CHAPTER 8

CONCLUSIONS AND SUGGESTIONS
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A. GENERAL

"Discourage litigation. Persuade your neighbours to compromise wherever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

-Abraham Lincon

These words of Abraham Lincon echo in my ears when I think of alternate dispute resolution system. Litigation in courts, whether in India, the United States or most any other country, has become so time consuming, so expensive and so stressful that some other way to resolve disputes among people had to be found. Arbitration, conciliation and other ADR forms offer an alternative to the traditional court system. The advocates of Alternative Dispute Resolution (ADR) movement are in search of alternatives that would advance the understandings of justice which are radically different from the justice as lawyers administer. They assume that justice is not something people get from the government but that it is something people give to one another. To meet the challenges of delays and formalities we have to find either alternative less formal court system or alternatives to the court system itself. This Chapter deals with conclusions and suggestions arrived at as a result of discussions in the previous chapters. In conclusions, an appraisal of whole study is given. It is earnestly hoped that the conclusions drawn and the suggestions presented on the basis of the critical study in this discourse will be a real contribution to the field.

B. CONCLUSIONS

Resolution of disputes is an essential element of social peace and harmony. 1 Disputes must be resolved at minimum possible cost both in terms of money and time, so that more time and more resources are spared for constructive pursuits. Any given legal system of any country by which people get their disputes resolved should have two basic features. The legal system must be equally accessible to all. The legal system must lead to results that are individually and socially just.

1. See Supra Chapter 1.
In India what we have adopted is a legal system designed on British pattern. And, this legal system is unable to provide equal access as well as just results. In its 14th report, Law Commission of India recommended devising of ways and means to ensure that justice should be simple, speedy, cheap, effective and substantial. In its 77th report Law Commission of India observed that the Indian society is primarily an agrarian society and is not sophisticated enough to understand the technical and cumbersome procedures followed by the Courts. 2

The attention paid to the phenomenon of ADR has raised a number of issues. The first thorny issue is to define the term ADR. 3 It can safely be said that ADR is a collection of mechanisms or strategies for resolving a dispute outside the usual processes of litigation. ADR is a collection of mechanisms or strategies for resolving a dispute outside the usual processes of litigation. Alternative Dispute Resolution (ADR) techniques are extra-judicial in character. Techniques of ADR are an effort to design workable and fair alternative to our traditional judicial system. In simple words “Whatever one can do to stay out of court to settle his dispute is an ADR”. Nomenclature in the dispute resolution world has gone through many transitions. There are various meanings of the term ADR for instance: (i) ADR – “Alternative” Dispute Resolution (ii) ADR – “Additional” Dispute Resolution (iii) ADR – “Appropriate” Dispute Resolution (iv) ADR – “Assisted” Dispute Resolution. ADM (v) “Amicable” Dispute Resolution (vi) “A......... Dispute Management” As the dispute resolution movement has matured through conflict, institutionalisation, diversity, practice and theory development. (vii) ADM – “A.........Decision-Making” A further helpful linguistic alternative has focused on the letters “DM” to stand for ”decision-making”. Again “ADM” can be “assisted’ decision making.

The second major issue relates to objectives of ADR Movement in India. 4 The primary object of ADR movement is avoidance of vexation, expense and delay and promotion of this ideal of ‘access to justice’ for all. In other words, the ADR system seeks to provide cheap, simple, quick and accessible justice.

The main objects of this alternative movement are: to relieve the court congestion as well as undue cost and delay; to enhance the community involvement in the dispute resolution

2. Id. nn. 1-6.
3. Id. nn. 7-15.
4. Id. nn. 16-22.
process; to facilitate access to justice; and to provide more effective dispute resolution, to reflect seriously on the negotiation process in order to increase mediation and settlement conference confidence and effectiveness; to learn the language of negotiation, mediation and settlement conferences so that all these process can be placed on a practical, concept that frame work; to understand the latest empirical studies in business communication, pyschology and law and their application to negotiation mediation and settlement conferences; to develop more effective personal negotiations, mediations and settlements conference dynamics through practical exercise and case studies; to identify strategies in dispute resolution and apply them to actual cases.

Third issue is concerned with necessity of ADR. Litigation in courts, whether in India, the United States or most any other country, has become so time consuming, so expensive and so stressful that some other way to resolve disputes among people had to be found. However, it is imperative that the system of ADR overcomes the litigative impediments through the permissible means, ensuring that the pillars of justice do not crumble in the name of an efficient alternative system. ADR's time has come- even overdue some would argue. The researcher is of the view that the whole concept of ADR has evolved just due to the fact that traditional legal system in the world have failed to deliver the cheap, simple and speedy justice. ADR system emanates from dissatisfaction of many people with the way in which dispute are traditionally resolved resulting in criticism of the courts, the legal profession and some times lead to a sense of alienation from the whole legal system.

ADR is now gaining popularity in India. It has been observed that ADR is able to produce better outcomes than the traditional courts because of the following reasons: Firstly, different kinds of disputes may require different kinds of approaches which may perhaps be not available in, the courts. Second factor for resorting ADR techniques to resolve the disputes is direct involvement and intensive participation by the parties in the negotiations to arrive at a settlement. The best advantage of accepting ADR is the intervention of a skilled neutral Adviser which is always very helpful in arriving at a settlement. The principles of natural justice, equity and reasonableness always favour the ADR proceedings and conclusion arrived at.

