Chapter-II

History and Background of ADR Movement in India with Special Reference to Lok Adalats
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"Law must be stable, but it must not stand still"

Roscoe Pound

The evidences of administration of justice in India since ancient times have been well documented. Several methods of dispensation of justice were recorded by historians of different periods.

One can see the rudimentary forms of the present day Alternative Dispute Resolution systems in the legal dispensation systems of ancient and medieval India. It might not be correct to call them the rudimentary forms of ADR, as it may perhaps be not appropriate to call them ‘alternative’ as well. This is because they in fact constituted the formal methods of the times for disposal of justice.

(1) Evolution of Ancient Law & Practice

The period from earliest times to 8th Century A.D is termed as Ancient period, which may be split into pre-classical and classical period identified by Vedic literature and metrical Smritis respectively. The period thereafter and up to the 17th century, is the medieval period and it is identified with the digests and commentaries on the traditional law, as it was in practice then.

Werner Menski has mentioned four stages of evolution of the indigenous law, which he calls ‘Hindu law’- Rta stage of early vedic times, Dharma stage of later vedic times, Danda stage of early smritis, Vyavahara stage of later smritis.

The Rta is symbolic of the pre-classical phase with emphasis on the macrocosmic-the higher invisible order-to which mankind as a whole is subservient. It was ritually correct action which was seen most conducive to the maintenance of such order.

1 US Jurist (1870-1964)
2 Werner F. Menski, Hindu Law-Beyond Tradition and Modernity, p.27, (OUP, Delhi, 2003).
The next stage of consciousness was *dharma* in the classical period (800BC to 200AD). It was an idealized concept relating to privileges and obligations of an individual. There was no central authority to guide an individual as to what was *dharma* or how to follow *dharma*. It was essentially a self-controlled order. It comprised all levels of existence, macrocosmic as well as microcosmic. A perceptible shift from ritual action to righteous action was an obvious accompaniment.\(^3\)

*Danda* was the next level of evolution in the late classical period. It was identified with assisted self-controlled wherein a public agent came into the picture and dispute settlement as well as threat of punishment was considered necessary.

The beginning of medieval phase is synonymous with *Vyavahara* in which legal experts and judges acquired prominence with consequent importance on investigation and critical evaluation of evidence. The formal dispute resolution process made substantial inroads, apart from the informal mechanism already entrenched, in the justice dispensation system.

The Vedic literature is vast and comprehensive consisting of several significant compositions. The Vedas comprised of four collections- the *Samhitas*- of verses or sacred formulae- *Rig veda, Yajurveda, Samveda* and *Atharvaveda*. The *Brahmanas* dealt with ritual prescription of verses or sacred formulae from the *Samhitas*. Then came the *Aranyakas* that sought to give a mystical interpretation to the formulae and rituals. The *Upanishads* propounded the theory of self as the true essence of man. Lastly, there were the *Dharmasutras* that dealt with obligations (dharma) of persons in different phases of life. They are the first systematic, normative texts prescribing right conduct.\(^4\)

It may be noted that although Vedas are supposed to be the highest authority in matters of *Dharma*, yet they do not contain too much of prescriptive or injunctive statements relating to acceptable social conduct.

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\(^3\) Patrick Oliville, *The Law Codes of Ancient India*, p.56, (OUP, USA, 2009)

The *Sutras* are followed by metrical *Smritis*. They are more than 100 in number and have been written over a period of 1000 years. Although all *Smritis* are supposedly equal, yet few are quoted more often than others as of Manu, Yajnavalkya, Narada etc. They represent a vast reservoir from where rules of *Dharma* were discerned and applied in different situations.\textsuperscript{5}

It is the digests and commentaries that complete the literature on ancient and medieval Hindu traditions- wherein authors created newer texts, using *Dharmashastras* and adapted them to suit the exigencies of time.

It may be said that modern Hindu law has its foundations and roots in ancient and medieval precepts although its manifestations are more in the form of statutory laws and customs.

**(a) Concept of Law in Ancient India**

Again, the concept of law, as it arose in pre-classical or Vedic period was in the realm of sacred and divine, as a universal order that governs the conduct of all entities in the universe, including human beings. Man was expected to follow the divine order as revealed in sacred texts. There however soon arose the need to regulate his conduct through a system of retribution and rewards that the metrical *smritis* attempted to do. The word 'Dharma' was used to signify a detailed and elaborate normative system that sought to regulate the conduct of man, so as to preserve and uphold the universe.\textsuperscript{6}

It was soon realised that the natural system of divine retribution and divine awards was not enough to deter or motivate an individual. Thus, the king emerged as an enforcer of the divine order.

*Dharma* now came to have three branches-namely, the *Acara* (right conduct), the *Vyavahara* (substantive and procedural norms for enforcement of right conduct) and the *Prayaschit* (ritual expiation for making a man spiritually, culturally and socially pure). The focus shifted slowly and gradually from the sacred or divine to the political.

\textsuperscript{5} J.N. Farquhar, *Outlines of the Religious Literature of India*, p. 35, (OUP, USA, 1920).

It may be said that in early medieval period, the indigenous law or the Hindu law emerged from the shadows of *Dharma* and established itself independently as *Vyavahara*.

**(b) Hindu Law: Historical and Etymological views**

‘Hindu Law’ may be spoken of as a collective term. In fact, there is no such thing as one Hindu Law. The internal diversity of Hindu law is of such enormous magnitude that the general term needs to be supplemented with the particular aspect or period of Hindu Law that is being referred to.

According to Derrett, Hindu law is ‘one of the most complicated in the world.’

Most of the writers agree that Hindu law ‘is acknowledged of having one of the most ancient pedigrees of any known system of jurisprudence’. In an important text originally published in 1958, Desai starts with the recognition that ‘law as understood by the Hindus is a branch of *Dharma*,’ which really reflects the internal Hindu perspective. But later, the same author proceeds to describe Hindu law’s ‘basic structure as the law of the *Smritis*’ which was developed further through ‘a number of explanatory and critical commentaries and digests which had the effect of enlarging and consolidating the law’. Thus, within a short space, a dramatic change in the Hindu law’s cosmic basis occurred as a legalistic, positivistic code.

It is easy to see that the conceptual framework of ancient Hindu law is not easy to discern since it does not lend itself to any single interpretation.

**(c) Precursor to Lok Adalats in Ancient India**

The system of administration of justice like the Lok Adalat, which in the modern times goes by the name of Alternative system of administration of justice or Dispute Resolution, was traditionally the mainstream system of justice administration of India since the ages.

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9 Ibid
The beginning of administration of justice through popular court goes back to the Vedic age. People’s Courts or popular courts were for the first time mentioned in the *Yajnavalkya Smriti.*

Further, according to the scheme of ancient law-giver Manu, and as adopted by Yajnavalkya, Brihaspati and Katyayan, the Sabha system formed the basis of forming and grading of the courts. These courts used to preside over resolution of disputes arising in a particular community of people (in increasing order of size of population) the Kula, the Sreni and Gana courts.

Before the advent of Panchayat system, popular courts that were in vogue in ancient India were- the Gana, the Sreni and the Kula.

**Gana**

The word ‘Gana’ or ‘Puga’ might have denoted the local corporations of towns and villages during post-Vedic period. In that period, villagers had their own judicial system. It has been has observed that “The villagers had a judicial system of their own, which was at once familiar to and respected by them. The various traders and guilds had a similar system. The Presiding officer of the popular courts or guild courts has office whether by election or by inheritance, in accordance with the prevailing local custom. Associated with the presiding officer were three or five men. These apparently private courts settled the affairs of everyday life. In the case of grave crimes and when the condemned party refused to obey the judgment of the local court, the Court of the King was concerned with such litigation.”

According to Altekar, the ‘Puga Court’ consisted of members of different castes and profession but staying in the same village or town. If the *Sabha* or village assembly of Vedic period was occasionally settling disputes, the ‘*Sabha*’ court would be the earlier prototype of the ‘Puga’ court (as in the post-Vedic period).

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11 Ibid
The *Puga* Court and *Gana* court were well known to the King and were empowered to decide the disputes of civil and criminal nature except what is called *Sahasa*, meaning any grave offence like violence including murder.\(^{14}\)

It is clear from this account that the administration of justice during the Vedic and post-Vedic period was participatory.

**Sreni (the Guild)**

The 'Sreni' forum of administration of justice was represented by traders, businessmen or artisans or persons belonging to different tribes, but subsisting by the practice of the same profession. They seemed to have functioned essentially like disciplinary bodies of different professions. In other words, 'Sreni' was used to denote the courts of Guilds, which became a prominent feature of the commercial life in ancient India. The Mahabharata reveals that these courts were vested with powers to decide matters relating to their special callings or trade.

The *Srenis* had their own executive committees of four or five members and it was likely that these committees functioned as the *Sreni* courts, when the efforts at the family arbitration failed.\(^{15}\)

According to Altekar,\(^{16}\) the *Sreni* courts were Courts of Guilds and became a prominent feature of commercial life in ancient India from 500 BC. These forms of Lok-Adalats continued to function in India down to the eighteenth century and remained in existence through the length and breadth of India.

The power vested with the *Sreni* Courts was to decide civil and criminal cases, except those involving trial for an offence committed with violence. Also, they did not have the authority to execute sentences of fines and corporal punishment, for which, the matter had to go to the king, who alone could execute the sentences, upon such sentences getting his due approval.\(^{17}\)

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\(^{16}\) Supra note 13, at p. 252.

\(^{17}\) Supra note 14, p.491
The Courts of Sreni were appellate courts and appeal from Kula Courts lay before these Courts.18

**Kula**

The Kula Courts were mainly confined to the personal and family laws and customs. ‘Kula’ was meeting of persons collectively related by blood as of a family or tribe or even distantly related by marriage.19 Kula was the lowest court and it was the court of informal body of family elders.

It can be mentioned that ‘KulanV’ has been interpreted as the officer who presided over the group of eight or ten villagers and received land grant proportional to one family.20

Kula Courts were vested with powers to discharge judicial functions and were considered to be the lowest popular Courts in the entire strata of local Courts then.21 It was essentially an arbitral tribunal of people or Lok Adalat of today. The idea behind this Court was that the administration of justice was not the sole concern of the king alone but the people also shared the burden of the State in the administration of justice.

The Kula court was the lowest Court and appeal from the Kula Courts lay before Sreni court. The Gana or Puga Courts were higher courts of Sreni.

