CHAPTER-2

HISTORICAL PERSPECTIVE
CHAPTER-2

HISTORICAL PERSPECTIVE

A. INTRODUCTION

"Justice is not derived from the king as his free gift but he is the steward of the public to dispense it to which it is due. He is not the spring but the reservoir from whence right and equity are conducted by a thousand channels to every individual."

- Blackstone

1. Administration of Justice- A" Private Affair"

Scholars of social sciences and legal history have expressed the view that in all early societies, there seems to have been no organized system for the judicial settlement of disputes. The administration of justice was a "Private Affair", settled by fight and might, although in some cases and at a later period it came to be administered with the help of community. Indeed, it was when communities came into existence that some rules of conduct were brought in as well. Disrespect of community rules was tantamount to disrespect of the community. Lawbreakers were treated severely, and punishment was executed collectively.

2. King- Fountain of Justice

In ancient times, according to Vinogradoff, more emphasis was laid on solving problems than on the search for truth. Justice was administered by the king and, Manu and Narada have compared the position of the king to that of a surgeon. The Mahabharata says that the king who is also the one who dispenses justice should not deviate from the path of truth and he should be a cultured person with an intellectual bent of mind. The major stages of development were Vedic, that is, the pre-Mauryan, Mauryan and Gupta periods. In the pre-Mauryan stage, it is possible to determine the true state of law as the Vedic and Dharmasutra periods. In Vedic times, the Sabha and Samiti played a vital role in the judicial sphere. In ancient India justice was administered according to the Smritis and was one of the most important and obligatory functions of a king. ¹The present researcher has attempted here to trace the historical evolution of ADR from ancient time to till today.

B. ADR IN ANCIENT INDIA

ADR is by no means a recent phenomenon, though it has been organized on more scientific lines, expressed in more clear terms and employed more wide resolution in recent years than before. The origin of arbitration may be traced back to the age-old system of village Panchayats prevalent in ancient India. The decisions of Panchas while sitting collectively as Panchas while sitting collectively as Panchayat commanded great respect because of the popular belief that they were the embodiment of voice of God and therefore had to be accepted and obeyed unquestionably. In course of time this mode of divine dispensation of justice through Panch Parmeswar underwent radical changes with the changing pattern of society and growth of human knowledge and civilization.2

1. General

The Law Commission in its Fourteenth Report has stated that though ancient writers have outlined a hierarchy of courts which existed in the remote past, their exact structure cannot be established with any certainty; but later works of writers like Narada, Brahaspati and others seem to suggest that regular courts must have existed on a fairly large scale, if the evolution of a complex system of procedural rules and of evidence can be any guide. Popular tribunals, particularly the village courts, survived for a long time and existed even at the time British rule began in India. Their continuance was favoured by their antiquity as there were practically no other effective tribunals within easy reach. The principal functions discharged by such tribunals were conciliatory and local rulers did not usually interfere in their working.3

2. ADR IN ANCIENT INDIA

The concept of parties settling their disputes by reference to a person or persons of their choice or private tribunal was known to ancient India. Long before the king came to adjudicate on disputes between persons such disputes were quite peacefully decided by the intervention of the Kulas (family or clan assemblies), Srenis (guilds of men following the same occupation), Parishads (assemblies of learned men who knew law) and such other autonomous bodies. There were Nyaya Parrchayats at grass-roots level before the advent of the British system of justice. Even in day-to-day affairs, in rest

   Central Law Agency Allahabad.
3. Supra n. 1 pp. 3-4.
categories of disputes, ADR procedures of sorts are invoked without sometimes without conscious thought, e.g., disputes within the family, between friends, between neighbours; disputes involving employers and employees etc. From all the attention that it has received recently, particularly from the time of inauguration of the International Centre for Alternative Dispute Resolution one may get an impression that it is a recent concept. Arbitration, conciliation and mediation have long traditions in several parts of the world.

(a) Different Kinds of Courts in Ancient India

The court presided over by a king was the highest court. There were also others, some of them appointed by the king, and others which were people's courts recognized by the Smritis as having the power to administer justice. These were, in ascending order:

(i) Kula (Gatherings or Family Council)
Kula (Gatherings or Family Council) used to be an assembly of impartial persons belonging to the family or caste of the litigants, which functioned as Panchyatdars or Panchayat Mandalis and decided disputes among those belonging to the same family or caste.

(ii) Shreni (Corporation)
Shreni (Corporation) as in commercial guild arbitration, these courts were made of corporations of persons following the same craft, profession or trade.

(iii) Gana (Area Assembly)
Gana (Area Assembly) these were assemblies of persons who belonged to one place but were of different castes and followed different vocations.

(iv) Adhikrita
These were courts appointed by the king.

(v) Nripa
They were also known as courts of the king.

(vi) Pratistitha
It was a Court established at a particular village or town. The Pratistitha was a mobile court, which moved from village to village.

5. K. Jayachandra Reddy- "Alternative Dispute Resolution" Supra n.4 p. 79. He has been Former Judge of the Supreme Court of India; Chairman, Law Commission of India.
6. Supra n. 1 p. 4.
(vii) **Mudrita**
Mudrita was a court appointed by the king and authorized to use the royal seal.

(viii) **Sasita**
The Sasita was the court over which the king presided.

(b) **Jurisdiction**
The Kula, Shreni and Gana courts could decide all disputes other than those that came under the title Sahasa. Dines and corporal punishment could only be decided by king. The people's courts consisted of Panchayatdars. These kid the authority to decide all civil and criminal cases except those that involved trial for an offence committed with violence. They had no authority to execute sentences of fines and corporal punishments. These matters had to go before the king who alone could approve and order the execution of such sentences.

A Shreni could review the decision of a Kula and a Gana had the power to review the decision of a Shreni. Judges had power to review the decision of a Gana, and king was the highest court of appeal, and his decision was final. The prerogative of the sovereign to function as the Highest court of his kingdom was recognised. A party could approach the king for a review of the decisions given by any tribunal such as a Kula, a Gana, a Shreni or any other court. Yajnavalkya provides that the king may review and set aside a decision which has been wrongly given even by him. He could also award costs. This part of sovereign power is comparable to the power which the Mughal Kings and the British Sovereign enjoyed and exercised through the Privy Council, and which is now conferred on the Supreme Court under Article 136 of the Constitution of India. This is the source of its power of review.

One of the most important functions of the old village assemblies was the Administration of justice. N.C. Sen Gupta traces the history of popular community courts to Smritis and refers to Kula, Sreni & Puga as the institutions connected with administration of justice. Broadly speaking Kula was the lowest court composed of Kinsmen for arbitration in small matters. Sreni was court constituted of traders or artisans, including men of different castes pursuing similar means of livelihood, and Puga was a court constituted by men of different castes and occupations inhabiting the same village or town. The principle underlying these courts was, they are the best judges.

7. *Id.* at 5.
of the merits of the case who live in the place where the subject matter of the dispute arise.  

3. **ADR in Mughal Period**

There were various types of courts dealing with various kinds of cases; revenue courts settling cases arising out of complaints about rights in land; the Qazi’s courts dealing with cases pertaining to marriage, inheritance, divorce, etc; the secular courts headed by administrative officers dealing with non-religious and undefined offences that came before them and the caste courts and village Panchayats outside the judicial organisation.

(a) **General**

The courts in Mughal Empire can be classified as follows:

(i) Courts administering religious law, with the Qazi as the presiding officer;

(ii) Courts dealing with secular cases, with governors and other officers as presiding officers;

(iii) Courts dealing with political cases, presided over by the emperor or his agents.