5. Id. nn. 23-28.
Another advantage is problem-solving attitude and openness to compromise. ADR is today being increasingly acknowledged in the field of law as well as in the commercial sector. When there are disputes arising across national frontiers in such cases it becomes very painful for business associations to achieve any satisfactory justice.6

Fourth issue relates to forms and extent of ADR.7 The present researcher has divided the various forms of ADR into three categories for convenience; namely Indigenous Techniques, Modern Techniques and Hybrid Techniques. There are various private dispute resolution methods (indigenous techniques) which the communities have developed themselves. Such indigenous techniques may be negotiations, violent self help, avoidance, coercion or enlistment of public opinion or apology and Nyaya Panchayats.

Self help does not take the disputant to any third party or official or non-official forum. Whenever a person finds that the crops were wrongly planted in his field, or a wall was wrongly constructed on his land, he pulls down the wall or pulls up the crops and kills the animal that were caught destroying his crops? However, if there is a real dispute regarding the ownership of land, it cannot be solved by violent self help. But it is submitted that violent self help if allowed legally, would disturb the peace.

In Avoidance, disputants avoid each other and stop speaking with each other. This avoids further chances of disputes. 'Avoidance' serves two purposes. It induces the peace-loving people to come to terms, and also avoids the escalation of dispute.

Withchcraft as method of dispute settlement is prevalent in Zinacantan. In India also, people in backward communities resort to 'jadu tone' and believe that the adversary will be avenged by the gods. It is submitted that such people need legal literacy and awareness of their rights, and the avenues for the enforcement of their rights.

Enlistment of Public Opinion is another indigenous method of settling disputes. The aggrieved party talks through well defined channels so that the members of the community understand his problem and develop sympathy for him. The other party also talks to the people and tries to enlist public opinion for himself. In this process a general consensus in the community emerges to which the consent of the parties is irrelevant e.g. chaupal or temples or community panchayats.

6. Id, nn. 29-32.
7. Id, n. 33.
In Fiji, it is over Kava, a traditional community drink.

In Appeal to Community Authorities, the disputants in villages sometimes submit themselves to the authority of the community elders and accept their decision to re-establish their smooth relationship. This method should be encouraged.

A system of Ritual Apology is prevalent in Fiji. Fijians resort to ritual apology i.e. 'i soro' to avoid punishments in both the cases in which the offence was intentional as well as in cases in which offence was unintentional. Though the 'i soro' can be refused but the other party readily accepts the 'i soro' because non acceptance of 'i soro' infuriates the person ready to apologise and there is possibility of retaliation. The ritual apology re-establishes normal relationships between the disputants and that is the end of conflict. In India, in many states like U.P., Rajasthan, Bihar, Delhi and Kerala etc. the Nyaya Panchayats were there.

The various Modern ADR techniques now well recognised are Negotiation, Arbitration, Mediation and Conciliation.

Negotiation is a non-binding procedure involving direct interaction of the disputing parties wherein a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each other's position.

Mediation/Conciliation is a non-binding procedure in which a neutral third party assists the disputing parties in mutually reaching an agreed settlement of the dispute. Mediation and conciliation are inter-changeable expressions. In both the procedures a successful completion of the proceedings results in a mutually agreed settlement of dispute between the parties though, in some jurisdictions, mediation is treated as distinct from conciliation inasmuch as in mediation the emphasis is on more positive role of the neutral third party than in conciliation.

Arbitration is a binding procedure where the dispute is submitted for adjudication by arbitral tribunal consisting of a sole or an odd number of arbitrators, which gives its decisions in the form of an award that finally settles the dispute and is binding on parties.

Now let us talk about Hybrid Techniques. Each of the primary processes (litigation, arbitration or mediation) can be used in its own right without adaptation. In addition, by drawing elements from the primary processes and 'tailoring' them, an ADR practitioner can devise a permutation of procedures and approaches (hybrid processes) which fit all the nuances of the, parties' needs and circumstances without being constrained by prescribed rules.

Mediation Arbitration (Med-Arb) is a procedure where the parties agree to settle their
dispute first by attempting; the conciliation within a specified time, failing which by arbitration. Variations of hybrid Med-Arb are Shadow Mediation, Mediation Final Offer Selection, Concilio-Arbitration.

Mini-Trial is a non-binding procedure where the disputing parties present their respective cases before their senior executives who are competent to take decisions and why are assisted by a neutral third party.

Neutral Listener Agreement under which the parties to dispute discuss their respective best settlement offer in confidence with the Neutral third party who, after his own evaluation, suggests settlements to assist the parties to attempt a negotiated settlement.

Rent A Judge is another procedure where the disputing parties mutually approach the court to appoint a referee, usually a retired judge, before whom they present their case in an informal proceedings. The referee judge gives his decision which is enforceable by the court. The fee of the referee is paid by the parties.

MEDOLA, on the other hand, is a binding procedure where if the parties fail to reach agreement through mediation, a neutral person, who may be the original mediator or an arbitrator, will select between the final negotiated offers of parties, such selection being binding on the parties. Michigan Mediation is another court-related ADR procedure evolved in the pre-trial mediation insisted upon by courts.

Final Offer Arbitration is yet another variety evolved in the USA where each party submits its monetary claim before a panel who render their decision by awarding one and meting the other claim.