One particular characteristic of these community courts was that they were quite easily accessible to masses. This easy reach enabled every person to plead for justice without delay and with least effort. The relationship between king’s court and Popular Courts was well defined. Sage Brihaspati has mentioned that Sabha occupied higher position than that of kula and the Adhyakshas (presiding officers) were above the Sabha and the King was above all.22

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19 M.G. Chitkara, *Lok Adalat and the Poor*, p.36, (Ashish Publishing House, New Delhi, 1993)
20 Supra note 4, at p. 280
21 S. D. Sharma, *Administration of Justice in Ancient India*, p.167, (Bhartiya Vidya Bhavan, New Delhi, 2007)
(d) Modes of Obtaining Justice

The following are the four means by which justice was obtained in ancient society:

Dharma, Vyavahara, Caritra and Rajashasana.

The first step towards resolving disputes may be said to be based on the principles of Dharma. It is when the first step fails, i.e., settlement of relationship is not in accordance with Dharma that the second, Vyavahara, viz., legal relationship enforced with the help of the State takes place. The third mode of settling a dispute is on the basis of Caritra-conduct, for instance, confession of the guilt by the accused. The last means to decide the case is by way of Rajashasana, whence in the absence of the principle of Dharma, the dispute is sought to be resolved, based on the principles of justice, equity and good conscience, thus satisfying the principle- ‘where there is a wrong, there is a remedy’.

(e) Expansion of System of Settlement of Disputes

A very important development took place in the very late Classical phase and the beginning of the Medieval Phase, relating to the formal and informal settlement of disputes. Self-regulated ordering process was likely to take place with mostly informal methods of negotiation or discussion, but could also involve formal methods of dispute settlement.

Reference is found of such formal dispute resolution mechanisms in the Narada Smriti. Similarly Brihaspati Smriti declares that ‘in former times, people were virtuous and devoid of mischievous inclinations. Now that avarice and malice have taken possession of them, judicial proceedings have been established.’

Such texts consistently reflect perceptions about decline and inefficiency of self-control mechanisms in this period. At the same time, they suggest a potential strengthening of the Hindu ruler as administrator of justice and also the movement of experts into positions like legal advisors and even judges in the administration of

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23 S.N. Pendse, Oaths and Ordeals in Dharmashastras, p.27, (M.S. University, Vadodara, 1985)
24 B. D. Chattopadhyaya, The Making of Early Medieval India, p.5, (OUP, Delhi, 1994)
justice. The basis of justice still remained *dharma* and not king-made laws. Moreover, the ruler could have an equivalent as a family head or *karta* of a Hindu joint family.

It is pertinent to note that local fora in India, in that period and even to this day, claim and exercise, the right to devise appropriate punishment including the death penalty.\(^{25}\) The ruler was thus not so frequently called upon, to settle disputes or to punish criminals. Order was still maintained, in the main, at the local level with the ruler exercising a supervisory function. The ruler did not really want to be involved in local matters unless it affected his rule or was of a serious nature.

The concept of *Vyavahara* is often described as removal of doubts or extraction of a thorn. Investigations and critical evaluation of evidence became new areas of interest so that an impressive body of procedural rules including that of evidence came slowly into existence.

There was also formalization of processes for ascertaining *dharma*. For example, the code of Manu declares 18 heads of legal proceedings which were followed by Yajnavalkya, Narada and Brihaspati. These divisions and their order made no pretensions to a scientific system. They were probably due to the practical needs of society and testify to the greater frequency and intricacy of some kinds of disputes than of others.\(^{26}\)

Early rulers like the Buddhist King Ashoka (c. 274-232 BC) issued edicts that were clearly moralistic guidelines, phrased in idealistic terms relating to dharmic concerns of following appropriate behaviour, rather than obeying the king’s dictate.

According to Diwan and Diwan,\(^ {27}\) it has been seen earlier that the king did not make law; he merely enforced law. Yet we find that the king’s power to make law—though to a limited extent—by edicts or ordinances—was recognised. It is not clear at what stage of development of law, the *Rajyashasan* became important. Yajnavalkya mentions it. Narada clearly states that the king-made law overrides the sacred law or the custom. Kautilya said also to the same effect. According to him, *dharma,*


vyavahara, caritra and ethics of the king are the four legs of law. Of these four in order, the latter is superior to the one previously named.

The development of Raj Dharma, a specialised branch of the science of duties of the ruler, occurred in this period. The Hindu ruler, his judicial deputies and other functionaries became more and more involved in dispute resolution exercises, still acting within the confines of dharma, but now very slowly engaged in the process of making law. The ruler’s main role, in the classical Hindu law context, was therefore not to produce or enforce his own law, but to enable everyone to follow their own respective dharma as far as possible. The ruler was primarily to act as a facilitator of justice and not as the creator of legal rules.

It is more visible in the arena of dispute settlement that the conceptual development of Hindu law occurred. The function of assisting self-controlled order evolved into settling disputes in a variety of local fora, culminating in the ruler’s supreme function as the final arbiter in disputes. A dispute, in the background of given facts and circumstances, was sought to be resolved by reference to dharmic rules, although without a binding precedent. A parallel may easily be drawn to the later day British system of judge-made law although with precedent.

(f) Formalization of Dispute Settlement Process and Procedure

It is interesting to note that procedural aspect of law-making was developed prior to substantive law-making in the ancient Hindu legal jurisprudence. Various texts elaborate upon the four stages of plaint, answer, examination of evidence and finally judgment, though there is little agreement amongst individual texts on points of detail.

There was increasing formalization of legal rules in the administration of justice at the highest level, wherein, the Hindu ruler had the last word in deciding disputes, thus establishing a hierarchy of sources of law. For example, Naradasmriti says ‘virtue

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28 Sures Chandra Banerji, Dharmasutras: A Study in Their Origin and Development, p.121, (Punthi Pustak, Delhi, 1962)
(dharma), a judicial proceeding (vyavahara), documentary evidence (caritra) and an edict from the king (raja shasana) are the four feet of a law suit, each following one is superior to the one previously named'.

This hierarchy of sources is a realistic one, beginning with the least authoritative but most frequently applied source. When both parties to a dispute act truthfully and the wrong-doer admits his misdeed, the decision or outcome is achieved through dharma. This may imply informal extra-judicial dispute settlement.\(^\text{30}\) Such settlement of dispute before trial would strongly confirm the continuing relevance of self-control mechanism in real life. The second source, vyavahara was slightly more formal process of dispute settlement. It involved settling of disputes by reference to smriti rules. The third source in the hierarchy is the caritra, viewed as a method of dispute settlement, referring to documentary evidence or what is right and proper. It is perhaps not custom but 'proof of custom'. The last component of the hierarchy was the ruler's verdict. The ruler would be the final arbiter and the final court of appeal. He would dispense justice by considering a variety of factors within dharmic context in order to fulfil his own dharma. Thus, even in the Late Classical Hindu law phase, it does not allow the ruler to make law as he pleases, but keeps him in the strict confines of dharmic relativities.\(^\text{31}\)

The Late Classical Hindu law represents a significant conceptual modification in emphasis from the internalised processes of ascertaining dharma to more external and visible negotiated attempts at finding the right balance in conflicts or disputes. The majority of disputes continue to be dealt with, locally, by more or less informal processes of dispute settlement in which local customary laws remained in all likelihood the most important yardstick for ascertaining Dharma. In fact, most of the Hindu law in this phase remained informal, unrecorded and not amenable to positivist control.

\((i)\) Vyavahara

Vyavahara or adjudication must have been a very important source of justice in ancient Hindu law. The different tribunals including the king, with original or appellate jurisdiction used to decide disputes among the litigants. These decisions


\(^{31}\) Ibid
must have served the purpose of precedent and principles for guiding the tribunals in subsequent disputes in similar or analogous circumstances.

Vyavaharapada means the topics or subject matter of litigation or dispute. For Manu, pada means sthana i.e., occasion. He enumerates eighteen Vyavaharapadas, the eighteen titles of law mentioned by Manu, that are mostly the matters about which disputes arise and justice between two parties is administered. These two parties may be two private individuals or State on the one side and the private individual on the other; State or king representing the society.32

According to Kulluk,33 the administration of justice is mostly dispensed in disputes related to the 18 topics. The enumerations are only illustrative and not exhaustive. The king is required to do justice in these matters. They are (a) Non-payment of debt (b) Deposits (c) Selling without ownership (d) Joint concerns (e) Non-delivery of what has been given away (f) Non-payment of wages (g) Breach of contract (h) Rescission of sale and purchase (i) Dispute between the owner and the keeper (j) Disputes regarding boundaries (k) Physical assault (l) Verbal Assault (m) Theft (n) Violence (o) Adultery (p) Duties of Man and Wife (q) Partition and (r) Gambling and Betting. These are in brief the 18 topics that form the basis of law suits.

An analysis of these 18 topics indicates that the administration of justice is mostly required in these matters. These topics, though, are not exhaustive yet they cover (i) the law of property (ii) law of persons and (iii) law of obligations. These topics also include cases of criminal liability. The exhaustive and complete enumeration of the topics of law is not possible even in modern times.

Under the category of Vyavaharapada fall wrongs of private nature into which the king should not look suo motu.

(ii) Kantakasodhana (Doctrine of Police-power)

Narada’s relegation of such matters in which the king was to take action suo motu to a separate topic Prakirnaka and Kautilya’s treatment of the Vyavaharapada in his

32 Supra note 21
Dharmasthiya and Kantakasodhana gives the impression that Vyavaharapada deals with civil law and Kantaksodhana deals with criminal law.

However, the view that Kantakasodhana means the topics which belong to criminal law is difficult to be sustained. There is an admixture of private and public wrongs in Kautilya’s description of Kantakasodhana. On the other hand, in Narada’s Prakirnaka, all matters cannot be said to belong to wrongs of public nature. Further, in the Prakirnaka, those acts are enumerated about which specific responsibility is imposed upon the king, which is of administrative nature. Kane’s observation of Kantakasodhana seems more plausible. He says: “In wrongs dealt with in the Kantakasodhana section, it was the king or king’s officers who themselves brought up the offenders for punishment and the offences were viewed not as mere private matters, but as matters in which the State was concerned for the eradication of crimes.” In Manu, after the discussion on Vyavaharapada, he says that Kantakasodhanam or Kantakasodharana is necessary for the welfare of the kingdom and the society. Thus, Kantakasodhanam is a responsibility which is different in nature than the judicial duty of the king.

All in all, Kantakasodhana is the subject which was something in the nature of the ‘doctrine of police power’. Therefore, the king in order to regulate the liberties of its people and to ensure the peaceful enjoyment of their rights was obliged under the doctrine of Kantakasodhna to remove all such impediments (thorns) which were injurious to the peaceful enjoyment of rights of the people and to root out all such anti-social elements which acted against the established social order (varna and asramadharma). If we look into the acts included in the Prakirnaka of Narada and Kautilya’s Kantakasodhana sections, we shall find that they very much resemble the acts which a State, even in modern days, undertakes to do under the doctrine of police power.