(b) **Caste Courts and Panchayats**

Apart from the above, there was the very important institution of the Panchayat (Village and Qasbas - Caste Courts and Panchayats) in villages which decided all kinds of cases - religious, civil and criminal - filed by villagers. Panchayat courts were not under the control of any Qazi, Governor or District Officer. Panchayat members were elected by the people. The Panchas or judges were those who had rendered some notable service to the village community. The word Pancha means five and the Panchayat would normally be a body of uneven numbers, mostly five, in order to permit a majority decision to prevail. They were empowered to impose fines, public degradation, reprimands or excommunication, but they could not pass a sentence of imprisonment or death. The Panchas were supposed to possess the divine quality of rendering true justice and their authority was more moral than strictly legal or administrative. Public opinion was the major sanction behind their authority. The administration of justice by Panchayats was appreciated by early British administrators in India. Sir Henry Elliot in this regard, prior to the enactment of the Indian Penal Code in 1861, observed:

The particular value of this mode of trial was that in intricate points of native customs, often depending upon a state of feeling, which it is difficult for the English officer, as being a foreigner, to enter into, the members of the Pancha were thoroughly at home in their subject and were able to give due weight to a variety of minor considerations which none but a native could perfectly understand. Even in the older provinces, where the regulations are in force, it is found at times convenient to have recourse to this time honoured method of decision and the result is so satisfactory, that one is tempted to wish it were more largely resorted to.

The rule during Akbar's regime was that the judges must try to find out the facts of a case by every possible means. Statements of witnesses alone were not regarded its sufficient. Judges were expected to make thorough interrogations of the parties concerned and were further expected to give considerable thought to the case before pronouncing any judgement. In order to achieve the goal of impartial justice, the judges were directed to be guided by the spirit of the law, render expeditious justice and pursue a policy of reformation rather than retaliation. Jahangir (Akbar's son) became famous for the rendition of justice.

Cases in villages were decided by the village elders on the basis of the customs, practices and faiths of the parties. There was not much difficulty in arriving at the truth, because people in the villages knew what had happened ruin would settle cases on the basis of truth. The caste courts decided the cases of parties belonging to the same caste, with social sanctions behind them. In the larger villages classed as Qasbas, a Qazi was appointed and he administered justice. The parties in the villages could take the cases to the Qazi of the neighbouring town in whose jurisdiction they lay. Even if the Qazis were appointed, the parties could go to trade guilds and communal courts. The policy was to let the time-honoured institutions of the land, which worked quite satisfactorily, continue to cooperate with the government in the business of administration and not to destroy them indiscriminately. The Sultans of Delhi and the Mughal emperors did not find it profitable and practicable to interfere with these and therefore left them alone. Akbar recognised the village Panchayat as a legally established court of justice and upheld its decisions. He gave an official recognition to its activities.11

11. Supra n. 3.
C. DEVELOPMENT OF NYAYA PANCHAYATS IN INDIA

1. General

The institution of the village Panchayat has a long history in India. In Vedic India, an autonomous village community was a special feature of the social fabric of society. There was minimal interference by rulers in the functioning of Panchayats. A Panchayat was constituted of elected members and its head was appointed by election from among them. A woman could be elected as member according to the procedure established for such elections. The powers exercised by Panchayats were both executive and judicial. They included:

(a) the distribution of land among people of the village;
(b) the collection of taxes from the produce of the land;
(c) inquiry into offences and punishment of offenders.

Where matters pertaining to any village were concerned, the rulers had to take the opinion of the village Panchayat as far as possible. The duties and powers of Panchayats were prescribed in the Smritis and in treatises such as Chanakya's Arthasastra and Shukracharya's Nitisastra. The institution of the Panchayat continued to enjoy autonomy until it was destroyed during the time of the Turkish and Afghan invasions.

2. Nyaya Panchayats in Ancient India

Village administration including administration of justice by Panchayats in India is as old as the villages. In ancient India the village headman, who was always from the village, carried on the village government and the village council or sabha decided the questions relating to village administration. The multifarious duties of village headman included the power to decide petty civil and criminal cases, and to make the guilty pay the fine. Village assembly wielded supreme authority in the village and central administration did not interfere with the village administration. Even the Muslim invaders were not able to make any vital impact on the village community. It was only under the British.

rule, or to be more precise, between the collapse of the Mohammedan and the advent of the British rule when the political scene in India was confused, that there was gradual decadence of village community.  

3. **Nyaya Panchayats in British India**

As we have already pointed out, with the advent of the British, the village institutions declined because the British Government established its own courts and when the people discovered that the power of the state was behind the newly established courts and not behind the old institutions, they abandoned the old courts and turned to new ones. The village courts were unable to compete with these formidable rivals. The old quasi-democratic rural polity crumbled away. The new courts were used by rich landlords to exploit and harass the tenants and the poor. However in 1802, the importance of village institutions for delivering cheap and expeditious justice, was realised. In Bombay and Madras, regulations aiming at reducing the expenses in litigation, were passed in 1802 and 1816.

Historically the genesis of Panchayat justice in Bombay can be traced back to 1673 when Aungier, the President of the East India Factory at Surat established community Panchayats in Bombay town and island. The judicial powers of Tree Community Panchayats were limited to decide the disputes amongst the persons of their own caste and community, if they agreed to submit to them for arbitration. By the time British rule came to be established in India, Panchayats had more or less lost their importance and identity. The first attempt by the British to establish local self-government was in 1869 when a District Local Fund Committee was established by the government of Bombay. This was a nominated body.

In 1882, Lord Ripon established local self-government in India with the setting up of district local boards. The district boards and district councils were established in Marathwada and Vidarbha. The Local Self Government Act was enacted in 1889, under which the rural, local administration was determined by a group of circles, each consisting of a certain number of villages. In 1907-8 the Royal Commission on decentralization considered the subject of local self government and strongly recommended for development of Panchayats. We hold that it is most desirable, alike in the interest of decentralization and in order to associate the people with the local task of administration.

16. Dr. Khushwaha—"Working of Nyaya Panchayots in India" Young Asia1977, p.12.
17. See H.D. Malvia— "Panchayats in India" Delhi, 1956, pp.772 -73.
18. Ibid.
20. The Commission was appointed in Dec. 1907, with Hobhouse as its Chairman to report on Decentralization. The report of the Commission was published in 1909.
that an attempt should be made to constitute and develop village panchayats for the administration of local village affairs.\textsuperscript{21} As a result in 1920's there was a spurt of enactments in different states establishing Panchayat courts and conf civil and criminal jurisdiction upon them to decide minor disputes of civil as well as criminal nature.\textsuperscript{22} The village courts were constituted of lay men having good sense of justice, equity and good conscience and reasonable prudence. Not having expert, knowledge of law did not obstruct them from administering justice.\textsuperscript{23}

The next important piece of legislation was the Bombay Village Panchayat Act 1920. Under this Act, the Panchayat was constituted into an elected body. Members were elected by adult male villagers and the Panchayat was entrusted with local functions, mainly of a civil nature. Panchayats, were empowered to collect compulsory house taxes. Bombay Village Panchayat Act 1920 empowered village Panchayats to take up various activities, including some socio-economic functions, and gave them the power to levy taxes and duties in order to increase their income.

Although Panchayats were revived by Lord Ripon in 1882, they did not, in any real sense, represent the will of the people and a Panchayat could hardly be said to be equivalent of local self government.