In the Court-Annexed Arbitration in the United States, Australia and England, a civil court can order a case to be decided by way of arbitration by a third party whose finding is initially non-binding. Either party may require a pre-hearing by a judge, but if neither does so the award becomes a binding court order. If in the pre-hearing, the judge does not give a better award to the person who applied for pre-hearing, then there may be sanctions applied to that party. This system is called "court-annexed arbitration".

In the State of Texas, Court Attached ADR is recognized. The courts are empowered to order the parties in dispute to undertake non-binding ADR procedures, such as arbitration, mediation, settlement conferences, settlement weeks, mini trial, summary jury trials, and early neutral evaluations.

In the United States, the practice of having a Judicial settlement conference in every civil litigation has become a routine. The judge encourages the lawyers and the parties to meet either in his own chamber in his presence or they can meet outside the court.
to arrive at a settlement. It has been observed that in majority of the cases settlements are reached between the parties in dispute and the court may grant a decree in terms the settlement or the case may be taken as withdrawn and the parties may act on the terms agreed to by them.

In Settlement Weeks, the cases are mediated by the judge before whom the case is pending and the volunteer lawyers.

In 1985, the United States District Court for the Northern District of California enunciated a system of referring the cases for early neutral evaluation to a third-party lawyer. The role of the evaluator is not confined to the strength and weaknesses of the case but also to consider how he can propose to conduct the litigation rapidly and economically. The early neutral evaluation system has been found to be working satisfactorily and it is widely viewed as being fair and valuable.

In USA and some parts of Europe and Asia, judges act as conciliators. The judges while presiding over courts themselves conciliate to resolve the dispute pending before them as a civil suit.

The main feature of the Multi Door Court House is the initial procedure; intake screening and referral. In this technique, disputes are analyzed through various criteria to determine what mechanism or sequence of mechanisms shall be best suited for the resolution of the problem.

Pre-Trial conference is a form of judicial mediation between the litigating parties. The purpose of pre-trial is three fold: - To indicate to the parties what the likely outcome of a trial would be; to narrow and define issues to stream-line the trial; and to encourage evidentiary disclosure and discovery. “Combining as they do benefit of facilitating settlement without the disadvantage of depriving the parties of their right to a hearing, pre-trials are a welcome station enroute to a fair trial.”

Self-Government Courts are established by a formal decision of work-organisation (by a self management act), by a local community of interest, or any group of private citizens, or by an agreement of several organisations or institutions. For specific types of disputes such courts may also be founded by a government decree or law. The founding act of the court also regulates its jurisdiction.

Lok Adalat is another alternative to the judicial justice. This is a recent strategy for delivering informal, cheap and expeditious justice to the common man. The main objective of Lok Adalat is to settle the disputes which are pending in the courts and also those which have not yet reached the courts, by negotiation, conciliation and by adopting
persuasive, common sense and humane approach to the problems of the disputants, with the assistance of specially trained and experienced members of a team of conciliators.

Village Courts (Gram Nyayalayas) are units of self-government. They are like village panchayats. The Gram Nyayalaya Bill 2005 to establish one or more Gram Nyayalaya at panchayat level consisting of Nyayadhikari.

Mediation Centers were started in the year 1983, in Tamil Nadu, in rural areas under the Tamil Nadu Legal Aid and Advice Boards. Their objectives are to promote settlement of disputes before they are taken to the regular courts. They are established where there are no courts. They are run, through a mediator-lawyer.

To give a special status to women and their exclusive problems, Tamil Nadu State gave thrust and expansion to women's mediation centers by starting such elusively for women. Their role is to deal with matrimonial problems. They also help in settling disputes involving women.

SLSC is another form. If as a rule the civil cases or petty criminal cases are referred to Students Legal Aid clinic for pretrial conferences and conciliation, most of the cases will not go to the court and the load on the courts will be considerably reduced.

Another strategy for reaching the poor and delivery of justice on the spot evolved recently by the social service minded executive in Chindwara District of M.P. is Mobile Court. The Mobile courts, though mainly revenue courts, also entertain complaints against sarpanch, patwaris or other authorities and other incidents of injustice against daughters by father, against tribals by rich zamindars etc. are enquired into on the spot and settled forthwith. Other small problems e.g. application for use of canal water, loans from govt. are also decided on the spot. Those cases which require civil or criminal procedure, or are already pending in the court are not accepted.

The Himachal High Court has started another experiment by setting up conciliation court in Shimla in September, 84, which resolved about 500 disputes amicably within one year. The Senior sub-judge cum chief judicial magistrate was designated as the "Conciliation Court". The procedure of conciliation court in fact makes him duty bound to bring out reconciliation. He aids and assists the parties to resolve the dispute and ensures a speedy, just fair and lasting solution.

The above list is by no means exhaustive or final. New techniques are being evolved to suit the nature of dispute or convenience of the parties. One can say that ADR has now become a successful and legitimate professional tool by which the lawyers and the
advisers can extend the services they offer to their clients. In India, varied ADR mechanisms exist for resolving disputes outside the courts. The choice of the ADR method largely depends on the nature of the dispute and relation of the parties. The general ADR methods of resolving disputes are arbitration, conciliation, mediation, negotiation, consumer forums etc. Thus, there are sufficient ADR mechanisms in India and the only requirement is their application in true letter and spirit. Arbitration is the most commonly used method in India for resolving and adjudicating various disputes. ADR is by no means a recent phenomenon. The concept of parties settling their disputes by reference to a person or persons of their choice or private tribunal was known in ancient India. 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. 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. In Mughal period, 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. There were Nyaya Panchayats at grass-roots level before the advent of the British system of justice. 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.