Kautilya speaks of matters that were dealt with by officers called Pradestras (who correspond to coroners and police magistrates of modern times) while matters falling

35 Supra note 4, at p.45
36 R. Shamashastry, Kautilya’s Dharmashatra, p.69, (Bangalore, Bangalore Government Press, 1915)
under the dharmasthiya section (viz., vyavaharapada) were disposed of by judges called dharmastha. An analysis of the matters enumerated in Narada’s Prakirnaka and those that are mentioned by Kautilya falling in the section Kantakasodhana allows one to conclude that most of those matters do not pertain to law suits (vivadapada); they are in the nature of duty of a king, which in the modern times fall under the category of the doctrine of police power.

An example of various important matters which fell within the purview of kantakasodhana, according to Kautilya,\(^\text{37}\) were artisans like blacksmiths and carpenters who were generally to work in guilds and receive from people material for working them up. If they caused unreasonable delay in handing back finished articles, they were to receive one-fourth less than the proper wages and were to be fined twice the amount of wages. These provisions are for protection of people from the oppression and harassment of artisans (karukaraksnam). They are primarily concerned with private dealings of people and the State or the king is required to see that no artisan takes undue advantage of his position. It is just to ensure the harmonious relationship between the artisans and the people. The mere provision of punishment does not reduce it to the category of criminal law. The elaborate provisions in this chapter are of regulatory nature and might be considered as falling under the doctrine of police power, which in turn, was to safeguard the interests of general public.

Such provisions in modern times are related with the power of the government to make regulations to promote health, peace, morals and order in the State. It is the right of the State to impose restrictions on the business community and frame regulations for their observance. These regulations ensure free and smooth functioning of trade, commerce and social interaction within the State.

These matters, in ancient India, being of administrative and regulatory nature, befell on the king to ensure security of his subjects; that they are not oppressed or cheated, either by any section of the society or by the State officials, in however high position they might be. Success of such measures was possible only when there was a very

\(^{37}\) Ibid
developed and refined machinery at work. These provisions give us a glimpse of the idea of institutions like the *lokapala* or *lokayukta*, *pradestras* and *samahartras*-officers who discharge such duties. This, in other words, is to say that the doctrine of police power existed even in ancient Indian jurisprudence.

Under the said doctrine of police power, the king or the State could make provisions for general convenience, welfare and prosperity of his subjects. Under this doctrine, a law authorising the abatement of a public menace by destroying the private property if the peril cannot be abated otherwise, will be a valid law in modern times as well. The concept of police power is flexible and it can include any law, the aim of which is social welfare. *Kantakasodhnam* deals with such laws for the welfare of society. The transgression of these regulations is punishable. The king can issue rules and regulations for social security and welfare which must be obliged. It is this power of the king, to make rules, which is regarded by Derrett as its legislative competence. It was in reality the regulatory power vested in the State, which is a natural consequence of the duty to protect the subjects. Under Hindu jurisprudence, there was no legislative power, granted to the king. But for the welfare of his subjects and their prosperity, he was under an obligation to frame regulations, the obedience to which was enforced by a separate machinery-more refined than the general police machinery; in order to supplement it, separate institutions of *pradestras* and *samahartras* were created.

Thus, it may be said that the doctrine of police power was recognised in its fullest form in the ancient Hindu jurisprudence along with its effective instrumentalities through which, it was to be operated- the *Pradestras and samhartras* - the institutions that may be said to be the precursors for *Lokpal* or *Lokayukta*.

According to Brihaspati, courts were of four kinds- *pratisthita*, court established in a fixed place, which is a town; *apratisthita*, circuit court; *mudrita*, court presided over by a judge who is authorised to use the Royal seal; *sasita*, court presided over by the king himself. Apart from these courts, other tribunals were also recognised by *dharma shastra*

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38 Kamal Kishore Mishra, *Police Administration in ancient India*, p. 59, (Mittal Publications, Delhi, 1987)  
39 Supra note 7, p.21  
40 Supra note 21, p.53
writers as well as by commentators and digest writers. According to Narada,41 ‘law suits may be decided by the village councils (kulani), corporations (sreni), assemblies (puga in Yajnavalkya, gana in Narada), the judges appointed by the king, and the king himself, each later one being superior to each preceding one.’ Kane42 is of the opinion that these were the arbitration tribunals like the modern Panchayats or Lok Adalats of today.

The description of tribunals by both Narada and Yajnavalkya shows that they were part of the hierarchy of courts, the highest being the court of the king himself and the lowest being the village council (kulani). This gradation of courts was in conformity to the principle of sovereignty vested in the people and also realised in fact. The judicial power was vested in these courts. The modern grama nyayalayas constitute the judicial machinery at the lowest ladder, which are organised on the basis of sovereignty of people.

From the Sanchi stone inscription of Chandragupta II, it appears that in ancient India Panchayats were called Pancha mandali. Various differing meanings were attributed by commentators to the words sreni, puga and gana etc. Whatever the nature of these bodies, they all agree to the extent that judicial power was confided with them which imply that in the epochs of Hindu legal history, the administration of justice was not the sole concern of the king alone but the people also shared the burden of the State in administering justice. It further proves the fact that sovereignty of people was vested not in name alone but also in fact, unlike the modern times. The vesting of the judicial power with social organisations is a mark of a very developed society. The society was directly connected to the day-to-day life of the people and social organisation was comprehensive enough, to regulate and provide all conceivable aspects of life and conduct.43 These observations indicate the real nature and extent of the power and of the sovereignty of people in ancient India. These various social organisations acted as judicial institutions. It becomes clear from the text of Brihaspati, who ordained: “the kulas, srenis and ganas that are well known to the king, may decide the disputes of litigants except those that fall under sahasa and that it was only the king, who could carry out the order for fines or corporal punishment”.

41 Supra note 21, p.57
42 Supra Note 4, at p.24

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Besides these courts, it appears from Kautilya\textsuperscript{44} that the village head man (\textit{gramika} or \textit{gramukta} or \textit{gramakuta}) exercised certain summary powers similar to that of police under the Village Police Act (Bombay Act VIII of 1867). Bhrigu says that there are ten tribunals common to all men, viz., (i) the village people (ii) the assembly of citizens of the capital (iii) \textit{gana} (iv) sreni (v) men learned in the four vedas (vi) vargins (vii)\textit{kulas} (viii) \textit{kulikas} (ix) judges appointed by the king and (x) the king himself.

Bhrigu\textsuperscript{45} further says the foresters may get the disputes settled by foresters, members of caravans by other members, soldiers by a tribunal of soldiers, and those who stay in a village as well as in forest may get their disputes settled either by villagers or foresters by mutual agreement and that the five tribunals for foresters and others are - \textit{kulikas} (high officers or heads of families), \textit{sarthas} (members of caravans), headmen, villagers and citizens. Thus, the administration of justice was assigned a very important place wherein, disputed boundaries of villages and fields in a village, four, eight or ten neighbours were to settle the boundaries.

The jury system was also in vogue in ancient India. Kautilya and Brihaspati\textsuperscript{46} say that the disputes between those who have performed austerities or between those who are experts in yogas should not be decided by the unaided, but with the help of those learned in the three vedas. This text is of great significance, since it implies that technical expertise should be utilised in settling complicated and technical issues.

Similar provisions are mentioned by sage Gautam,\textsuperscript{47} who says that the king, having received help from the heads of husbandmen, merchants, cowherds, moneylenders and artisans as regards disputes in their own groups, should finally decide what is just. It establishes a very high standard of justice. Every care was taken to ensure justice to the litigants. The elaborate and comprehensive provisions in this regard are of much importance as technical and complicated questions were not decided in a summary way,

\textsuperscript{44} Ibid, p.68
\textsuperscript{45} T.M. Rao, \textit{Bhrigu Samhita}, p.22, (Pustak Mahal, New Delhi, 2008)
\textsuperscript{46} Lingat Robert, \textit{The Classical Law of India}, p.203, (University of California, Berkeley, Centre for South and Southeast Asia Studies, 1973)
\textsuperscript{47} Georg Buhler, "Introduction to Gautama" in F. Max Muller, Georg Buhler (ed.), \textit{The Sacred Laws of the Aryans}, (Low Cost Publications, Reprint 2008)
but were referred to the experts. The association of people with the administration of justice was the mark of very high social order and an advanced legal system.

Hindu jurists made a clear distinction between substantive and adjective law. The *Vyavaharapadās* is the substantive law and *Vyavahara* is the adjective law.

The appointment of judges, their qualifications and character, constitution of the courts and their procedure are the inevitable ingredients of the adjective law. One of the most glaring defects of the present day procedure lies in the delay in deciding the cases. In Hindu jurisprudence, much care was taken to avoid delays. A precedent is found in ancient Indian literature, in which a king was to suffer the consequences for causing delay in deciding a dispute. In one of the epics, the *Ramayana*, the king Nṛga is said to have been cursed to become a chameleon for a long period by two Brahmanas, who had a dispute about the ownership of a cow and could not see the king for many days.

Kautilya\(^{48}\) is very conscious of the fact that the delay may cause the fall of the king and his kingdom. Therefore he gives an advice, when in court, the king should not cause, petitioners or litigants to wait long at the door, because when the king makes himself inaccessible, those who are near him create confusion about what should or should not be done, thereby the king generates disaffection amongst his subjects and makes himself a prey to his foes. Hence we find that in ancient Hindu legal system, justice denied through delayed justice was considered very dangerous to the State.

*Is There a Code of Ancient Hindu Law?*

It is well documented that the ancient method of administration of justice was through the law that evolved during the rudimentary stages of civilization in India.

The oriental legal scholarship tended to present *Dharma* as law. It was thereby suggested that Hindu legal rules could be found fixed as a code similar to the Roman

\(^{48}\) Supra note 41, at p.35
law and the more recent French Civil code. Thus the Dharmashastra could become a code of law and texts like Manusmriti could become the ‘Laws of Manu.’

The convenient equation of Dharma with law would then facilitate an application in formal courts in the post-classical period.

An immediate fallout of such a correlation was an end to the inherent flexibility and situation-specificity of Dharma. Further, there was also an arrest to the automatic, spontaneous and organic development of law. With passage of time, Hindu law could be reconstructed and modelled into a proper legal system, with ground rules of law ascertained from new written sources rather than the confusing ancient texts which indeed turned out to be unworkable. In this way, Hindu law and its administration were brought under state control. A situation gradually arose where a redefinition of Hindu law ultimately excluded everything that was not subject to state control.

The oriental interpretation of ancient Hindu law, did not however, reflect the reality and totality of Hindu beliefs and Hindu law.

**g) Importance of Custom in Classical Hindu Law**

Custom occupied a supreme position in the daily life of an individual to the extent that it may even be in derogation of a smriti rule. Sadacara is another term used to refer to custom or rather ‘good’ custom.

The predominance of custom as a source of law also acted as an instrument to accommodate the interests of fringe groups, or groups that were not totally Hinduized in the society of those times.