4. \textbf{Nyaya Panchayats in Independent India}

After independence, the process of decentralization continued to be in operation. In Bihar, the Panchayat Raj Act was enacted in 1948 and in Rajasthan the Panchayat Act was introduced in the year 1953. After reorganisation of states in 1956, laws to introduce Panchayat systems in different states were gradually enacted. This process was almost complete in Andhra Pradesh, Assam, Madhya Pradesh, Madras, Mysore, Orissa, Punjab, Rajasthan, Uttar Pradesh and Bombay. The Bombay Village Panchayats Act was enacted in 1958. Under the Act, a district village Panchayat Mandal was constituted in every district for the supervision and control of village Panchayats. These Mandals were, however abolished in 1962. Apart from these enactments in various states, a direction is contained in the

\textsuperscript{21} \textit{Id.} at Para 699.

\textsuperscript{22} The different enactments establishing the Panchayats and Panchayat Courts were: (a) Bombay village Panchayat Act IX of 1920 later replaced by Bombay village Panchayatas Act 1933. (b) Madras Village courts Act 1889 as amended by Act II of 1920. (c) Madhya Pradesh-Central provinces Panchayat Act V of 1920 replaced by Central provinces and Berar Panchayats Act 19 (Act I or 1947) further replaced by Madhya Pradesh Panchayats Act 1962. d) Punjab - Village Panchayat Act 1921 as amended by Act X of 1922. e) Uttar Pradesh - U.P. Village Panchayat Act VI of 1920 replaced by U.P. Panchayat Raj Act XXX VI of 1947.

\textsuperscript{23} Dr. P.C. Juneja- "Equal Access to Justice" p. 278, Publisher The Bright Law House Rohtak-124001.
Constitution of India in Article 40 which says that "The State shall take steps to organise village Panchayats and endow them with such power, and authority as may be necessary to enable them to function as units of self-government." Village Panchayats set up under these new enactments were substantially different from those that had existed in the British period. Under the new enactments, a Gram Sabha of adult residents in the village was constituted, and it was made obligatory on the Panchayats to hold meetings of the Gram Sabha within two months from the commencement of every financial year and to prepare an annual statement of accounts to be placed before such a meeting.

The administrative report, the proposed development programme, audit report, compliance of audit objections and other such matters were also required to be placed before this meeting. In some states, the work of collection of land revenue was entrusted to Panchayats, as was the work of maintaining village records. Group Nyaya Panchayats were established, but later they were abolished. The obligatory duties of the Panchayats were mainly of a civil nature that is, making provisions for sanitation, street lights and drinking water. The discretionary functions covered the fields of agriculture, cooperation, animal husbandry, forests, social welfare, education, medical and public health, buildings and communication, irrigation, cottage industry, self-defense and other such administrative and development works.

A village fund has been constituted and established under the Village Panchayat Act. It consists of the proceeds of a tax on professions, trees, callings and employment assigned to the Panchayats, sale-proceeds of all dust, dung, refuse, etc., sums contributed by the state government and Zilla Parishad, loans from state or district village development funds, gifts and contributions, income and proceeds from the property of the Panchayat, proceeds from the collection of cess, rent, penalty, pound fees and commissions received from the rural insurance scheme.

Village Panchayats are controlled and supervised by Zilla Parishads, Panchayat Samitis and their officers. The state government also has direct control over Panchayats through the Collector of the district. District Village Panchayat officers work under Zilla Parishads to supervise and control the village Panchayats, and are appointed by the state governments. There is however, no proper machinery for the public to air their grievances and to control malpractices in Zilla Parishads. Vested interests in the government have always been found to be sheltering corrupt elements in the system and they are now well entrenched. Government control over these institutions has
seldom proved to be effective and the poor masses at the grassroots level are yet to benefit from the existing system of Panchayati Raj.

In view of these shortcomings, Part IX, consisting of Articles 243 to 243—was inserted by the Constitution (73rd Amendment) Act, 1992). This pertains to Panchayats and inter-alia provides that: In every village, there shall be a Panchayat which will be a constitutional body. Elections to the Panchayats will be held by the State Election Commission. Reservation of seats for the weaker sections and women has been made mandatory. The term of Panchayats is fixed at five years. If any Panchayat is dissolved before the expiry of this period, elections must be held within six months. The State governments may enact a law-making provision for vesting Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibility upon the Panchayats with respect to the preparation and plans for economic development and social justice as may be entrusted to them including those in matters listed in the Eleventh Schedule. The state governments, by law, may authorise Panchayats to levy, collect and appropriate taxes, duties, tolls and fees. They may provide for grants and constitute funds for Panchayats. The legislature of a state may, by law, make provisions with respect to the maintenance of accounts by Panchayats and the auditing of such accounts. The amendment has added the Eleventh Schedule to the Constitution in which twenty nine subjects for the economic and social development of villages are provided.

A new body called the State Finance Commission, appointed by the Governor, has been created. Its responsibility is to review the financial position of Panchayats and to make recommendations to the Governor about the distribution of the net proceeds of taxes between the states and Panchayats as also about the grants-in-aid to Panchayats from the Consolidated Fund of the state and also about the measures needed to improve the financial position of Panchayats.

The Provisions of the amendment will not apply, at present, to the scheduled areas and certain tribal areas such as the states of Nagaland, Meghalaya, Mizoram, hill areas in the state of Manipur for which a district council exists, and hill areas of the district of Darjeeling in the state of West Bengal for which Darjeeling Gorkha Hill Council exists. However, provision has been made to include these areas under the provisions of the Act, if and when these states so desire.24

D. ADR DURING BRITISH REGIME

The concept of parties to a dispute settling their dispute in a binding manner by reference to a person or persons of their choice or private tribunals was well known to ancient and medieval India. Appeals were also often provided against the decisions of such persons or tribunals to the courts of judges appointed by the king and ultimately to the king himself.

1. General

However, with the advent of the British Raj the traditional institutions of dispute settlement somehow started withering and the formal legal system introduced by the British began to rule on the basis of the concept of omissions of rule of law and the supremacy of law.

2. ADR in British Regime

However, the law of arbitration as is known to modern India owes its elaboration, in phases, to the British rule of India.

(a) Different Regulations

Through a series of what were known as Regulations framed by the East India Company in exercise of the power vested in them by the British Government, beginning with the Bengal Regulation of 1772 which provided that the parties to a dispute relating to accounts etc. shall submit their cause to arbitration, the award of which shall become a decree of the court. Bengal Regulation 1 of 1772 provided for Resolution of dispute through arbitration and the courts in different parts of British India were empowered to refer, either with the consent of the parties or at the instance of the parties, certain suits to arbitration. Further changes were made in the arbitration law by the Regulations of 1781 and 1782 which provided that an arbitration award could be set aside on the proof of gross corruption or partiality on such assertions being made by at least two credible witnesses on oath. The arbitrators were to be appointed by the parties of their own choice and their decision was final and binding on the parties except in case of partiality or misconduct on the part of arbitrators. Bengal Regulation 1781 contained a provision which is interesting to read.

"The judge do recommend and so far as he can without compulsion prevail upon the parties to submit to the arbitration of one person, to be mutually agreed upon by the parties ... No award of any arbitrator be set aside, except upon full proof, made by oath of two creditable witnesses that the arbitrators had been guilty of gross corruption or partially, in the course of which they had made their award.

Regulation of 1787 empowered the court to refer disputed matters to arbitration with the consent of the parties. The operational part of the arbitration law was made more effective by the Bengal Regulation, 1793 which provided that the Court could refer matters and suits relating to accounts, partnership debts, non-performance of contracts etc. to arbitration where the value of suit did not exceed two hundred Sikkas (i.e., rupees). The Regulation also laid down the procedure to be followed in conducting arbitration proceedings. The provisions relating to arbitration proceedings contained in the Regulation of 1793 were extended to the territory of Banaras by the Regulation of 1795. These were made further applicable to the Province of Oudh by the Regulation of 1803. The Governments of Madras and Bombay also conferred certain powers on the Panchayats to settle disputes by arbitration by the Madras Regulation of 1816 and Bombay Regulation of 1827 respectively.