8. See Supra Chapter 2.
9. Id. nn. 2-11.
10. Id. nn. 12-24.
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, that an attempt should be made to constitute and develop village panchayats for the administration of local village affairs. 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.

However, the law of arbitration as is known to modern India owes its elaboration, in phases, to the British rule of India. 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. There were also Regulation of 1787 and Bengal Regulation 1793. 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.

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. 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. Exception 1 to Section 28 of the Contract Act, 1872 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. 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.

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.

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.

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 Malimath Committee and also the Law Commission had recommended changes in 1940 Act. The PAC (Public Accounts Committee) of the Lok Sabha had also commented adversely on the working of the Arbitration Act.

11. Id. nn. 25-30.
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.

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.  

The enactment of 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 researcher found 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.

12. Id., nn. 31-39.
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 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. 13

Our judiciary has come under great stress and is crumbling under its own weight. 14 In this country where most people opt for litigation to resolve disputes, there is excessive over-burdening of courts and a large number of pending cases, which has ultimately lead to dissatisfaction among people regarding the judicial system and its ability to dispense justice. This opinion is generated largely on the basis of the popular belief, "Justice delayed is justice denied". In the words of Professor Henry Sidgwick: "In determining a nation's rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration." Lord Bryce writes: "There is no better test of the excellence of a government than the efficiency of its judicial system." The most essential functions of a State are war and administration of justice. If a State is not capable of performing either or both of these functions, it cannot be called a State. 15

We have inherited the present system of our courts and their procedure from the British which has been tried for more than 150 years. It has however, to be admitted that old is not always gold.

13. Id. nn. 40-45.
15. Id. nn. 1-6.
Our courts are on trial, our judges are under challenge, our justice system itself is so arcane and obscurantist that alienates it from the people—I mean the common people.  

The persons from every quarter are amply feeling the need for ADR. The Apex Court in *Guru Nanak Foundation Case* 17 reverberated in its judgment in *Trustees of the Port of Madras Case* 18 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 movement towards ADR was endorsed a resolution at a meeting of Chief Ministers and Chief Justices held on Dec.4, 1993. The researcher thinks that it is absolutely imperative to find out effective alternate methods of disputes resolution without further loss of time for maintaining efficacy and credibility of our judicial system.

Shall we not introspect sincerely as to why faith in judicial system has started shaking? Why confidence of litigant who is heart of the system is in trouble? Why does this judicial cardiogram show, unhealthy signs, and symptoms? The present adjudicatory system is the legacy of Anglo-Saxon jurisprudence. There are inherent shortcomings in this system. 19 The major reason responsible for giving impetus to movement of ADR in India is tremendous explosion of dockets. The problem is truly complex. It is enormous in nature. There was pendency of over two crore case in District Courts in the year 2000. 20 The figures would show that Institution of civil cases in High Courts was 10,82,492 and disposal was 9,34,987 in the year 2005, institution of criminal cases being 4,60,398 and disposal being 4,03,258 during that period. Institution of civil cases in subordinate courts was 40,69,073 and disposal was 38,66,926 in the year 2005, institution of criminal cases being 1,31,94,289 and disposal being 1,24,42,981 during that period. Thus, annual institution in the High Courts as well as in the subordinate courts exceeds disposal in civil as well as criminal cases.

16. Id. nn. 7-14.
19. See *Supra* Chapter 3 nn. 15-18.
20. Id. nn. 19-20.
The figures would also show that the disposal of civil and criminal cases in the High Court rose from 980474 in the year 1999 to 1338245 in the year 2005, the cumulative increase in six years being 36%. However, the institution increased at a faster speed from 1122430 to 1542890 in the year 2005, the cumulative increase being 37%. Consequently the pendency increased from 2757806 at the end of 1999 to 3521283 at the end of the year 2005.

Analysis of the figures would show that in Subordinate Courts the disposal of civil and criminal cases increased from 12394760 in the year 1999 to 16309907 in the year 2005, the cumulative increase being 32% but, again the institution increased more rapidly, from 12731275 in the year 1999 to 17263362 in the year 2005 and cumulative increase being 36%. As a result the pendency which stood at 20498400 cases at the end of year 1999 rose to 25654251 at the end of 2005.

In the first quarter of the current year, the High Courts disposed of 350481 cases. However, the institution during this period being 392292, the pendency at the end of March, 2006 rose to 3560614 as against 3521283 at the end of December, 2005. Subordinate Courts other than the Courts in Bihar disposed of 3664680 cases between 1-01-2006 to 31-01-2006. Institution during this period being 3730240, there was increase of 65560 cases in the pendency of Subordinate Courts, in the last quarter.

As many as 531477 more than ten years old cases were pending in the High Courts alone as on 31st December, 2005. The pendency of such cases in Subordinate Courts is bound to be many times more. It is true that the pendency of cases is always highlighted whereas the increase in institution on account of a number of factors and the increase in disposal despite the constraints faced by the system, is not always appreciated, but still we cannot deny the responsibility of the system and its functionaries to deliver an efficient and economical justice to our people. Justice V.D. Tulzapurkar of the Supreme Court has observed: “If an independent judiciary is regarded as the heart of a republic, then the Indian republic is at present suffering from serious heart ailment.” Former Chief Justice P N Bhagwati in his Law Day speech in 1985 said: “I am pained to observe that the judicial system in the country is almost on the verge of collapse. Our judicial system is crashing under the weight of arrears.”