According to the Manusmriti, ‘A ruler who knows dharma, must enquire into the customary laws of castes, of districts, of guilds and of families and thus settle the law peculiar to each. For men who follow their respective occupation and who abide by the respective duties become dear to people even though they live at a distance.’

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49 Numerous examples from older and recent writings could be given. For example, Flood simply accepts the brahmanical view of Hindu morality ‘thought to be based on the revelation (Sruti) of the Veda, articulated in various law books, the Dharmasastras and describes the Manusmriti as ‘the famous Hindu law book’ depicts the Aapastamba Dharmasutra as one of the oldest Indian legal texts.

50 Werner F. Menski, Hindu Law-Beyond Tradition and Modernity, p.27, (OUP, Delhi, 2003).

fact, the Manusmriti itself is looked upon as one of the earliest attempts at compilation of the then customs and usages.

Custom occupied a unique position in Hindu law and did not merely supplement the law, but even prevailed over sacred law. It has been pointed out by Diwan and Diwan that the Dharmashastras were themselves based on custom.

The relationship between customary flexibility and Dharmic obligation was not contradictory since the Dharmic system was not a uniform code of obligation but rather situation-specific and context-specific method of decoding a response.

(2) Justice Dispensation in Medieval India

(a) A critical transformation from Dharma to Law

The critical transformation from dharma to law occurred in the period following the Late Classical Hindu law. The late classical phase extends between century 200 AD to circa 1100 AD and the medieval phase thereafter extends up to century 1700 AD. This period also has a rich literature in the form of digests and commentaries.

Diwan and Diwan suggest that "till the twelfth century we find that the general tendency was to write commentaries on particular smritis and from twelfth century, the trend was to write digests on several smritis and thereby to attempt to synthesize all the topics in the smritis."

Pathak provides a useful overview of why the digests and commentaries became important, listing that "(a) smritis do not agree with each other, (b) the smritis were often obscure (c) smritis were silent on many points and (d) most of the smritis were in verse and were not intelligible to the ordinary men."

In the apt words of Mr. Justice Desai, 'if the productive era of dharmashastras was the Golden age of Hindu law, this was the age of critical enquiry, expansion and

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consolidation.’

Pathak\textsuperscript{56} lists three major rules for reconciliation of conflicting texts, as stipulated in the Brihaspatismriti, Naradasmriti and Yajnavalkyasrmiti and clarifies these texts advocate quite different methods. While the Brihaspatismriti stipulates that the rules given in Manusmrtri possess superior authority, the Naradasmriti is said to appeal to reason while the Yajnavalkyasrmiti suggests that in case of disagreement, one should follow ‘nyaya’ translated here as ‘equity guided by the people of the old,’ which Pathak\textsuperscript{57} defines as ‘natural equity and reason’.

However, the attempts at uniformity to establish practical guidelines of the relative authority of texts did not succeed in practice. For instance, the widespread belief that the Manusmriti is a universal binding code of law for all Hindus was not maintainable on the evidence of that period, despite many claims for the same.

It is said that the old system of sources of dharma viz., sruti and smrtri were increasingly replaced by the secularized understanding of the sources of law.

Two important texts of medieval period may be highlighted-the Dayabhaga of Jimutavahana, an independent work on property law and Mitakshara of Vijneswara.\textsuperscript{58} Both the texts appear to be composed around 1125 AD. Mitakshara and Dayabhaga are considered as two principal schools of Hindu law.

The last of the great commentaries on Hindu law is a work called Vaijayanti, a commentary on Vishnu Dharmasutra, composed by the learned Nanda pandita in the seventeenth century.

(b) Muslim Rule and its Impact

It appears that political fragmentation of medieval India made it fairly easy for any strong force to take over more and more parts of the sub-continent. At times, this was achieved by Hindu and Buddhist rulers. But ultimately, a politically unified entity in medieval India took the shape of Muslim rule.

\textsuperscript{56} Supra note 52, p.7
\textsuperscript{57} Supra note 53
It certainly did not lead to the Hindu Law ceasing to exist in different regions. In fact, in the medieval period, Hindu law seems to have flourished in the regional centres still remaining under the Hindu rule.

However, the Islamic influence had its effect too. The effect of Muslim rule on the legal system remained largely restricted to the cities. And Muslim rulers were mainly concerned with collection of taxes and administration of criminal law. Most Muslim rulers acted like their Hindu predecessors in leaving vast scope for local and individual self-controlled order.

At the local level, there was a traditional reluctance to carry one’s disputes beyond the immediate social groups. However, in the cities, disputes did reach higher forum of dispute settlement. A hybrid mix of technical terms like mahazar (a Persian term for the plaint), and jayapatra (Sanskrit for the document given to the victor) illustrates very well the inter-mixing of cultures in the realm of dispute resolution in medieval India.\(^5^9\)

By 1206 AD, when Muslim central rule had been consolidated, Sunni Islamic law became the official law of the land and Hindu law turned formally into a typical personal law.\(^6^0\) The Mughal rule differed from time to time in its approach to non-Muslims, oscillating between leniency and parochialism.

The personal laws of Hindus and Muslims fell within their respective domains, while the criminal law was officially subject to Islamic law. There was however, a general tendency to avoid resorting to formal dispute settlement processes.

Apart from the Shariat, which was the primary religious text, there were two officially recognised authoritative juristic texts of Islamic law principles in South Asia- the Hedaya and the Fatwa-i-Alamgiri. These texts, like the Hindu smritis, were used as guidelines for certain situations rather than strict and universally strict binding rules of law or textual precedents.


According to Derret,\(^{61}\) 'where Muslims occupied the seats of power, disputes between Hindus, which were brought before them, were often remitted to Brahman jurists for an opinion, upon which the parties were compelled to compose their differences. By far, the greater part of litigation was never brought before Muslim officials, but was settled by recourse to traditional methods of resolving disputes, which differed according to the caste, the status in the society and the locality of the parties.'

\textbf{(c) Justice Dispensation in Pre-British Period}

The popular Court (or what is called the Lok Adalat in modern times) remained a distinct institution even during the Muslim rule in India. Such a participatory forum for disputants was effectively functioning throughout Indian history, till the British came.

The unique characteristic of the Mughal administration of justice in India was that it did not concern nearly three-fourth of the total population, because people of the rural areas had their own courts which enjoyed civil and criminal jurisdiction.\(^{62}\)

The gradation of Courts that was prevalent then was:

(i) Central Court or Royal Court at the highest level

(ii) Provincial Court at the State level or Provincial level

(iii) District Court at the District level

(iv) Pargana Court at the Taluka level and lastly,

(v) Village Court at the Village level

A result of such non-penetration of Muslim Rulers into the countryside was that the textual laws influenced, but did not displace the local laws. The disputes in the villages and even in cities were not settled by the Royal Court, but by the Lok Adalat or Popular Court of the caste within which the dispute arose, or of guilds or

\(^{62}\) R.C. Majumdar, \textit{The History and Culture of Indian People: the Mughal Empire}, p.549-550, (Vol. VII, Munshilal Manoharlal Publishers, Delhi, 1974)
associations of traders and artisans. These tribunals were empowered to adjudicate in accordance with the custom and usage of locality, caste, trade or family.

According to Jadunath Sircar, the Indian villagers had to settle their differences locally by appeal to the caste Court or the arbitration of an impartial umpire (Salis). These people’s courts were vested with powers to deal with both the civil and criminal cases. It is revealed that people were satisfied by the decision of the popular courts and relieved the Government largely of its judicial functions.

Perhaps the process of getting justice under the Mughals was not such a long drawn-out misery, as there were no tedious briefs, no methodised form and other procedural hurdles to keep parties longer in suspense. The speedy decision of cases and the absence of long and intricate legal proceedings was much admired.

The decisions of the Panchayats or People’s Courts, of which today’s Lok Adalat is based, were almost invariably unanimous and the punishments inflicted were fines, public degradation, or reprimands or ex-communication.

No sentence of punishment of death was awarded, because there was no proper authority to execute these sentences. The fear of public opinion was one of the most potent factors responsible for the prevention of crimes and hardly anyone could go out of the boundaries of the village. Normally, cases involving even murders were settled locally. The law administered by the Panchayats or People’s Courts was usually caste and tribal usages and the customary law of the land.

In the opinion of some legal experts, one of the prime reasons for effective functioning of mediation and conciliation proceedings during Mughal Period might be the guidelines of the Holy Quran, which prefer amicable settlement instead of adversarial system of dispute resolution.

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64 Ibid.
66 Ibid.
68 Supra note 56, at p.545.
The collapse of the Mughal rule in India heralded the gradual emergence of British rule in India. The Hindu and Muslim personal laws remained largely outside the formal law and worked through internal self-regulation in the social field. Informal local methods of dispute settlement initially remained unaffected. Colonial intervention, therefore, did not root out, replace or displace Hindu/Muslim law totally. But it introduced important new methods at a formal level of dealing with the entire field of law and with legal proceedings in particular.

The extent to which there was legal interference by the British depended on a variety of factors. As Baxi has pointed out, the slow pace of legal intervention in the personal law sphere shows 'the wariness of a colonial power to intrude in sensitive areas of group morality'.

Over the time, the growing emergence of European legal concepts had its impact on British India, where the pressures of administration demanded efficiency and a clear preference for precedent and legal certainty. It was only in 1858, when British sovereignty was finally imposed, that there was a direct intervention by the British in the legal sphere. There was an eventual emergence of a complex hybrid of local laws and colonial laws known as Anglo-Indian law.

As early as in 1600 AD, when the East India company was granted the Royal Charter for trading, there was the felt compelling need to develop systems of dispute settlement that would serve their purposes in a practical manner rather than ideological. The aim was to provide legal mechanisms for the settlement of civil and criminal matters, which involved first of all, their own staff. The application of local laws

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70 Detailed outline of the historical development of early British intervention in India and the emergence of Anglo-Indian laws is provided by Jain (1966), a study first published in 1952. See also, Fawcett, The First Century of British Justice in India, Reprint, Aalen, Scientia, and Banerjee A.C., English Law in India, New Delhi, 1984 Abhinav Publications, Delhi 1979
72 A.C Banerjee., English Law in India, p.275 (Abhinav Publications, Delhi, 1984) writes that between 1772 and 1859, the introduction of English law was a very slow process and lists in the subsequent discussion, the reluctance of the British to interfere with the religious sources, the difficulty of applying English law to Indian conditions ad of the non-availability of judges and advocates, well-versed in English law.
Muslim or Hindu laws to British personnel was considered extremely inappropriate. Inevitably, the question extended to Indians living in the territories governed by the British, as to what extent, they should be subject to the local laws.