(b) Civil Procedure Codes

The successive Civil Procedure Codes enacted in 1859, 1877 and 1882, which codified the procedure of civil courts, dealt with both arbitration between parties to a suit and arbitration without the intervention of a court. Consequent to the enactment of the Code of Civil Procedure, 1859, the provisions relating to arbitration were incorporated in Chapter VI of the Code. However, these were not applicable to the Non-Regulation Provinces and the Presidency Small Cause Courts as also the Supreme Court of Calcutta, Madras and Bombay. The Code of Civil Procedure, 1859 was subsequently repealed and replaced by the Act of 1882 which was further replaced by the Code of Civil Procedure 1908. This Code contained elaborate provisions relating to arbitration in Section 89, Section 104 and Second Schedule of the Code of Civil Procedure, 1908. The Indian Arbitration Act, 1899, however, continued to be applied only to matters which were not before a court of law for adjudication.

27. Section 1 to 16 of the Second Schedule of CPC, 1908 dealt with arbitration in suits, Section 17 to 19 provided for mechanism to enforce an agreement for reference and Section 20 and 21 contained the procedure to enforce in a court of law an arbitration award made without the intervention of a court.
The Code of Civil Procedure enacted in 1908 originally left the arbitration provisions much as they were in the earlier Codes except that it placed the said provisions in a Schedule - the Second Schedule - in the hope that they would be transferred later into a comprehensive Arbitration Act. The Second Schedule dealt with arbitrations outside the operation and scope of the Arbitration Act, 1899; it related for the most part to arbitration in suits, though arbitration without intervention of courts was also briefly provided for. It also contained an alternative method whereby the parties to a dispute or any of them could file their arbitral agreement before a court which, after a certain procedure, referred the matter to an arbitrator.

(c) Law Relating to Contract

The law relating to contracts also simultaneously developed certain principles of relevance to arbitration. Ordinarily, all disputes arising under a contract have to be settled by courts established by the State. Section 28 of the Contract Act, 1872 provides that every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent. In short, no man can exclude himself from the protection of courts by contract.28

Exception 1 to section 28, however, provides that the said section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. Exception 2 provides that section 28 shall not render illegal any contract in writing, by which two or more persons agree to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

(d) Specific Relief Act 1877

Section 21 of the Specific Relief Act, 1877, also provided that, save as provided by the Code of Civil Procedure and the Indian Arbitration Act, 1899, no contract to refer present or future differences to arbitration could be specifically enforced; but if any person who had made such a contract and had refused to perform it, sued in respect of

any subject which he had contracted to refer, the existence of such contract would bar
the suit.29

(e) **Arbitration Act 1899**

Like most Indian laws, the law relating to arbitration in India is also based on the British
Arbitration Law. The English merchants and traders referred their trade and
commercial disputes for settlement to persons called arbitrators who were specially
selected for the purpose. Initially, the Arbitration Act of 1697 was enacted in England to
resolve the disputes relating to personal chattels or personal wrongs or real estate
of the disputant merchants and traders. Besides, the Common Law Procedure Act, 1854
also contained some provisions relating to arbitration with a view to making the
award more binding upon the parties and ensuring its legal enforcement. These statutes
were subsequently replaced by the Arbitration Acts which repealed all the earlier English
enactments relating to arbitration.

In India, the first statutory enactment on arbitration law was the Indian Arbitration
Act 1899, which was modeled on the English Arbitration Law, 1889. This Act was
applied only to cases where, if the subject matter submitted to arbitration were the
subject matter of a suit, the suit could, whether with leave or otherwise, be
instituted in what was then known as a Presidency town. The scope of this Act was
confined to arbitration by agreement without the intervention of a court.

(f) **Arbitration Act 1940**

The year 1940 is an important year in the history of the law of arbitration in British
India, as in that year was enacted the Arbitration Act, 1940. It consolidated and amended
the law relating to arbitration as contained in the Indian Arbitration Act, 1899 and the
Second Schedule to the Code of Civil Procedure, 1908. It was also largely based on the
English Arbitration Act of 1934 and came into force on 1st July, 1940. It extended to the
whole of India except the State of Jammu and Kashmir. The Act dealt with broadly three
kinds of arbitration: (i) arbitration without intervention of a court, (ii) arbitration with
intervention of a court where there is no suit pending, and (iii) arbitration in suits. Save
insofar as was otherwise provided either by the Act or any other Act, it applied to all
arbitrations, including statutory arbitrations.30

29. For the present legal position on the subject, see sec. 14 (2) of the Specific Relief
30. Supra n.4 pp. 33-34
E. ADR IN INDEPENDENT INDIA

The researcher found out that it was in 1940 that the Indian law on arbitration was consolidated and redrafted in the form of Arbitration Act, 1940 on the pattern of the English Arbitration Act, 1934. While the English Arbitration Act, 1934 was subsequently modified by the Act of 1950 followed by the Arbitration Act of 1979, the Indian Arbitration Act, 1940 remained in force until it was replaced by the new Arbitration and Conciliation Act, 1996.

1. **Position before 1996**


For giving effect to the obligations under the above instruments, India enacted the Arbitration (Protocol and Convention) Act, 1937 (hereinafter the 1937 Act). More recently, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 came into force on 7th June, 1959. India became a party to this Convention on 13th July, 1960. For giving effect to the obligations under this Convention, India enacted the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter the 1961 Act). Thus, prior to the commencement of the Arbitration and Conciliation Act, 1996 the law of arbitration in India was contained in three enactments: the 1937 Act, the 1940 Act and the 1961 Act. The Act consolidates and amends the law relating to arbitration in India. With the enactment of 1996 Act, the Arbitration (Protocol and Convention) Act, 1937; the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration Act, 1940 stand repealed.

2. **Factors Leading to Arbitration and Conciliation Act 1996**

The globalisation of trade and commerce and the need for effective implementation of economic reforms during the preceding decade necessitated redrafting of the Indian Arbitration Act of 1940 with a view to ensuring smooth and prompt settlement of domestic as well as international commercial disputes. The Law Commission of India in its 76th Report in November 1978 had already recommended need for updating the Arbitration Act of 1940 to meet the new challenges of the modern developing economy of the country.
The need for enactment of the Act had arisen on account of several factors. Though the English Arbitration Act, 1934, on which the 1940 Act was based, had been replaced by the English Arbitration Act, 1950, which in its turn was amended by the Arbitration Act, 1975, and the Arbitration Act, 1979, to keep pace with the developments in the field of arbitration, the Indian Act had remained static. Factors leading to enactment of Arbitration and Conciliation Act 1996 were:

(a) **Criticism by Courts**

The Indian Courts have the reputation for answering the felt necessities of time. The Kerla High Court in *Joseph Anchilose Case*\(^{31}\) noted the “widespread abuse of arbitral processes” in recent years and underlined the need for evolving effective safeguards to arrest such abuses. The Supreme Court in *M/s Guru Nanak Foundation Case*\(^{32}\) observed: “Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap.” The Supreme Court in *Food Corporation of India Case*\(^{33}\) observed: “We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating sense that justice appears to have been done.” The need for reform in the law relating to arbitration thus became necessary and urgent. The question then was whether the 1940 Act should be amended or the new law be written on a clean slate.