On 20.11.2004 a Conference on ADR was organized by High Court of Bombay and International Centre for Alternative Dispute Resolution (ICADR), at Yashwantrao Chavan Pratishthan. In that conference, Shri R.C.Lahoti, the Chief Justice of India delivered inaugural address in which His Lordship gave some dry statistics to give an idea of the task being performed by the Indian judiciary. The statistics given by the Honourable the Chief justices show that as on 1.1.1999 the total pendency of civil and criminal matters in Supreme Court was 20,358; in High Courts 24,5195; and in subordinate courts all over India was 2,03,96,275.

The ratio of Judges to population is undoubtedly very low as compared to the ratio in developed countries. The present sanctioned strength of High Court Judges is 726 and the actual strength 588 leaving 138 vacancies. The sanctioned strength of subordinate judges was 14582 and the working strength 11723 on 30th April, 2006, leaving vacancy of 2860 Judicial Officers.

The average disposal per judge comes to 2455 cases in the High Courts and 1430 cases in the subordinate courts, if calculated on the basis of disposal in the year 2005 and working strength of judges as on 31st December, 2005. Applying this average, we require 1434 High Court judges and 18376 subordinate judges only to clear the backlog as on 31st December, 2005 in one year. The requirement would come down to 717 High Court judges and 9188 subordinate judges, if the arrears alone have to be cleared in the next two years. The existing strength being inadequate even to dispose of the annual institution, the backlog cannot be wiped out without additional strength, particularly when the institution is likely to increase and not come down in coming years.

We have 12-13 Judges per million of the population as compared to 40-100 in developed country. As a result, the justice dispensing system has come under great stress. Honourable Mr Justice S.P.Bharucha of the Supreme Court of India (as His Lordship then was) had stated while inaugurating the First National Conference of "The Society of Indian Law Firms" held in Mumbai on 7.7.2001 "The ratio of judges to population in India is very low indeed, not only in comparison to the developed countries, but also in comparison to some third world nations." Supreme Court in Sheela Barse Case urged upon the State Governments to appoint more session judges and Additional session judges because delay is mostly due to shortage of staff.

22. Id. n. 22.
Instead of Adversary System the need is of Inquisitorial System. It is desirable that to deliver real justice the judge should go beyond witnesses and records and try to find the truth through independent machinery because the tutored witnesses and manipulated record can mislead the judge. Under the German Legal System, which is of inquisitorial nature, the judge does not limit himself to the consideration of the material put forward by the parties. He can appoint an independent expert to find the truth for him. "To put it concisely, the court may look for the truth beyond the confines of the evidence offered by the parties." Though it will need suitable amendment in Evidence Act to change over to inquisitorial method, yet it is an experiment worth making.

The law's delay is classic and universal. It has served to describe the almost immemorial condition of civil suits. Courts in India have become courts of giving dates. In High Court a case usually takes 7 to 8 years. In Supreme Court the time of disposal is more. Many times delay in civil justice is caused at the stage of service of summons. Another harassment to the poor litigant is the frequent adjournments in the Court. Another reason for delay and injustice is lengthy oral arguments. We have a very liberal system of Appeals. One can go from lower courts up to High Court and Supreme Court.

The core values of justice and judges are eternal and have been handed down as a rich heritage from the past to the present. However, today, we are living in the age of computers. Old methodologies are outdated and need a re-look with innovation. Records of the courts have to be computerized. Facilities for e-filing and hearing through video-conferencing need to be introduced. The judges need to be trained and updated achieving and maintaining professional excellence. New trends in litigation, such as those related to intellectual property rights, cyber crimes, environment, money-laundering, repetition, telecom, taxation, international arbitration are coming up which need expertise. Old and outdated court buildings should be changed by a time-bound programme.

Litigation expenses and inordinate delays in deciding cases have become characteristic of our legal system. Any litigation is a costly affair involving court fees, expenses for preparing a case, expenses in the courts, additional miscellaneous expenses, lawyers' fees - all these have to be incurred by the litigants.

25. Id. n. 28.
26. Id. nn. 29-36.
27. Id. n. 37.
28. Id. nn. 38-39.
The costs to the litigants are high in our system and some of the reasons are: The nature of our procedure, the division in the legal profession between Senior and Junior Advocates. This results in a case involving at least two sets of fees. There is also under the present system multiplicity and high cost of appeals.

Broadly speaking, the constituents of the judicial mechanism can be explained better in terms of its Anatomical Atlas. In this context, it is, therefore, said that the Head of this anatomy is a judge. Heart of the anatomy is the litigant; the hands of the body are the Lawyers. Investigating and prosecuting agencies and staff are the legs of this body. No doubt, in that, there should not be any attempt to underestimate or overestimate one or the other. The most neglected is Heart i.e. litigant, very vital part of judicial anatomy. Really speaking, the litigant has a very strong role to be the weakest part of the anatomy. He has to pass through long procedural and legal conduit pipes. How many of them even after undergoing such exercise could see successfully the light at the end of the tunnel?

Another pitfall is procedural clap-traps that too full of complex formalities. The judges, lawyers and the litigants have now vested interest in this procedure. The proceedings in the court are often in the language which the poor and the disadvantaged litigant does not understand and thus does not know what is happening to his case. His ignorance, illiteracy and poverty and the complex, awesome dilatory and harassing procedures confuse and frighten the common man. The language that today is date of DW or PW or 313 statements or 8/51 case or case of 38 NI confuses. Once the judicial process is engaged, it seems to the disputants that the dispute as been taken out of their hands.