Early British administrators realised that the application of English law to Indians would not be feasible and would lead to chaos.\textsuperscript{73} Warren Hastings in particular, very well realised that it will not work if an alien system was foisted on them.\textsuperscript{74} After 1600, various royal charters had been given, the power to establish courts in their areas of influence without specifying the law to be applied.\textsuperscript{75} Legal insecurity prevailed also when in a charter of 1726, mayor’s courts were established in the Presidency towns of Madras, Bombay and Calcutta.\textsuperscript{76}

Later, under various new charters, granted from time to time, East India Company could enact laws that would be neither contrary to English law and also be acceptable to the natives.\textsuperscript{77} Thus English law and procedure was introduced gradually across the country, and the practical experience soon showed that it was quite unsuitable for the local population.

Reluctantly, customs were recognised and there began the co-existence of English law with numerous concurrent personal laws. In 1772, Warren Hastings, the then Governor General of Bengal, issued a regulation to the effect that ‘...in all suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of the \textit{Quran} with respect to the Mohemmedans and those of the \textit{Shastras} with respect to the Gentooos, shall be invariably adhered to.’

The significance of custom was highlighted in \textit{Collector of Madura v. Moottoo Ramalinga},\textsuperscript{78} in which it was observed by the Privy Council, ‘under the Hindu system of law, clear proof of usage will outweigh the written text of law’. Thus it could be

\begin{itemize}
  \item Supra note 56, p.276
  \item In Bombay for example, English law was applied under a charter of 1661 (Pearl David, \textit{Family Law and The Immigrant Communities}, p.22, Jordan and Sons, Bristol, 1986)
  \item Supra note 52, p.11
  \item Supra note 56, p.280
  \item (1868) 12 MIA, 397
\end{itemize}
said that custom would override any text of smriti law. It was however difficult to meet the high standards of proof to establish a custom.

In view of the Declaration of 1772, despite personal laws continuing within the domains of various communities, a very large public law sphere, including criminal law, procedural law etc., came within the authority of the British.

Prior to 1793, when the Corn Wallis Code was introduced, there was no general code of laws and regulations in British India. Codification was now considered to be essential for good administration.\textsuperscript{79} A major codification process was initiated to achieve uniformity and certainty. The native law was considered as redundant and the new codes took as their new basis, the laws of England. The Indian Penal Code, 1860 is an example of excellent craftsmanship by Macaulay.

However, codification was not restricted to the area of non-personal laws. In derogation of Warren Hastings’ Declaration of 1772, Sati Regulation of 1829, Caste Disabilities Removal Act of 1850 were enacted, wherein, it was clear that the British gradually began to interfere, more and more, in matters of Muslim and Hindu law. The later major Acts promulgated by the British in the realm of personal laws were the Child Marriage Restraint Act of 1929, the Hindu Women’s Right to Property Act, 1937 and Dissolution of Muslim Marriage Act, 1939.\textsuperscript{80}

\textbf{(a) Emergence of Anglo-Indian Law}

The use of precedents and the important formula of justice, equity and conscience became the basis for administration of law in the country during British times.

The 1772 Declaration of Warren Hastings brought Hindu law on equal footing with Muslim law. It also gave official recognition to the need for formal administration of indigenous laws. The pandits and maulvis in turn, treated the British like a Hindu or Muslim ruler and it would appear that their methods in the use of textual authority were adjusted to the new expectations.\textsuperscript{81}

\textsuperscript{79} Aalen, Scientia, and Banerjee A.C., \textit{English Law in India}, p.46, (Lexisnexis, New Delhi, 1984).
\textsuperscript{80} Sripati Roy, \textit{Customs and Customary Law in British India}, p.51, (Thacker Spinks and Co., Calcutta, 1911)
\textsuperscript{81} Ibid.
For example, situation-specific solutions under the Hindu law of Dharma, were understood and reconstructed as binding precedents, quite unlike traditional Hindu law, which had developed from case to case and which had remained context-sensitive.

There emerged Anglo-Indian law, a conglomerate of precedents built on shaky textual authority of Hindu and Muslim legal principles.

Gradually, the Indian law became heavily indebted not only to English law but also to Roman law and other legal systems. The 'living law' of the Hindus and Muslims was under a huge shadow of the hybrid system introduced. It offered new remedies and alternative strategies to harass adversaries and though the stakes were high, the gamble was often considered worthwhile. As a result, a flood of litigation enveloped the justice delivery system. Historians of south India, in particular, have shown that litigation with army of lawyers replaced traditional warfare among ruling clans and thus assisted the British cause too.

(b) Emergence of a new institution and a new profession

It is well documented that colonial rule brought a host of entirely new political institutions. And whenever indigenous modes and mechanisms were adopted for colonial administrative purposes, they were incorporated within the new institutional fora.

As many experts have pointed out, the colonial law court as an institution typifies the British modus operandi of monitoring and controlling local civic grievances and in fact, using those to their advantage. There is however, another argument that the British had only set up the law courts on the lines similar to the one in their own country.

The Hastings Plan of 1772 established a hierarchy of civil and criminal courts, which were charged with the task of applying indigenous legal norms ‘in all suits regarding inheritance, marriage, caste and other religious usages or institutions’. Indigenous norms comprised ‘the laws of Quran with respect to Muhammadans’, and the laws of the Brahmanic Shastras with respect to Hindus. Although the courts followed the

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83 N,B. Dirks, “From Little king to landlord: property, law and the gift under the Madras permanent settlement”, in Comparative Studies in Society and History, Vol.28, no.2, April 1986,
84 Supra note 2
85 Supra note 7
British models of procedure and adjudication, the plan provided for maulvis and pandits to advise the courts on matters of Islamic and Hindu law respectively. By the early nineteenth century, the system of courts had been expanded, a new legal profession had been established, and a growing body of statute and court practice extended the influence of the colonial state.

However, the actual social impact of the courts was tempered by the reluctance expressed by many colonial administrators to interfere in the agrarian society unless they encountered a compelling need. At the same time, this reluctance may be seen as a virtue that emerged out of necessity. For, the resilience of pre-colonial social systems ensured that actual authority was shared among a number of entities, so that most disputes were settled at the local or community level.

Well before the advent of the British, the local bodies had acquired privileges of legal autonomy in both the rural and urban areas under Mughal rule. The same persisted during the colonial period. The autonomy of indigenous legal set-up sheltered a diversity of legal norms, even among peoples practising and professing a strict adherence to their respective orthodoxies.

However, British courts had a broad appeal to the landed gentry and other local influential groups. It can be said that if colonial legal institutions appeared to have less impact on the lower strata of the society, they did establish a new framework for disputes among the local elite. The local elite were attracted to the colonial law courts primarily because they were able to use the law courts to mediate disputes among themselves and to reinforce their dominance over peasants.

As is the case elsewhere, in British India, individuals with better economic and political resources often manipulated institutions to their advantage. For instance, early district administrators in the North were able to appropriate considerable amounts of land under their political control and then have themselves recorded as the title-holders or proprietors under British legal authority. Designated authorities who

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87 B. Cohn, *An Anthropologist Among Historians and Other Essays*, 1987, Delhi, OUP, at p.121
had held political office in the pre-colonial regime found it easy to thrive under the law of private property because, they could continue to exercise political control by virtue of their new legal rights.

The prevalence of corruption and mini-despotisms allowed the well-heeled to use Company courts when it suited their purposes, but at the same time, to exercise extra-judicial power when the law was inconvenient or contrary to their interests.\(^9^9\)

The British successfully enlisted the cooperation of the landed gentry and certain merchant groups, to overcome any obstacles in order to perpetuate the colonial rule and make it more effective. They were enabled because the landed gentry and merchant groups acted as intermediaries for them, as they were well organised according to the dynastic principles of family and clan, the administration of familial norms and law played a role in brokering wealth and power at the local level. Property and labour were regulated under the overwhelming authority of familial norms. The organisation of production in the family firm, including the division of labour according to gender and age, presupposed the legal regulation of marriage, dissolution of marriage, inheritance and endowments. For the Islamic gentry, material subsistence as well as political authority rested on the property grants of earlier rulers that were maintained under a variety of legal arrangements.\(^9^0\)

\textbf{(c) Origin and strengthening of Panchayat System}

The history of the Panchayat system goes back to the Vedic times, wherein a communion of village elders, usually five or more, presided over the affairs of the village including dispensation of justice holding a village community trial. Justice was administered swiftly and honestly. These institutions of local self-government enjoyed certain amount of independence and non-interference from the king in their functioning. The ancient \textit{Smritis} and Kautilya’s \textit{Arthashastra} mention the existence of Panchayats. Panchayats were effective in dealing with local causes, relating to distribution of land amongst villagers, collection of taxes from proceeds of land, punishment of offences etc. Panchayats however fell into relative oblivion during

\(^{89}\) J.B. Norton, \textit{The Administration of Justice in South India, Madras}, p.64, (Cambridge University Press, New York, 1953)

British rule. There were some efforts at reorganization of local self-government including rural self-government through Mayo Resolution of 1870 on Decentralization, Lord Rippon's Resolution of 1882, Report of Royal Commission on Decentralization, the Government of India Resolution of 1915, and the Montague-Chelmsford Report of 1918.

Hugh Tinker's authoritative analysis establishes: (i) The British experimentation in Panchayats was 'nowhere intended to reproduce the characteristics of old-time Panchayats. (ii) Panchayats were only intended to provide 'a rudimentary municipal framework for large villages and small towns' and/or to form a 'simple judicial tribunal'. (iii) In this latter role, the principal function of the Panchayat was to act as a petty court' (iv) Litigation before Panchayat was a source of revenue- mostly through levy of fines- since these bodies had no taxing power.

Prof. Tinker has drawn attention to the judicial nature and workload of Panchayats. Under the UP Panchayat Act, 1920, the principal function of the Panchayat was to act as a petty court. The Bombay Village Panchayat Act 1920 was broadly similar in purpose, though quite different in detail. Judicial functions were pre-eminent in the ordinary Panchayats of Central provinces, Punjab, and 'Union courts' in Bengal and 'village courts' in Madras. In UP, the Panchayats disposed of 122, 360 cases in 1925 (two-thirds being civil cases; subsequent pattern is one of steady decline; 1931: 91,476 cases; 1936:85,399 cases; 1937: 67,233 cases). In Bengal by contrast, the 'Union benches' and courts handled increasing volume of disputes; 1929:120,000 cases; 1937: 174,000 cases. There was considerable amount of work in other provinces too but not on such a huge scale.