(b) **Recommendations of PAC**

The PAC (Public Accounts Committee) of the Lok Sabha had also commented adversely on the working of the Arbitration Act. Its complaints mainly related to the long delays that took place in the completion of arbitral proceedings, the number of extensions of the period permitted for making the award that were obtained either by consent of the parties or through the intervention of the court, the several number of years taken for completion of arbitral proceedings, and the enormous expenses incurred by way of fees payable both to the arbitrators and the counsel.\(^{34}\)

---

(c) **Recommendations of Law Commission and Malimath Committee**

In the light of these adverse comments, the Government of India decided to have a second look at the provisions of the Arbitration Act and, for this purpose, referred the matter, in 1977, to the Law Commission for its examination. The Law Commission's recommendations in this regard are contained in its Seventy-sixth Report submitted to the Government in November 1978. The Government of India consulted the State Governments on these recommendations and, before any action was taken in this regard, the Thirteenth Law Commission undertook further examination of its recommendations.

An opportunity to review the situation again presented itself more recently in the context of the growing awareness about the inadequacies of the formal judicial system in India to contend successfully with the demands placed on it. There are about twenty-five million cases pending in different courts in India. Each case consumes a number of years before it is settled. The need to get away from the traditional conception that a court is the only place in which to settle disputes is no longer disputed. The subject matter of arrears of cases in courts had engaged the attention of various Commissions and Committees in India. More recently, the Arrears Committee, popularly known as the Malimath Committee, constituted by the Government of India on the recommendations of the Chief Justices' Conference, made a number of recommendations in a Report submitted in 1990. Similarly, the Law Commission of India had also submitted as many as 16 Reports containing recommendations on various aspects of the frightful problem of mounting arrears of cases in courts. It is now widely recognised that irrespective of the number of courts that may be constituted and the number of judges that may be appointed, our justice system may not be able to take the entire litigation load. With a view to reducing the pressure on courts as also to offering dispute resolution by bodies well informed in the areas falling in their respective jurisdictions, the Constitution made provision for the establishment of administrative tribunals at both the Central and State levels. At the Central level, there are about 13 such tribunals. There are more than half a million cases pending in these bodies. The Malimath Committee as also the Law Commission had recommended a number of alternative modes such as arbitration, conciliation and mediation for dispute-resolution.

(d) **Meeting of the Chief Ministers and Chief Justices**

On 4th December, 1993, a meeting of the Chief Ministers and Chief Justices was held
at New Delhi under the chairmanship of the Prime Minister of India to evolve a strategy for dealing with the congestion of cases in courts and other fora. The meeting adopted a resolution that sets forth ways and means to deal with the arrears problem as expeditiously as possible. While dealing with the arrears of cases in courts and tribunals, the resolution also recommended that a number of disputes lent themselves to resolution by alternative means such as arbitration, mediation and negotiation. The resolution further emphasized the desirability of disputants taking advantage of Alternative Dispute Resolution (ADR) which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial. ADR is seen as part of a package system designed to meet the needs of consumers of justice especially in the context of recent reforms in the economic sector. Simultaneous with this has been the growing demand of both the business community within the country and investors from abroad for reforms in the arbitration law of India. The Government of India also felt that its economic reforms might remain incomplete if corresponding changes were not brought in the law relating to settlement of disputes, especially through arbitration and conciliation.

(e) **Representations from Various Bodies**

Besides, several other representative bodies of trade and industry and legal experts also proposed drastic changes in the existing arbitration law which suffered from several lacunae and defects. Apart from the seventy-sixth Report of the Law Commission of India on the Arbitration Act, 1940, the Government had before it representations from, among others, the Indian Council of Arbitration, the Indian Society of Arbitrators, the Confederation of Indian Industries, the Federation of Indian Chambers of Commerce and Industry, the Associated Chambers of Commerce and Industry proposing amendments to the 1940 Act. Proposals for amendment of the 1940 Act were also received from eminent lawyers like Mr. F.S. Nariman. The Government had also before it several international models including the UNCITRAL Model Law on International Commercial Arbitration (hereinafter the Model Law) and the ICC Rules on Conciliation and Arbitration. It was, however, felt that there were definite advantages in discarding the old law and in enacting a new law, based on the Model Law, which has harmonised the common law and civil law concepts on arbitration and thus contains provisions which are designed for universal application. Before the Act was enacted, extensive consultations were held with arbitral institutions, individual arbitration experts and State Governments.

(f) **Calcutta Resolution 1994**

In the Calcutta Resolution adopted at their meeting held on 17th November, 1994
under the auspices of the Union Ministry of Law, Justice and Company Affairs, the Law Ministers of States and Union territories considered that the 1940 Act was no longer in tune with the international thought on the subject and that a comprehensive law on arbitration be made, based largely on the Model Law. They further recommended that the new law should also contain provisions on conciliation modelled on the UNCITRAL Conciliation Rules.

(g) **UNCITRAL Model Law**

It was felt that a well conceived law for international commercial arbitration would be equally appropriate for domestic arbitration. The Secretary-General of the United Nations has also emphasized the desirability of a State avoiding a dichotomy within its arbitration law between the laws applicable on domestic arbitration on the one hand and the law applicable on international commercial arbitration on the other.

It may further be pointed out that efforts were already being made by the United Nations to work out a comprehensive uniform Model Arbitration Law at the International level which could be uniformly adopted by the member countries with suitable modifications keeping in view their domestic needs and national laws. For this purpose, the Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL) on 21st June, 1985 in its 18th Annual Session. The General Assembly, in its Resolution dated 11th December, 1985 recommended that all States should adopt UNCITRAL Model Law on International commercial arbitration. India, being a member-country, has adopted the UNCITRAL Model Law by enacting the Arbitration and Conciliation Act, 1996 with a view to bringing about uniformity in arbitration procedures and meets the needs of International commercial arbitration in its commercial transactions with foreign countries.

The justification for adopting the Model Law on International Commercial Arbitration lies in the fact that with the liberalization and globalization on Indian economy in recent past more and more non-resident Indians (NRIs) and Foreign Investment Institutions are entering the Indian market which necessitated re-drafting of the Arbitration Act 1940 to be made more responsive to the change in Indian economy.  

---

35. The UNCITRAL Model Law on Arbitration was designed to meet the need for harmonizing and improving the domestic laws of arbitration which had considerable disparity which created difficulties in resolving International commercial disputes.  
3. **Enactment of Arbitration and Conciliation Act 1996**

As seen earlier, in their 1993 resolution, the Chief Ministers and Chief Justices emphasised the advantages of alternative dispute resolution. The UNCITRAL adopted the UNCITRAL Conciliation Rules in 1980. The General Assembly, by its resolution 35/52 of 4th December, 1980, recommended the use of these rules in cases where the disputes arise in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation. The Government also considered the ICC Rules on the subject as also the Rules for Conciliation of the Society of Maritime Arbitrators, Inc. of New York, adopted in 1988. It may be noted that the provisions on conciliation in the Act are largely based on the UNCITRAL Conciliation Rules though they cover conciliation of domestic disputes also.

In the context of growing number of cases in the courts as also the need to provide for expeditious disposal of commercial disputes in the context of economic reforms undertaken in India in recent years, it was widely recognised that the law on arbitration needed reform.