Moreover a decision through adversary litigation is not always 'just', because it is based on the evidence which can be concocted, the witnesses can be tutored and the facts distorted. It is a contest of skills between lawyers, two 'hired guns' and so the result is not always satisfactory and just. Under adversary system, search for truth is often overlooked, and whole attention is devoted to winning to case by hook or crook, and the decision instead of satisfying the parties generates animosity between them. Our judicial system also discriminates against the poor. The poor generally loses in litigation because he cannot engage a good lawyer; he cannot be released on bail.

29. Id., n. 40.
30. Id., nn. 41-42.
because due to poverty he cannot give pecuniary guarantees; he is discriminated in sentencing because he has to undergo jail due to his inability to pay fine; whereas the rich person can purchase his liberty. Experience has shown that whenever the dispensation of Justice is quick, the inflow of frivolous litigation gets arrested because the expense involved in frivolous litigation is not productive. On the contrary, delay promotes frivolous litigation and it is quite often used as a means of harassment of the opposite party to compel him to succumb to some unreasonable and unjust. The net result of all this is the erosion of the people's faith in the judicial system and subversion of the "Rule of Law".  

We are being governed by outdated laws. Independent India has seen a plethora of reports on how to reform legal position in India. Legal luminaries such as Justice S.R. Gas, Justice J.C. Shah, Justice Satish Chandra and even more recently, Justice Malimath, who submitted two reports including one on the criminal justice delivery system headed some of the more important committees on judicial reforms. In addition to their reports, there are almost 200 reports submitted by the Law Commission, established in 1955, and usually chaired by a former Judge of our Supreme Court. These reports have dwelt on various aspects of law, both substantive and procedural; but the fact remains that unless reforms are implemented at the grassroots level, the common man may have access to justice, but in real terms it will be delayed justice, effectively leading to its denial.

It was due to these disadvantages that Salmond said that "law is without a doubt a remedy for greater evil, yet it brings with it evils of its own". Due to the reasons discussed above the law and courts failed to answer as Holmes says "the felt necessities of time". The above reasons cited, in the view of present researcher paved the way for present movement of ADR in India.

ADR is not just finding a solution for the dispute at hand. It is much more. It is dispute resolution plus reconciliation. Such a resolution is aimed at avoiding future conflicts. The advantages of ADR are several. First, it can be used at anytime, even when a case is pending before a court of law, though recourse to ADR as soon as the dispute arises may confer maximum advantages on the parties; it can be used to reduce the number of contentious issues between the parties; and, it (except in the case of binding arbitration) can be terminated at any stage by any one of the parties. Second, it can provide a better solution to disputes more expeditiously at less cost than litigation.

32. Id., nn. 49-52.
It helps in keeping the dispute a private and promotes creative and realistic business solutions, since the parties are in the control of ADR proceedings. ADR procedures take only a day or a few days to reach at a settlement. Third, ADR programmes are flexible and not afflicted with rules of procedure. Fourth, the freedom of the parties to litigation is not affected by ADR proceedings. Even a failed ADR proceeding is never a waste either in terms of money or time spent on it, since it helps the parties to appreciate each other's cause better. Fifth, ADR can be used with or without a lawyer. A lawyer, however, plays a very useful role in identification of the contentious issues, exposition of the strong and weak points in a case, rendering advice during negotiations and overall presentation of his client's case. Sixth, ADR procedures help in the reduction of the workload of courts and thereby help them to focus attention on the cases which ought to be decided by courts. Seventh, ADR procedures permit parties to choose neutrals who are specialists in the subject matter of dispute. Eighth, there is choice of tailoring of processes. Ninth, permanent and holistic resolution of the dispute in a spirit of 'Give and Take'. Permanent resolution means - no appeal; revision, review or execution. It has potential for effective problem solving with wide range of remedies. Tenth, there is increased party involvement.

No phenomena is problem free, it is about just choosing the less problematic option. Disadvantages of ADR are not many but they require attention. Firstly, ADR may not be appropriate for every dispute like constitutional law and criminal law in respect of which there is no substitute for court decisions. Secondly, even if ADR is appropriate for a dispute it can't be invoked unless both the parties to a dispute are genuinely interested in a settlement. Thirdly, some ADR procedures are new for Indian masses hence a proper familiarity procedure is required. Fourthly, ADR procedures are mostly informal and, thereby lead to unequal bargaining power between the parties. Fifthly, ADR mechanisms call for much greater co-operation at every step. 33

In India, provisions for promotion of ADR are given in different legislations that too here and there. 34 The soul of good Government is justice to people. Our Constitution, therefore, highlights triple aspects of Economic Justice, Political Justice and Social Justice. Legal Justice is a part of social justice. As whenever the legal justice is denied the society gets disturbed. A legal system is part of state which maintains social harmony through dispute resolution.