(4) Post-Independence Evolution in Dispute Resolution

Comments of no lesser a person than the Father of the Nation Mahatma Gandhi on the justice dispensation system on the eve of independence of India are quite revealing. He had said: “India lives in her villages and most of the countryside is smeared with

92 Ibid.
poverty and social squalor. Today the poor and the disadvantaged are cut off from the legal system. They have distrust and are suspicious of the law, the law courts and the lawyers for several reasons. There is an air of excessive formalism in law courts, which over-awes them and sometimes scares them. They are completely mystified by the Court proceedings and this, to a large extent, has alienated them from the legal and judicial process. The result is that it has failed to inspire the confidence in the poor and they have little faith in its capacity to do justice.\textsuperscript{93}

The founding fathers of the free nation and the intellectuals who were instrumental in the making of Indian Constitution did realise the drawbacks of the existing system of justice administration.

There may be said to be three major phases in judicial development efforts for effective dispute resolution in post-independent India - a) official efforts to establish village based courts (\textit{Nyaya} Panchayats), b) the top down public interest litigation endeavour, c) official efforts to settle disputes in an indigenous and traditional manner (mainly through Lok Adalats).\textsuperscript{94}

\textbf{(a) Panchayati Raj}

After Independence, the Indian Constitution, through Article 40, directed the State to organize village panchayats as units of self-government. The adoption of the Balwantrai Mehta Committee Report on democratic decentralization, led to the creation of a three-tier system of Panchayati Raj: \textit{Gram panchayat} (village), \textit{Samiti} (block) and \textit{Zilla Parishad} (district). The Constitution 73\textsuperscript{rd} Amendment Act, 1993, has now given a Constitutional basis to the Panchayat system and the 11\textsuperscript{th} Schedule of the Constitution details their functions.

In consonance with Article 50 that directs the State to take steps to separate judiciary from the executive, Nyaya panchayats were established. Apart from the necessity of separation of powers, Nyaya panchayat was considered to provide an easy access to


\textsuperscript{94} Marc Galanter and Jayant Krishnan, "Bread for the Poor: Access to Justice and the Rights of the Needy in India", p.58, (2004) \textit{55HILJ} 789
justice to the village population and also represented an attempt by the State to
displace the existing dispute institutions in the village, examples – jati institution,
special dispute institutions established by social reformers etc.

(b) Nyaya Panchayats

Nyaya panchayat is the system of dispute resolution at village level in India. The
earliest statutory prototype was the village court established under the Village Courts
Act of 1888. Since independence, almost all States have enacted Village Panchayat
Acts that has resulted in creation of statutory Nyaya panchayat. Village panchayat and
Nyaya panchayat existed as dual entities in order to have separation of judiciary from
executive.

In this context, the organisation of village panchayat and the requirement of
separation of judiciary from the executive have to be appreciated in view of the
further directive of the Constitution to promote justice on basis of equal opportunity.

Nyaya panchayat ensure participatory and people oriented system of justice-
indigenisation of justice—that mitigates hardship of rural poor by providing justice at
village level thereby facilitating decentralisation of justice, helps in disposal of cases
without assistance of lawyers, provides scope for mediation, conciliation and
compromise and relieves judiciary of its arrears. It encourages rendering justice with
knowledge of local culture, traditions of society and behavioural patterns.

Nyaya panchayats have civil and criminal jurisdiction. Civil jurisdiction is confined to
pecuniary claims of Rs. 100 and it could be raised to Rs. 200 by agreement amongst parties.
Criminal jurisdiction covers a substantial range of offences under IPC and other special
statutes (e.g. Cattle Trespass Act, Gambling Act etc.) Usually, a Nyaya panchayat has
jurisdiction to try a range of offences such a criminal negligence or trespass, nuisance
including pollution of water, possession or use of false weights and measures, theft and

95 Article 40, Constitution of India.
96 Article 50, Constitution of India.
97 Article 39-A, Constitution of India
They are authorized to levy fines, ranging from Rs. 25 to Rs. 100. Although they have no power to sentence imprisonment, but they are empowered to pay compensation to the injured out of the fines thus imposed. They have also the power to admonish in certain cases. The State government has power to enhance, diminish (in case of miscarriage of justice) the jurisdiction of Nyaya panchayats.

Thus, the Nyaya panchayats sought to imbibe flexibility of procedure and lay adjudicators, while also extending state power and Constitutionalist ideology to the countryside. Nyaya panchayats are generally established for a group of villages (usually seven to ten). The members are lay persons with no legal or basic educational qualification. The members are generally elected e.g. Delhi (some states may have a combination of elected-nominated members, e.g. UP, Bihar; some states may have only nominated members, e.g. Kerala) and must be able to read and write the State language, must not suffer from any disqualification described under the statute and must not hold an office of sarpanch or that of a member in the samiti, parishad, state or Union legislature. A member can be removed on ground of corruption, neglect in performance of duties etc.

Disputes are sought to be resolved through conciliation rather than adjudication in certain state legislations. The State legislations of Bihar and Kerala oblige the Nyaya panchayats to first resort to conciliation in all matters including criminal cases.

The two important aspects of Nyaya Panchayats are the informality of procedure and the flexibility of functioning. They are not bound by the elaborate provision in the civil procedure codes or the law of evidence. Complaints may be made orally or in writing. Parties are heard in informal manner and no legal representations are allowed, although in some civil matters, parties may be represented by an agent. The decision is arrived at by consensus amongst the Panchayats and pronounced in an open court. It is there after written and signed or thumb-impressed by parties, signifying the communication of judgment to the

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98 S.N. Mathur, "Nyaya Panchayats as Instruments of Justice," (Institute of Social Sciences, New Delhi, 1997)
Nyaya panchayats have not been very successful as dispute resolution forum in the rural hinterland in many States as Rajasthan and Maharashtra although it has been effective in some States as Himachal Pradesh. There may be domination of a Nyaya panchayat by the Sarpanch of a village panchayat indirectly. Moreover, factors within a village can also influence Nyaya panchayat in favour of powerful factions, at the expense of justice values. The 73rd Constitution amendment, being silent about justice dispensation function of Panchayats – resulted in many States discontinuing Nyaya panchayat institution and consequently lead to the emergence of the menacing khap, caste and kangaroo Panchayats. The court oriented justice measures also failed to achieve the desired results in rural areas due to its physical inaccessibility, highly expensive outcomes, extremely technical and rigid procedures so that it remained alien to the common man even several decades after independence.

Apart from sharing the symbolic and sentimental value of the indigenous system, Nyaya Panchayats were quite different from traditional Panchayats. They applied statutory law rather than indigenous norms; they made decisions by majority rule rather than unanimity; their membership was chosen by popular election from territorial constituencies rather than consisting of the leading men of a caste (village). An attempt was thus made to recreate an idealized version of traditional society based on democratic fellowship that ignored the caste basis of that society.99

Although Nyaya Panchayats had moments of promise and at times even brought important legal services to those at the local levels; ultimately they were plagued by inconsistent rulings, inept administrators, a weak infrastructure, delays, and a lack of full accountability to the public.100 As Catherine Meschievitz summed it up, “the Nyaya Panchayat is thus a body of men—that handles dispute without regard to applicable rules and yet appears to the villagers as formal and incomprehensible”.101

99 Supra note 94
There is thus a vital need for revitalising *Nyaya* panchayats in order to ensure a participatory and people oriented system of justice and for providing greater scope to mediation for mitigating the hardship of the poor.\(^{102}\)

The Ministry of Panchayati Raj in consultation with Prof. Upendra Baxi prepared a *Nyaya* Panchayat Bill, 2009 to provide for the establishment of Nyaya Panchayats, at the level of every Village Panchayat or a group of Village Panchayats as the case may be, as a forum for resolution of disputes with peoples’ participation directed to providing a system of fair and speedy resolution of disputes arising in rural areas; access to justice, both civil and criminal, to the citizens at the grassroots level, and for matters connected therewith or incidental thereto.

**Nyaya Panchayat Bill, 2009**

Whereas Article 39A of the Constitution mandates that the opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities in the administration of justice; And, whereas establishment of a decentralized dispute redressal system through mediation, conciliation and compromise at the grass-root level requires to be institutionalized with the involvement of the people living in that particular area; And, whereas there exists constitutionally -mandated need for some uniform standards in the provisions relating to Nyaya Panchayats under the respective laws of the States; And, whereas it is thus considered expedient to assimilate and codify the laws and rules governing the establishment of Nyaya Panchayats at the village Panchayat level throughout India.\(^{103}\)

The outcome of the Bill is awaited.

(c) *Tribal Law and Justice*

India has a substantial percentage of tribal population in the three Indian states of Madhya Pradesh, Orissa and Bihar in which around half of India’s Scheduled tribe

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\(^{103}\) The Nyaya Panchayats Bill, 2009 – Statement of objects and reasons.
Chapter 11

population is based. Few other states as Nagaland and Union Territories as Lakshadweep and Dadra & Nagar Haveli have predominant tribal population. The Indian Constitution guarantees the right to cultural identity to tribal groups and also seeks to make special provisions for scheduled tribes in education and employment. There are also institutional arrangements for the welfare and development of tribal areas including land and agrarian reforms.

It is interesting to note that though tribal communities are not above the State law, yet for all practical purposes, 'they are governed by complex regimes of customary law, administered by community dispute institutions'. The normative and institutional regimes of people's law vary according to the stage of socio-economic development. On one hand, there may be the nomadic food gathering tribes that are simply structured with a basic division of labour and with no established authority for enforcement of norms. The norms themselves may be complex and even distinctively legal. Example: individual property. Disputes may occur in relation to these norms. But there is no recognizable dispute institution. The most effective sanction in such a situation is the community disapproval of the violation of the norm. On the other hand, there may be tribes that practise shifting cultivation, where there is 'greater permanency of local groups' and correspondingly 'greater need for social control'. In such a situation, the violation of a norm may invite severe punishment.

(d) Tribunalization

With the acceptance of welfare ideology, there was a mushroom growth of public services and public servants. The courts, particularly the High courts, were inundated with cases concerning service matters. The Swaran Singh Committee therefore, recommended the establishment of Administrative Tribunals as part of the Constitutional adjudicative system. Consequently, the Constitution 42\textsuperscript{nd} Amendment Act 1976 introduced Part XIVA to the Constitution of India consisting of Articles 323 (A) and 323 (B). Article 323 (A) provides for establishment of tribunals, for adjudication of disputes relating to recruitment, conditions of service of persons

\begin{enumerate}
\item Upendra Baxi, *Towards a Sociology of Indian Law*, p. 84, (Satavahan, New Delhi, 1986)
\item Ibid.
\item Report of Swaran Singh Committee cited in (1976) 2 SCC (Jour) 45
\end{enumerate}
appointed to public service and other allied matters. It is the Parliament that has the power to enact a Law under Article 323 (A). The Administrative Tribunal Act, 1985 has come up as a result of exercise of this power by the Parliament. Article 323 (B) makes provision for creation of tribunals for adjudication of disputes connected with tax, foreign exchange, industrial and labour disputes, land reforms, ceiling on urban property, election to parliament and state legislatures. Here, it is both the Parliament and State legislatures that can make laws on matters of Article 323 (B) subject to the legislative competence. For instance, Income tax appellate Tribunal is empowered to hear appeals under section 253 of the Income Tax Act 1961, Industrial Tribunals, Debt Recovery Tribunals, Motor Accident Claims Tribunals.