(a) **Bill on Law of Arbitration and Conciliation**

As a result of these demands, the Arbitration and Conciliation, Bill, 1996 was promulgated by the President to meet the needs of business community for speedy settlement of commercial disputes. The Bill on law of arbitration and conciliation 37 was introduced in Rajya Sabha on 16th May, 1995 by the then Minister of Law and Justice. The Statement of Objects and Reasons of the Bill underlined the need for replacement of the Arbitration Act, 1940 which had become outdated and was no longer responsive to the contemporary economic reforms and globalisation of the Indian economy. The Law Commission and representative bodies of trade and industry had also expressed similar views and highlighted the need for an effective law for settlement of domestic as well as international disputes. The desirability of recognising conciliation as an instrument for settlement of disputes was also emphasised by the Indian entrepreneurs because of its worldwide recognition.

The Bill had also taken notice of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. The General Assembly of the United Nations recommended that the member countries should adopt the Model Law with a view to attaining uniformity of the

37. Id. at 30-31.
arbitration law and procedure which was so vital for the smooth conduct of the commercial transactions at the International level. The UNCITRAL had also adopted in 1980 a set of conciliation Rules for resolving disputes which arise in course of international commercial transactions between the parties.

The Bill further sought to consolidate and amend the law relating to domestic arbitration. It was realised that the UNCITRAL Model Law and Rules could serve as a model for domestic arbitration and conciliation law in India with appropriate modifications to suit the Indian conditions.

The Chairman of the Rajya Sabha referred the Bill to the Pay Committee on 17th May, 1995. The Committee submitted its report to Parliament on 28th November, 1995. Since the winter Session of the Parliament in December, 1995 ended without transacting any business, an Ordinance was promulgated on 16th January, 1996. It had to be reissue Second Ordinance, (11th of 1996) and the third Ordinance, (27 December, 1996) because it could still not be passed by the Parliament. It was on 16th January, 1996 that the Arbitration and Conciliation Bill of 1995 (No. XXX-C of 1995) was passed by the Rajya Sabha and it was cleared by the Lok Sabha on 2 January, 1996. The Bill having been passed by both the Houses of the Parliament, received President's assent on 16th August, 1996, and became Arbitration and Conciliation Act, 1996 came into force on 25th January, 1996 i.e., the date on which the first Ordinance on the law had come into force.

(b) **Salient Features of Arbitration and Conciliation Act 1996**

The Act, being based on the Model Law which is also broadly compatible with the Rules of Arbitration of the International Chamber of Commerce (hereinafter the 'ICC Rules') puts India on the International map of arbitration. The most significant feature of this Act is the recognition it accords to the freedom of the parties with minimal restrictions in carrying out the arbitration agreement between them. It extends to the whole of India except the State of Jammu and Kashmir. The Act is of consolidating and amending nature and is not exhaustive. But it goes much beyond the scope of its predecessor, the 1940 Act. It provides for domestic arbitration, international commercial arbitration and also enforcement of foreign arbitral awards. It also contains the new feature on conciliation. It proceeds on the basis of the UN Model Law so as to make

our law accord with the law adopted by the United Nations Commission on International Trade Law (UNCITRAL). 39 The Preamble to the Act proceeds as follows:

"An Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto."

The main objectives of the Act are as under:

(i) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

(iii) to provide that arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

(v) to minimise the supervisory role of courts in the arbitral process;

(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage speedy settlement of disputes;

(vii) to provide that every final arbitral is enforced in the same manner as if it were a decree of the court;

(viii) to provide that a settlement agreement reached by the result of conciliation proceedings will have the same effect as an arbitral award on agreed terms on the substance of dispute rendered by an arbitral tribunal; and

(ix) to provide that for the purposes of enforcement of foreign arbitral award made in a country which is a signatory to one or both of the International Conventions (i.e., the New York and the Geneva Convention) relating to foreign arbitral which India is a party, will be treated as a foreign award

(c) 1996 Act- An Improvement Over the Model Law

In certain respects, the Act constitutes an improvement over the Model Law inasmuch as it nearly takes away the role of courts except in very limited matters. Though the Model Law was conceived in the context of international commercial arbitration, the Act uses it, with certain modifications, as the basis for domestic arbitration of all arbitral disputes. The Act seeks to go beyond the aforesaid Model Law and Conciliation Rules inasmuch as it makes provisions for arbitration and conciliation of domestic disputes

as well. Any domestic dispute, not merely a commercial one, which is capable of being resolved by agreement between the parties, may become the subject-matter of arbitration, conciliation or any other ADR programme. The Act consolidates and amends the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also defines the law relating to conciliations.

F. DEVELOPMENT OF ADR AT INTERNATIONAL LEVEL

Actually informal dispute resolution has a long tradition in many of the world societies dating back to 12th century in China, England and America. William M. Howard in an article entitled 'Evolution of Contractually Mandated Arbitration' has observed as follows: Alternative Dispute Resolution (ADR) is the hot new socio-legal concept of the 1990s. Everyone is espousing it, becoming an expert in it and lauding it as the panacea for all of the languishing victims of our overpriced, inefficient and intransigent legal system. In the Far East countries-specially in China, Australia and Japan conciliation has been a preferred method for resolving disputes. The United States has seen rapid evolution and growth of various ADR procedures. In 1980, 18 States in America had same type of dispute resolution programme; 10 years later, i.e., by the year 1990 all 50 States and the District of Columbia had at least one such programme. By 1993, there were more than 1,200 court related ADR programmes nationwide, handling the entire categories of civil tufts. Many, if not most of these, are administered by part of the judicial machinery, and they are referred to as 'court annexed'. In some States, the requirement of law is that all civil litigants use ADR before trying to access the courts. In the States of Georgia and Colorado, it has been proposed that lawyers be required as a part of their professional obligation to counsel clients about the availability and use of ADR procedures. Under the Civil Justice Reform Act of 1990, the American Congress, has encouraged all federal courts to have some ADR policy or programme in place by the end of 1993 to help reduce civil case backlog and delay. Dispute resolution outside of courts is not new; societies world-over have long used non judicial, indigenous methods to resolve conflicts. What is new is the extensive promotion

40. Supra n. 5.
and proliferation of ADR models, wider use of court-connected ADR, and the increasing use of ADR as a tool to realize goals broader than the settlement of specific disputes. The ADR movement in the United States was launched in the 1970s, beginning as a social movement to resolve community-wide civil rights disputes through mediation, and as a legal movement to address increased delay and expense in litigation arising from an overcrowded court system. Ever since, the legal ADR movement in the United States has grown rapidly, and has evolved from experimentation to institutionalization with the support of the American Bar Association, academics, courts, the U.S. Congress, and state governments. For example, in response to the 1990 Civil Justice Reform Act requiring all U.S. federal district courts to develop a plan to reduce cost and delay in civil litigation, most district courts have authorized or established some form of ADR. Innovations in ADR models, expansion of government-mandated, court-based ADR in state and federal systems, and increased interest in ADR by disputants has made the United States the richest source of experience in court connected ADR. While the court-connected ADR movement flourished in the U.S. legal community, other ADR advocates saw the use of ADR methods outside the court system as a means to generate solutions to complex problems that would better meet the needs of disputants and their communities, reduce reliance on the legal system, strengthen local civic institutions, preserve disputants’ relationships, and teach alternatives to violence or litigation for dispute settlement. In 1976, the San Francisco Community Boards program was established to further such goals. This experiment has spawned a variety of community-based ADR projects, such as school-based peer mediation programs and neighborhood justice centers. In the 1980s, demand for ADR in the commercial sector began to grow as part of an effort to find more efficient and effective alternatives to litigation. Since this time, the use of private arbitration, mediation and other forms of ADR in the business setting has risen dramatically, accompanied by an explosion in the number of private firms offering ADR services. The move from experimentation to institutionalization in the ADR field has also affected U.S. administrative rule-making and federal litigation practice. Laws now in place authorize and encourage agencies to use negotiation and other forms of ADR in rulemaking, public consultation, and administrative dispute resolution. ADR models may be straight forward imports of processes found in the United States or hybrid experiments mixing ADR models with elements of traditional dispute resolution. ADR processes are being implemented to meet a wide range of social, legal, commercial, and political goals. In the developing world, a number of countries are engaging in the ADR experiment,
including Argentina, Bangladesh, Bolivia, Colombia, Ecuador, the Philippines, South Africa, Sri Lanka, Ukraine, and Uruguay. 42