33. Id. n. 53.
34. See Supra Chapter 4.
In a country, which aims to protect the socio-economic and cultural rights of citizens, it is extremely important to quickly dispose the cases in India, as the Courts alone cannot handle the huge backlog of cases. This can be effectively achieved by applying the mechanisms of Alternative Dispute Resolution. The right to speedy trial under Article 21 has been interpreted to be a part of the right to life and personal liberty. Article 39A obligates the State to secure that "the operation of the legal system which promotes justice." Thus promotion of justice is most important function of a state and ADR mechanisms helps in it. Hence much legislation like Arbitration and Conciliation Act 1996; Section 89 CPC; Legal Services Authority Act 1987 have been passed to promote justice.

There are provisions in the Code of Civil Procedure, 1908 which ensures settlement of disputes outside the courts. Order X Rule 1A says after recording the admissions and denials, the Court shall direct the parties to the suit to opt ether mode of the settlement outside the Court as specified in sub-section (1) of section 89. Rule 1B provides where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit. Rule 1C says where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.

In Part V (Special Proceedings) Section 89 provides for Settlement of disputes outside the Court. It says where it appears to the Court that there exist settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of settlement and refer the same for- (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through lok Adalat; or (d) mediation. The Family Courts Act (Act No. 66 of 1984) is an Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

35. Id. nn. 2-6.
36. Id. n. 7.
37. Id. n. 8.
38. Id. nn. 9-11.
39. Id. nn. 12-16.
It is the bounded duty of the Family Court for making an attempt for conciliation before proceeding with trial of the case.

Hindu Marriage Act 1955 provides under Section 23(2) that before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. Reconciliation is ensured in Section 23(3), which imposes a duty on the court to effect a conciliation between parties. 40

The Industrial Dispute Act 1947, the main object of which is investigation and settlement of industrial disputes. With that object in view various authorities have been created by the Act. The adjudication of industrial disputes has at the first instance been kept out of the jurisdiction of the Municipal Courts so that efforts may be made for settlement of such disputes through some other agencies. The Works Committee, Conciliation Officer, Board of Conciliation and Courts of Inquiry endeavour to settle the difference before it may be adjudicated upon by the Labour Court or the Industrial Tribunal. They all aim at amicable settlement of the industrial dispute. 41

Arbitration and Conciliation Act, 1996 was passed on the basis of the UNCITRAL Model Law on International Commercial Arbitration 1985 and UNCITRAL Conciliation Rules 1980. The Arbitration and Conciliation Act 1996 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. The Arbitration and Conciliation Act 1996 contains IV Parts dealt in 86 sections. Part I discusses arbitration comprehensively in X Chapters (Sections 1-43). Enforcement of Foreign Awards is covered under Part II in which Chapter I entails awards made under New York Convention (Sections 44-52) and Chapter II deals with Geneva Convention Awards (Sections 53-60). Part III is about Conciliation and the same has been dealt in Sections 61-81. Part IV provides for Supplementary Provisions (Sections 82-86). 42

Sec. 28 of Indian Contract Act 1872 has amended by the Indian Contract (Amendment) Act 1997 states that an agreement absolutely restraining a party from enforcing his rights through a court of law, or an agreement which places a limit as to the time within which a right is void.

40. Id. nn. 17-28.
41. Id. nn. 29-47.
42. Id. nn. 48-49.
Exception 1 says this 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 nor shall this section render illegal any contract in writing, by which two or more persons agree to refer 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. 43

The Legal Services Authorities Act, 1987 is an Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize LokAdalats to ensure that the operation of the legal system-promotes justice on a basis of equal opportunity. The National Legal Services Authority constituted under the Legal Services Authorities Act, 1987, acts as the apex and nodal agency for laying down policies and principles for making legal services available under the Act. The ground level operations of 'Lok Adalats' are handled by State-level, district-level and taluka-level agencies constituted in the respective States. Lok Adalat settlement is binding like an order, decree, judgment or award of a 'court'. It is executable and not-appealable. It brings an end only in one forum or stage and finality is achieved. 44 The legislative sensitivity towards providing a speedy and efficacious justice in India is mainly reflected in two enactments. The first one is the Arbitration and Conciliation Act, 1996 and the second one is the incorporation of section 89 in the traditional Civil Procedure Code (CPC).

In the last two decades, ADR initiatives have mushroomed in developing and developed countries alike. 45 Internationally, the ADR movement has also taken off in both developed and developing countries.

ADR originated in the USA in 1970s in a drive to find alternatives to the traditional legal system. The ADR landscape in the United States is multifaceted and diverse. Use of arbitration in the United States pre-dates both the Declaration of Independence and the Constitution.

43. Id. nn. 50-66.
44. Id. nn. 67-70.
45. See Supra Chapter 5.
For example, arbitral tribunals were established as early as 1768 in New York and shortly thereafter in other cities primarily to settle disputes in the clothing, printing and merchant seaman industries. In 1920 New York passed the first state law in the United States that recognized voluntary agreements to arbitrate. The community dispute resolution movement spawned from the social activism of the 1960s and helped to propel the ADR movement generally. Since the enactment in 1990 of the Civil Justice Reform Act (CJRA), which calls for every federal district court to implement a civil justice expense and delay reduction plan, there has been tremendous growth in the creation of ADR program and the use of ADR by federal and state courts. Government agencies have increasingly been making ADR options available to parties with which they have disputes. As of January 1996, more than 1560 United States law firms had responded to heightened client expectations regarding ADR use.  