The Tribunal system was evolved to provide an effective alternative to the regular courts. The various procedural laws as Code of Civil Procedure and Law of Evidence etc. may not bind a tribunal, therefore expediting the conclusion of a dispute. However, there is a criticism against the Tribunals that they are presided over by experts in the respective fields, not necessarily legally qualified and trained.\(^{107}\)

\((e)\) **Public Interest Litigation**

In order to provide access to justice from the top, since the early 1980s, Indian judiciary has devised Public Interest Litigation as part of its “epistolary jurisdiction” responding proactively to grievances brought to attention by third parties through letters or newspaper accounts etc. PIL has undoubtedly promoted important social changes, raised public awareness on many issues, increased government accountability and enhanced legitimacy of judiciary by providing an ‘alternative’ to the usual hierarchy of court procedure shortcutting time delays. Public Interest Litigation or Social Action Litigation is a means of expediting dispensation of justice. It is an initiative taken by Judiciary to provide a platform for access to justice to the disadvantaged, dispossessed and deprived section of society by relaxation of the rules of locus standi. The seeds of the concept of PIL were initially sown by Krishna Iyer J. in 1976 in *Mumbai Kamagar Sabha v. Abdul Bha*.\(^{108}\) Now, any public spirited citizen can file a petition in the interest of public or public welfare.


\(^{108}\) AIR 1976 SC 1455
in the Supreme Court under Article 32 of the Constitution or in High Court under Article 226 of the Constitution.

The apex courts while attempting to empower disadvantaged groups through PIL suffered from certain drawbacks as inability to resolve disputed questions of fact, weakness in delivering concrete remedies and monitoring performance, reliance on generalist volunteers with no organizational staying power etc. These courts while affirming a huge conspectus of human right norms were frequently unable to secure systematic implementation of these norms. Again, PIL has been criticised for taking up too much of Supreme Court’s precious time thereby compounding to its own problem of delay.

(f) Plea Bargaining

Plea Bargaining was conceived as an ‘alternative’ method to deal with huge arrears of criminal cases. The recommendations of various reports of Law Commission finally found support in the Malimath committee report to formally introduce plea bargaining by way of a statutory provision. Plea Bargaining was thus incorporated by Act 2 of 2006 by insertion of a new chapter XXI-A in the Code of Criminal Procedure. It is beneficial to both the State and the accused; while the State saves time, money and effort in prosecuting the suspects, the accused gets a lenient punishment by pleading guilty. It is deemed laudable as it helps the courts to manage their workload in an effective manner.

The Division Bench of Gujarat High Court in State of Gujarat v. Natwar Harchanji Thakor recognised the concept of Plea Bargaining as an alternative measure of redressal to deal with the huge arrears of criminal cases.


111 It may be clarified that it represents about 1% of the Court’s regular hearing. Robinson Nick, “Too Many Cases”, (2009) 26 Frontline, Jan 3-16.

112 The earliest report that recommended plea bargaining was the 142nd Report of Law Commission and it was re-iterated by the 154th and 177th Report of the Law Commission.

113 2005 Cr L J 2957
Plea Bargaining is amongst the informal alternatives to trial. There must be abundant caution however, in its application to different case scenario, especially as to the rights of the accused that may be affected.

**(g) Fast Track Courts**

A novel experiment initiated in 2000-01 aimed at cleansing the massive backlog of court cases began with setting up of Fast Track Courts, in various states, funded by the centre. They are meant to expeditiously clear the colossal scale of pendency in District and Subordinate Courts under a time bound programme. They are expected to take up on priority basis sessions and other cases involving undertrials. This would mean a huge saving in expenses for the upkeep of prisoners.

The Eleventh Finance Commission made an outright grant of Rs 502.90 cr. for creation of 1,734 additional courts specifically for this purpose. In the last ten years the Fast Track Courts have been able to dispose of 28.38 lakh cases out of 35.02 cases transferred to them.

**(h) Gram Nyayalayas**

A new forum for resolution of disputes for rural litigation has been initiated by the Gram Nyayalaya Act 2008,\(^{114}\) enforced from 2\(^{nd}\) October 2009, that proposes to bring access to justice at the very doorstep of the people, through a formal judicial set up in the villages by introducing 5000 new Magistrates’ courts across the countryside, as the lowest tier in the hierarchy of courts. It is an expensive proposition for which central government will provide Rs.1400 cr by way of assistance to the concerned State/Union territory. It entails setting the entire infrastructure of the new courts and recruiting considerable number of fresh Judicial Magistrates of First Class.

Gram Nyayalaya as a different court forum was visualised with mainly two objectives in mind viz. to address the pendency in subordinate courts and to have a participatory forum of justice. It was conceived with the model of having a magistrate and two ordinary members that would introduce a socio- economic dimension to adjudication.

\(^{114}\) Proposed by 114\(^{th}\) Report of Law Commission of India
The participatory aspect has, however, been cast aside by the present Act and the court is to be manned only by regular Judicial First Class Magistrate.

Under the Act, a Gram Nyayalaya shall have a Presiding Officer, Nyayadhikari, who shall be appointed by the State government in consultation with the High Court of the State. A Gram Nyayalaya shall have jurisdiction to try civil suits, criminal cases, claims or disputes specified in first and second schedules to the Act. Some other characteristic features of Gram Nyayalayas are: they are in the nature of mobile courts that shall conduct proceedings in close proximity to the cause of action; proceedings to be conducted in the local language; court fee to be nominal and not to exceed Rs.100 irrespective of worth of property involved; summary proceedings in criminal cases; accused can petition for plea bargaining; non-binding of codes in civil cases; magistrate presiding to be called Nyayadhikari who in addition to adjudicative function shall assist, persuade and conciliate parties in arriving at a solution.115

There is, however apprehension on several counts. The easy proximity of these courts and standardising of court fees may lead to more litigation among family members and neighbours so that what could be resolved through local and customary mechanisms may end before the courts. In fact, these courts may undermine existing tried and tested mechanisms of managing disputes in the villages. Plea bargaining also may result in undue pressure on the victim to close the case that may seriously jeopardise the cause of justice.

It is to be hoped that the new forum for rural litigation does not meet the same fate as the established milieu and is not plagued by delay, cost, technicality and consequent alienation of the party from the process of justice.

(5) Recognition and Evolution of ADRs with special reference to Lok Adalats

The first step towards initiating alternate methods of dispute resolution can be traced back to as early as the Bengal Regulation Act 1772, which provided that in all cases of disputed accounts, parties have to submit the same to arbitrators, whose decisions were deemed to be a decree and be final.

The Regulation Act of 1779, followed by two other Regulations in the provincial states of Bombay and Madras, empowered the Judges to see that the matters were settled by amicable negotiations.

The Regulation Act 1781 further envisaged that judges should recommend the parties to submit disputes to mutually agreed person and no word of the arbitrator could be set aside unless there were two witnesses that to the effect that the arbitrator had committed gross error or was partial to a party.116

A recommendation was made to the Second Law Commission for the first time by Sir Charles Wood117 to provide for a uniform law regarding arbitration. The Code of Civil Procedure was then enacted accordingly in 1859. (Section 312, 313-325 and 326-327 laid down permission and procedure for arbitration without the court’s intervention). In subsequent legislation efforts, arbitration was included as part of Code of Civil Procedure, 1908.

The Indian Contract Act, 1872 also recognises arbitration agreement as an exception to Section 28, which envisages that any agreement in restraint of legal proceedings is void. Later, the Arbitration Act 1899 was enacted that would apply only to Presidency towns to facilitate settlement of disputes out of court.

The Arbitration Act, 1940 repealed and replaced the previous Act of 1899. The Arbitration (Protocol and Convention) Act was passed when India became a signatory to the Protocol on Arbitration under the Geneva Convention. Later the Foreign Awards (Recognition and Enforcement) Act 1961 was passed, when India became a signatory to the New York Convention.118 With liberalization of Indian economy in 1990s, Arbitration and Conciliation Act 1996 was promulgated that superseded the earlier Act of 1940 and brought about radical changes in the law of arbitration and introduced concepts like Conciliation to ensure speedy settlement of commercial

116 Supra note 72, p.18
117 Charles Wood, (20 December 1800 – 8 August 1885), known as Sir Charles Wood, was a British Liberal politician and Member of Parliament. Wood did a yeoman’s job in spreading education in India when in 1854 he sent a dispatch to Lord Dalhousie, the then Governor-General of India. In accordance with Wood’s dispatch, Education Departments were established in every province and universities were opened at Calcutta, Bombay and Madras in 1857 and in Punjab in 1882 and at Allahabad 1887.
118 Krishna Sarma, Momota Oinam, Angshuman Kaushik, “Development and Practice of Arbitration in India - Has it Evolved as an Effective Legal Institution”, No.103, (Center on Democracy, Development and The Rule of Law, Stanford, October 2009)
disputes. It was in consonance with UNCITRAL model law of arbitration, which brought the nation on an international level playing platform.

The concept of conciliation was introduced in the statute of Trade Union Act 1929 and then in Industrial Disputes Act 1947, wherein, parties could settle their disputes through negotiation, mediation and conciliation. The Hindu Marriage Act 1955, Special Marriage Act 1954, Family Courts Act of 1984 also have provisions for settlement of family disputes.

(6) Evolution of Lok Adalats as ADR Forum

A definite occurrence, on the waning of public interest litigation, was the rise of informalism and alternative dispute resolution institutions rather than vindication of rights through adversary processes in mainstream judiciary administration. The promoters and advocates of the ADR movement sought to present the Lok Adalats as 'indigenous' and 'traditional' even though they had little resemblance to the earlier indigenous institutions.\(^{119}\)

The starting point was perhaps the Legal Aid and Advice Act, 1949, a British Act of Parliament which provided for assistance in the form of free legal aid to people unable to pay for a solicitor. In India, people wanted the Constitution makers, as also Parliament, later on, to incorporate the provisions of this Act in Indian Laws. At one point of time, even a debate was carried out to the effect that if a State has an obligation, or for that matter, a Constitutional obligation to provide 'health services', then why legal services be not provided for. It was not agreed to at that point of time keeping in view the financial stringency of the State.