The American origins of the concept are not surprising, given certain features of litigation in that system, such as: trials of civil actions by a jury, lawyers' contingency fees, lack of application in full of the rule ‘the loser pays the costs’. Beginning in the late nineteenth century, creative efforts to develop the use of arbitration and mediation emerged in response to the disruptive conflicts between labor and management. In 1898, Congress followed initiatives that began a few years earlier in Massachusetts and New York and authorized mediation for collective bargaining disputes. In the ensuing years, special mediation agencies, such as the Board of Mediation and Conciliation for railway labor, (1913) (renamed the National Mediation Board in 1943), and the Federal Mediation and Conciliation Service (1947) were formed and funded to carry out the mediation of collective bargaining disputes. Additional state labor mediation services followed. The 1913 New lands Act and later legislation reflected the belief that stable industrial peace could be achieved through the settlement of collective bargaining disputes; settlement in turn could be advanced through conciliation, mediation, and voluntary arbitration. At about the same time, and for different reasons, varied forms of mediation for non-labor matters were introduced in the courts. When a group of lawyers and jurists spoke on the topic to an American Bar Association meeting in 1923, they were able to assess court-related conciliation programs in Cleveland, Minneapolis, North Dakota, New York City, and Milwaukee. Conciliation in a different form also appeared in domestic relations courts. An outgrowth of concern about rising divorce rates in the postwar 1940's and the 1950's, the primary goal of these programs was to reduce the number of divorces by requiring efforts at reconciliation rather than to facilitate the achievement of divorces through less adversarial proceedings. Following privately funded mediation efforts by the American Arbitration Association and others in the late 1960s, the Community Relations

Service (CRS) of the United States Department of Justice initiated in 1972 a mediation program for civil rights disputes. Although a small number of individual lawyers had been interested in and were practicing mediation ADR in Britain for some years, it was only in 1989 when the first British based ADR Company - IDR Europe Ltd. - bought the idea across the Atlantic and opened its doors for business. This was the start of ADR Group. Since then many other ADR organizations, including CEDR (Centre for Dispute Resolution), followed suite and assisted in the development and promotion of ADR in the UK. ADR, or mediation (as it is now synonymously known as), is used world-wide by Governments, corporations and individuals to resolve disputes big or small, of virtually any nature and in most countries of the world. Many developing countries such as India, Bangladesh and Sri Lanka have adopted the Alternative Dispute Resolution Mechanism. However, it is for time to see how effective the implementation of these mechanisms would be in these countries.43

The United Nations Commission on International Trade Law (UNCITRAL) was established by General Assembly resolution 2205 (XXI) on 17th December, 1966. The Commission's object is promotion of the progressive harmonization and unification of the law of international trade. The Commission consists of 36 States representing various geographic regions and the principal economic and legal systems of the world. Ever since its inception, India has been a member of this Commission. Largely at the instance of the Asian- African Legal Consultative Committee44, and on the basis of extensive deliberations held in its Working Group on International Contract Practices and consultations with arbitral institutions and individual arbitration experts, the Commission adopted the Model Law on 21st June, 1985. The Model Law is not a treaty and does not, therefore, require the State adopting it to enact its national law in terms thereof. There are, of course, obvious advantages in following its terms in as close a manner as possible as this will enable a country adopting the Model Law to integrate its legal system with the emerging law of international trade. The General Assembly, by its resolution 40/72 of 11th December, 1985, recommended that "All states give due consideration to the Model Law on International Commercial

See also, Courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_history and www.adrgroup.co.uk/history.html.
44. See UNCITRAL (UN publication), 1986, pp. 29-30.
Arbitration, in view of the desirability of uniformity of law of arbitral procedures and the specific needs of international commercial practice. A number of countries including Australia, Bahrain, Bermuda, Bulgaria, Canada (by the Federal Parliament and by the Legislatures of all Provinces and Territories), Cyprus, Egypt, Finland, Hong Kong, Hungary, Mexico, Nigeria, Peru, the Russian Federation, Scotland, Singapore, Tunisia, Sri Lanka and, within the United States of America, California, Connecticut, Oregon and Texas have enacted law to give legal force to the Model Law within their jurisdictions.

Some countries like Canada, Australia and Hong Kong have attached the Model Law as a schedule to their enactments while giving the force of law to it within their jurisdictions. Some others like the State of California and the Province of British Columbia in Canada have used their own drafting formulations for giving legal effect to the Model Law. Some countries like Netherlands enacted their arbitration law that is claimed to be, to a large extent, compatible with the Model Law. While drafting the Ordinance, the International Commercial Arbitration Act, 1986, of British Columbia was taken as a model, for it conformed largely to the Indian drafting style. Though the drafting style of the Act differs from the Model Law, it does not differ in its language from the Model Law in any material respect.

Arbitration across the globe, over the years, witnessed a slow but sure movement of the players from the jurisdictional theory to the party autonomy concept. The former theory conceptualizes the process of adjudication by the national courts over the disputes essentially arising at the international levels. Where initially, the commercial disputes were engaged in and solved by the national courts, after the Second World War, there has been a drastic change in the manner of dispute-settlement. With the increase and growth of transnational commerce, trade and investment, simultaneously, there also arose the desire not to be assessed and decided upon by foreign judicial bodies. Thus, the concept of party autonomy gained importance. Parties were given more liberty not only to choose their own private fora for adjudication but also to decide the country of whose domestic law will be applicable in such arbitration proceedings.

The emergence of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1958 was a further step towards party autonomy. The Convention assures the recognition of not only the arbitration agreement

by a member State but also the recognition and enforcement of foreign arbitral awards in the Member State. In the coming years, United Nations Commission on International Trade Law, in an attempt to encourage uniform national arbitration laws across the globe, found it wise, in 1985, to propose the UNICTRAL Model Law on International Arbitration. Further, UNICTRAL Arbitration Rules were provided as guidance for arbitration. The International Chamber of Commerce provided its own Rules of Arbitration and Conciliation in 1998. Many other national and international arbitral institutions formed their own arbitration rules. These international documents contributed in making arbitration and conciliation a more positive and realistic approach to alternative dispute settlement across the globe.

G. REVIEW

It is evident that the concept of parties settling their disputes by reference to a person or persons of their choice or private tribunal known to ancient India. Long before the king came to adjudicate on disputes between persons such disputes were quite peacefully decided by the intervention of the Kulas (family or clan assemblies), Srenis (guilds of men following the same occupation), Parishads (assemblies of learned men who knew law) and such other autonomous bodies. There were Nyaya Panchayats at grass-roots level before the advent of the British system of justice. In 1907-8 the Royal Commission on decentralization considered the subject of local self-government and strongly recommended for development of Panchayats. As a result in 1920's there was a spurt of enactments in different states establishing Panchayat courts and conferring civil and criminal jurisdiction upon them to decide minor disputes of civil as well as criminal nature. The village courts were constituted of lay men having good sense of justice, equity and good conscience and reasonable prudence. Not having expert knowledge of law did not obstruct them from administering justice.

