void.

A Case Study Analysis

A mother, Mrs. X lodged a complaint on behalf of her student son, Y, who had numerous disabilities including an intellectual disability. Y could not clearly communicate and had frequent incidents of poor behavior including not listening or interacting among teachers and other students. Y was expelled following an unruly incident with another child. The University had adopted many strategies to accommodate Y and respond to his behavior. However, Mrs. S complained that Y had made no academic progress, had no individual education program and she had not been given any update of his academic progress. A conciliation conference was conducted, and the respondents noted strategies had been adopted to ensure Y stayed in the University but ensured no detrimental effect on other scholars. The University also ensured that, Y had the opportunity to learn as per to his individual needs. The complaint was decided through the provision of an apology, provision of training for staff and an agreement for the development of Y's progress.

Therefore, the ADR route may be helpful for both parties for reaching a mutually acceptable solution.

Appropriateness of ADR in Indian Universities

ADR methods of resolution are helpful in many respects. However, in some matters the ADR methods may not be appropriate. In matters of sexual harassment or in criminal behavior by students or staff, appropriate legal authorities should be informed and involved. Consensus in such cases among the accused and the accuser is not appropriate.

Conclusion

There is a growing awareness that, the Courts, are not in a position to bear the entire burden of the justice system. ADR is therefore emerging as an effective way of dispute resolution. It is seen as an effective method of obtaining social justice and better results. Though the process at any stage shouldn't be against the law, against higher education statute and regulations or biased towards any party. It is important to ensure the appointment of trained counselors, mediators, conciliators and arbitrators for the resolution of disputes. In case these guidelines are followed, it would lead to a peaceful, holistic and satisfying method of resolving conflicts between students and administrators.

Footnotes

¹ Mohini Jain v State of Karnataka, 1992 (3) SCC 666

² Taken from <https://www.beaconfamilylaw.com.au/family-lawyers/negotiations/> last visited on 9th March 2019.

³ Taken from European Commission, Directive 2008/52/EC of the European Parliament and of the Council on different forms of mediation in civil and commercial matters,(2008), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=en> last visited on

⁴ Taken from <https://www.ericdigests.org/1995-2/mediation.htm> last visited on 9th March 2019.

⁵ Taken from https://www.researchgate.net/publication/315133569_Mediation_and_Dispute_Resolution_Services_in_Higher_Education last visited on 15th March 2019

⁶ S.S.Gulshan, 'Mercantile Law', 2nd Edition, Reprint 2006, p. 732

⁷ The Arbitration and Conciliation Act, 1996