The Report of the Committee on Legal Aid constituted by the State of Gujarat in 1971 and Chaired by Justice P.N. Bhagwati recommended the adaptation of "Neighbourhood Law Network" then in vogue in the U.S. Few years later, the Report of the Expert Committee on Legal Aid: Processual Justice to People, in 1973 authored by Justice V.R Krishna Iyer exhorted the preservation and strengthening of Nyaya

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\(^{119}\) A similar case of Nyaya Panchayat whose advocates were keen to present them as a continuation of the historical panchayat institution.
Panchayats and urged ADR mechanisms in identified groups of cases.\textsuperscript{120} It emphasised the need for an active and widespread legal aid system that enabled law to reach the people rather than requiring people to reach the law. The Report on National Juridicare, Equal Justice-Social Justice, in 1976, comprising of Justice P. N. Bhagwati and Justice V. R. Krishna Iyer, formulated a draft legislation institutionalising the delivery of legal services and identified ADR, especially conciliation and mediation, as a key activity of legal services.\textsuperscript{121}

Each of these Reports looked at the process of improving access to justice through legal mechanisms and ADR as part of systemic reform of the institution of judiciary coupled with substantive reforms of laws and processes.

In 1976, Prof Upendra Baxi described a 'Lok Adalat' run by Harivallabh Parikh, a Gandhian, in a tribal area of Gujarat. As indicated in the Krishna Iyer and Bhagwati Reports, indigenous justice was sought to be combined with conciliation and local responsiveness under the leadership of an educated outsider.\textsuperscript{122}

It was however, only in 1980 that the movement for ADR got momentum in view of the Report by Justice P. N. Bhagwati as Chairman, Committee for Implementing Legal Aid Scheme (CILAS). One of the strategic legal aid programmes adopted by CILAS was holding of the Lok Adalats. The Lok Adalat movement was started in Gujarat in March 1982 and the first Lok Adalat was held at village Una in Junagarh district. The movement gradually caught momentum and various schemes for holding Lok Adalats came into being in every state. They were implemented to a certain extent, and ultimately resulted in Parliament not only inserting Article 39 A in the Constitution but also enacting the Legal Service Authority Act 1987.

Under the International Covenant on Civil and Political Rights, 1966 which is an Optional Protocol to Universal Declaration of Human Rights, 1948, every country shall have to ensure that a citizen has an effective remedy for enforcing his rights or

\textsuperscript{120} Government of India, Ministry of Law, Justice and Company Affairs, Department of Legal Affairs, Report of the Expert Committee on Legal Aid- Processual Justice to the People (1973)


\textsuperscript{122} Upendra Baxi "From Takrar to Karar: The Lok Adalat at Rangpur- A Preliminary Study", 10 JCP S 52 (1976). Baxi reports that the term 'Lok Adalat' was used by participants in Rangpur. His article may well be the source of its wider and official use.
freedoms. This is not a new concept. Since the ages, human civilization has recognised the right of every person to seek redressal in a legal forum. More so in a democratic society, people should be free to have access to adjudicative processes in courts or other tribunals or settlement processes and forums. In a vast country like India, with varying cultures and different economic stratification, all sorts of disputes are brought before the civil courts as well as a variety of criminal cases.

The number of pendency of cases has multiplied astronomically after Independence. There are various reasons for the dramatic increase in the arrears of cases and there are various solutions suggested for addressing the mammoth problem. Alternative Dispute Resolution is a significant method that may not only dissipate the dissatisfaction with the formal litigation system and its ills, but may also rejuvenate the age-old system of dispute resolution, attuned to contemporary movement for efficacious and amicable resolution of disputes.

(a) Recommendations of Law Commissions

The Law Commission in its 77th Report recommended Conciliation as a remedy for cutting back on the backlog of civil cases. Conciliation Boards may be set up on an experimental basis in selected areas in disputes giving rise to claims for recovery of money not exceeding Rs. 50000. Further, if these disputes are settled within a time span of 3 months then it should be reduced to writing, signed by all the parties concerned and filed in the court like an compromise. If no compromise can be made within a time period of 3 months then the court shall presume that no settlement is possible. Such category of disputes shall be kept out of the jurisdiction of the Conciliation Boards. The 124th Report of Law Commission of India considered it necessary to arm the High Courts and Supreme Court with the power to compel the parties to go for mediation or arbitration. This will avoid the delaying tactics used by a party.

The Law Commission in its 129th Report concentrated on the nature and extent of urban litigation and recommended essentially alternative and participatory mechanisms of dispute resolution that would not only reduce the huge congestion of litigation but also encourage the participatory firm of justice dispensation that would
reiterate the public's faith in the justice delivery system. As an alternative to the present method of disposal of disputes under the Rent Control Act, suits of mortgage, property suits, contract suits, partition suits, succession and inheritance etc., four distinct methods were considered. They are:

a) Establishment of Nagara Nyayalaya with one professional judge and two lay judges on lines similar to Gram Panchayat and having comparable powers, authority, jurisdiction and procedure; b) hearing of cases by a Bench of Judges, minimum two in number, with no appeal but only a revision on questions of law to the district court; c) Setting up a Neighbourhood Justice Centres involving people in the vicinity the premises in the resolution of dispute and try to reconcile the two parties; d) conciliation Court system, which is now working with full vigour in Himachal Pradesh wherein all suits at a preliminary stage after pleadings have been filed are transferred and the court endeavours to evolve a fair and just formula, acceptable to both parties.

The 222\textsuperscript{nd} Report of the Law Commission of India is very significant as it emphasises upon the importance of ADR measures for improving efficiency in the justice resolution processes. It stresses upon the duty of a welfare state to provide judicial and non-judicial Dispute Resolution Mechanisms to which all citizens have equal access for resolution of their legal disputes and enforcement of their fundamental and legal rights. The ADR method is considered to be participatory, cheaper and affordable and therefore it should be encouraged for reaching speedier resolution of disputes.

(b) Malimath Committee’s Recommendations:

In 1989, the Government of India on the advice of Chief Justice of India constituted a Committee under the Chairmanship of Justice Malimath, Chief Justice of Kerala High Court.\textsuperscript{123} The Committee undertook an overall view of the working of the court system, particularly all aspects of arrears of courts. It made very useful recommendations for making justice readily accessible to people at minimum cost of time and money.

\textsuperscript{123} Other members of the Committee were Dr. Justice A. S. Anand, Chief Justice of Madras High Court and Mr. Justice P. D. Desai, Chief Justice of Calcutta High Court. The Malimath committee submitted its comprehensive report in August 1990.
The Malimath Committee, while making a study on 'Alternative Modes and Forums for Dispute Resolution' endorsed the recommendations made in the 124th and 129th Reports of the Law Commission to the effect that the lacuna in the law as it stands today, arising out of the want of power in the courts to compel the parties to a private litigation, to resort to arbitration or mediation, requires to be filled up by necessary amendment being carried out. The Committee stated that the conferment of such power on courts would go a long way resulting in reducing, not only the burden of trial courts but also of the Revisional and appellate courts, since there would be considerable divergence of work at the base level and the inflow of work from trial courts to the revisional and appellate courts shall thereby diminish.\(^{124}\)

In its view such ADR measures were capable of going a long way in restoring the confidence of people and establishing the rule of law, which is in fact a key objective of our Constitution.

Having regard to the absolute necessity to evolve an alternative mechanism, the Parliament enacted three Acts:

(i) Legal Services Authorities Act, 1987 which has been amended by Legal Services Authorities Act, 2002;

(ii) Arbitration and Conciliation Act, 1996; and


The concept of resolution of disputes through arbitration, mediation, conciliation was institutionalised by Legal Services Authority Act. The said Act provided for Lok Adalats where disputes are pending in courts of law. It also provided for settlement of disputes at pre-litigation stage. The Legal Services (Amendment) Act, 2002 introduced a radical change in the method of dispute settlement wherein it introduced the institution of Permanent Lok Adalat.

The alternative methods of dispute resolution that had hitherto remained in the periphery of the Indian legal system were pitch-forked into the mainstream of the justice dispensation system, due to the inherent inadequacy of existing formal

\(^{124}\) It became the basis of incorporation of S.89 by Amendment to Civil Procedure Code in 1999.
litigation mechanisms that had resulted in mounting arrears of cases and resultant denial of justice.

Alternative Dispute Resolution mechanism is thus sought to be encouraged through the courts in case of pending suits and at the initiative of parties, with or without court intervention, pending and pre-litigation cases. It is essential to bring the ADR movement to the rural areas. Gram Nyayalayas, as contemplated by the Act, should process 60 to 70 per cent of rural litigation, leaving the regular courts in districts and sub-divisions to devote their time to complex civil and criminal matters. With participatory, flexible machinery available at the village level, where primarily non-adversarial and settlement-oriented procedures are employed, the rural people will have a fair, quick and inexpensive system of dispute settlement.

ADR mechanisms should ensure that not more than 15 per cent of cases go for adjudication before courts. This is a trend in the legal systems of developed countries, where most of the cases are resolved by alternate dispute resolution mechanisms like conciliation, mediation and arbitration.

It is inevitable that alternate dispute resolution becomes a movement for addressing the overwhelming bulk of disputes (about 85 per cent), potent and latent, in a satisfactory, time-bound, cost-effective and amicable manner, leaving the courts to decide the complex and complicated cases, like non-compoundable criminal offences and Constitutional Law issues.

In a country of gigantic population size as India and in view of the number and complexity of disputes confronting redressal forums, it is important to bring a confluence of the past traditions of informal resolution of disputes with the present system of formal court litigation. It is perhaps inevitable for the adversarial system and ADR system to come together effectively and complement each other, in order to revive the credibility and faith in the judicial system, so that the cherished goal of 'justice' becomes a reality.

(7) Conclusion

A perusal of the historical lineage of ADR institutions and mechanisms in India is indicative of a strong undercurrent of informal dispute resolution culture existing
since ancient times and traversing a spectrum of time zones across ancient, medieval and modern, unscathed in spirit yet affected in its form, content and prominence so that it has yet again emerged phoenix-like, in contemporary times, centre stage in law policy and programmes of dispute resolution in India.

It is interesting to note that virtually all the modern day connotations of ADR viz. negotiation, conciliation, mediation, arbitration etc. were practised in the early epochs of ancient Indian history and were the 'mainstream' system of dispute resolution of those times. It was with the coming of foreign rule in India and their deliberate tempering with the socio-legal framework that the informal fora and techniques receded but still did not completely eclipse.

In modern times, there has been a dramatic resurgence in the subject of ADR that has preoccupied Indian legal thought as never before. This is mainly due to the severe crisis afflicting the formal litigation system—a contribution of British colonial legacy—resulting in serious arrears of cases and alienation of the vast masses of Indian people from the dispute resolution process and consequent deprivation from access to justice. The quest of the west to look for 'alternatives' to quell the thirst for effective resolution of disputes too compelled Indian judicial thinkers to consider 'alternatives' within the Indian system of dispute resolution and to revive the traditional spirit of justice dispensed through informal mechanisms. In consonance with the abovementioned imperatives the ADR movement may emerge yet again as the mainstay of justice dispensation in India in the 21st century.