The law of arbitration as is known to modern India owes its elaboration, in phases, to the British rule of India. There were different Regulations like Regulations of 1772, 1781, 1782, 1787, 1793, 1795, 1803, 1816 and 1827 which provided for arbitration. The successive Civil Procedure Codes enacted in 1859, 1877 and 1882, which codified the procedure of civil courts, dealt with both arbitration between parties to a suit and arbitration without the intervention of a court. These were further replaced by the Code of Civil Procedure 1908 that contained elaborate provisions relating to arbitration in Section 89, Section 104 and Second Schedule of the Code of Civil Procedure, 1908. The
very first Indian Arbitration Act, 1899, however, continued to be applied only to matters which were not before a court of law for adjudication.

Exceptions 1 and 2 to section 28 of Indian Contract Act 1872 provide that the said section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration. Section 21 of the Specific Relief Act, 1877, also provided that, save as provided by the Code of Civil Procedure and the Indian Arbitration Act, 1899, no contract to refer present or future differences to arbitration could be specifically enforced; but if any person who had made such a contract and had refused to perform it, sued in respect of any subject which he had contracted to refer, the existence of such contract would bar the suit.

The year 1940 is an important year in the history of the law of arbitration in British India, as in that year was enacted the Arbitration Act, 1940. It consolidated and amended the law relating to arbitration as contained in the Indian Arbitration Act, 1899 and the Second Schedule to the Code of Civil Procedure, 1908. It was also largely based on the English Arbitration Act of 1934 and came into force on 1st July, 1940.

Thus, prior to the commencement of the Arbitration and Conciliation Act, 1996 the law of arbitration in India was contained in three enactments: the Arbitration (Protocol and Convention) Act 1937, the 1940 Act and the Foreign Awards (Recognition and Enforcement) Act, 1961. The Act consolidates and amends the law relating to arbitration in India. Various representative bodies of trade and industry and legal experts proposed drastic changes in the existing arbitration law which suffered from several lacunae and defects. The Public Accounts Committee of the Lok Sabha had also commented adversely about arbitration in India (9th Report 1977-78 pp 201-202). The matter came to be dealt by the Law Commission in its 76th Report, which recommended certain amendments, including a proviso to be inserted in section 28 of the Act of 1940 forbidding, an extension beyond one year, in respect of the time for making the award except for special and adequate reasons to be recorded.

The Malimath Committee also had recommended changes in 1940 Act. On 4th December, 1993, a meeting of the Chief Ministers and Chief Justices was held under the chairmanship of the Prime Minister of India to evolve a strategy for dealing with the congestion of cases in courts and other fora. The resolution also recommended that a number of disputes lent themselves to resolution by alternative meant such as arbitration, mediation and negotiation.
As a result of these demands, the Arbitration and Conciliation, Bill, 1996 was promulgated by the President and it was finally passed as the Arbitration and Conciliation Act, 1996 which received the assent of the President of India on 16th August, 1996. The Act has been brought into effect from 25th January, 1996, the day the relevant Ordinance was passed. With the enactment of this Act, the Arbitration (Protocol and Convention) Act, 1937; the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration Act, 1940 stand repealed.

Briefly speaking, it may be reiterated that the Arbitration and Conciliation Act, 1996 has sought to remove many serious defects with which the earlier arbitration law suffered and at the same time, has also incorporated many modern concepts of arbitration and conciliation which are universally accepted by most countries of the world. Undoubtedly, the 1996 Act is a bold initiative which promises to usher an efficient and effective Alternative Dispute Resolution (ADR) method by promoting arbitration and conciliation methods for resolving civil and commercial disputes and for avoiding litigation in courts. The working of this Act during the span of 11 years has been found to be beneficial for consumers including the business community who are the primary groups falling in the category of ‘users’ or ‘beneficiaries’ of the 1996 Act. The main objectives of the Arbitration and Conciliation Act, 1996 may be summarized as follows: to cover within its fold international commercial arbitration and conciliation also domestic arbitration and conciliation; to make provision for an efficient and effective procedure to meet the requirements and needs of specific arbitration; to ensure that arbitral tribunal functions within the framework of the Act.; to minimize supervisory role of courts in the arbitral process and thus ensure minimal judicial intervention; to encourage amicable settlement of disputes between parties using arbitration as an alternative disputes resolution mechanism; to ensure making of an award on settled terms of the parties; to provide that every final award is enforced in the same manner as if it were a decree of the court and thus eliminate the necessity of approaching a law court to make the award a decree of the court; Last but not the least, to provide conditions and procedure for the purpose of enforcement of foreign awards under New York and Geneva Convention. 46

The researcher finds out that informal dispute resolution has a long tradition in many of the world societies dating back to 12th century in China, England and America. . In the

46. Supra n. 2 p.11
Far East countries—specially in China, Australia and Japan conciliation has been a preferred method for resolving disputes. The United States has seen rapid evolution and growth of various ADR procedures. In the developing world, a number of countries are engaging in the ADR experiment, including Argentina, Bangladesh, Bolivia, Colombia, Ecuador, the Philippines, South Africa, Sri Lanka, Ukraine, and Uruguay. The General Assembly, by its resolution 40/72 of 11th December, 1985, recommended that “All states give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of law of arbitral procedures and the specific needs of international commercial practice”. A number of countries including Australia, Bahrain, Bermuda, Bulgaria, Canada (by the Federal Parliament and by the Legislatures of all Provinces and Territories), Cyprus, Egypt, Finland, Hong Kong, Hungary, Mexico, Nigeria, Peru, the Russian Federation, Scotland, Singapore, Tunisia, Sri Lanka and, within the United States of America, California, Connecticut, Oregon and Texas have enacted law to give legal force to the Model Law within their jurisdictions.

Arbitration as an institution for settlement of disputes has been known and practised in all civilised societies from time immemorial. Of all mankind's adventures in search of peace and justice, arbitration is among the earliest. Long before law was established or courts were organised, or judges had formulated principles of law, man had resorted to arbitration for resolving disputes. The practice of parties to a dispute referring their disputes to a person of their choice and accepting them as binding was known to ancient and medieval India. With the advent of the British rule and the introduction of their legal system into India starting from the Bengal Regulation of 1772, the traditional system of dispute resolution methods in India gradually declined. Traces of the ancient system can, however, still be found in the institutions of Panchas and Panchayats practiced in many village communities and tribal areas in India. Even in day-to-day affairs, in rest categories of disputes, ADR procedures of sorts are invoked without sometimes without conscious thought, e.g., disputes within the family, between friends, between neighbours; disputes involving employers and employees etc.

The institution of the hierarchical court system, the introduction of elaborate codes of procedure, the pre-eminence given to statute law vis-a-vis customary law, the emergence of the professional lawyer and the doctrine of precedents introduced during the British rule, all contributed to the gradual disappearance of the system of arbitration and other similar institution which prevailed in India till then. It was only after Independence and after realization that the formal legal system will not be in a position to bear the entire burden, it is felt that the system requires drastic changes. The mounting arrears in the courts, inordinate delays in the administration of justice, and expenses of litigation have gradually undermined the importance of the system. Today, therefore, the issue is to examine and choose a right formal legal system, such as the Alternative Dispute Resolution procedures and to organize the same on more scientific lines. The proposed amendments to the Act would help in efficient working of the Act in future. What is new is the fashioning of these time-tested tools to serve the complex needs of contemporary society.

49. Supra n. 5.
50. A.C.C. Unni- “The New law of Arbitration and conciliation in India.” Supra n.4 p. 68. He has been Additional Secretary in Ministry of Law, justice and Company Affairs and Member Governing Council of the International Centre for Alternative Dispute Resolution.