ADR has developed relatively quickly in the UK partly because of the problems presented in the recent past by the unwieldy and expensive process of UK litigation and lawyer dominated arbitration. The UK’s close relationship to the US legal system has also helped the common Anglo-Saxon legal base. London has a long and impressive 'flagship' pedigree of providing financial and legal services to the international business world. Legally the UK has a reputation for intellectual rigour, probity and fairness both in the courts and in arbitration services. The Confederation of British Industry, the Institute of Directors, the Department of Trade and Industry, and the City of London, all actively support CEDR and ADR together with many leading companies including conglomerates with overseas arms.  

ADR in Australia is growing. Australian Centre for Peace and Conflict Studies (ACPACS) provides various ADR Training Programs and Mediation Courses. The National Mediation Conference for 2006 was held in Hobart from 3 to 5 May, with a conference theme of "No mediator is an island: celebrating differences - learning from each other. There are may other organizations working for promotion of ADR like Alternative Dispute Resolution Association of Queensland, Victorian Association for Dispute Resolution, South Australian Dispute Resolution Association etc.  

Amicable settlement of disputes was the accepted concept in Ceylon (as Sri Lanka was then known) even as far back as during the reign of the Kings.

46. Id. nn. 4-11.
47. Id. n. 12.
48. Id. nn. 13-19.
There existed then a hierarchy of institutions at the base of which was the Gamsabhawa mandated to settle disputes amicably and thereby maintain peace and harmony at village level. Sri Lanka's experience in institutionalising alternative dispute resolution in respect of minor disputes with any degree of seriousness in later years was via the Conciliation Boards Act, in 1958 which provided for community level resolution of minor disputes at the pre-trial stage. Due to various deficiencies in the implementation of the provisions thereof, this Act was repealed in 1977. And in 1988, a new Act - the Mediation Boards Act, No.72 of 1988 - was introduced reiterating a belief in the concept of alternative dispute resolution in respect of minor disputes. A novel experiment in institutionalizing mediation at appellate stage is sought to be attempted by the Supreme Court of Sri Lanka. There is much enthusiasm with regard to the adoption of arbitration as alternative to court resolution of disputes. A new Arbitration Act, No.11 of 1995 has been enacted by Parliament and came into operation with effect from August 1st, 1995. There are certain provisions of the Indian Arbitration and Conciliation Act 1996 which can be compared with Sri Lankan Arbitration Act.49

The courts in Hong Kong have a very clear understanding of the arbitration process and have consistently supported the process. In addition the Chief Justice has assigned a particular high court judge to be allocated all cases relating to arbitration. Hong Kong is a unique regional centre in many areas of specialist expertise. Chartered Institute of Arbitrators (Hong Kong Branch) is very active in the education of arbitrators. The Institute has almost 1000 members in Hong Kong which over 140 have achieved the grade of Fellow. Since 1990 the pace of development of mediation in Hong Kong has been very encouraging. Consultation between the Hong Kong Government and the Hong kong Construction Association (A body representing building and civil engineering contractors in Hong Kong) has resulted in adoption of a flexible set of mediation rules. Hong Kong International Arbitration Centre (HKIAC) was established in 1985 to assist parties to resolve their disputes not only by arbitration but by other means of dispute resolution. Arbitration has been a means of resolving disputes for generations in the shipping industry. Over the last 20 years or so most construction disputes in Hong Kong which have not been resolved by negotiation, have been resolved by arbitration.

49. Id, n. 20.
For the Government contracts associated with the new airport development there is a three stage dispute resolution procedure. Administration of all three of these services is also entrusted to HKIAC. (a) The first step is mediation. (b) As a second stage the Government has introduced an interim adjudication procedure. (c) The third stage, arbitration will not be permitted under this form of contract until completion of the works. The Airport Authority has formed a standing dispute review board to monitor and adjudicate on any disputes which may occur during the construction of the new Hong Kong Airport at Chep Lap Kok. Another innovation in the use of ADR in Hong Kong has been introduces some major building contracts where a dispute resolution adviser has been pointed by agreement between the parties just prior to signing of the contract. After careful consideration it was decided to incorporate into the various documentation relating to the company and to the sale and purchase of its shares an arbitration agreement. Now Hong Kong ceases to be a British colony and becomes a special administrative region of China enjoying a high degree of autonomy. There is thus every reason to expect that Hong Kong will continue to be a major dispute resolution centre well beyond 1997.  

Alternative Dispute Resolution (ADR) is well established in New Zealand. There has been an Indigenous Arbitration Act since 1890 (prior to that date, the English legislation current from time to time applied). Current legislation comprises the Arbitration Act, 1908 and the Arbitration Amendment Act, 1938 (both as amended by subsequent Acts) in relation to domestic arbitrations and the Arbitration (International Investment Disputes) Act, 1979 and the Arbitration (Foreign Agreements and Awards) Act, 1982, giving effect to the Washington Convention of 1965 and the New York Convention of 1958 respectively, in relation to international arbitrations. In 1988 the New Zealand Law Commission published a preliminary paper on reform of the arbitration process. In that paper the Law Commission review Civil Justice Reform Act (CJRA), law relating to the different stages of arbitration, comparing the present New Zealand. The Government accepted the recommendation of the Law Commission within a short time of its publication; but it took over four years for the resulting Bill to be reduced into the House. There are over 50 statutes which provide for particular types of dispute to be determined by arbitration.

50. Id, n. 21.
Mediation, or its close relative conciliation, has had an important role in the resolution of industrial disputes since the passing of the Industrial Conciliation and Arbitration Act, 1894. From 1987 to 1991 the service was provided by the Mediation Service established under the Labour Relations Act, 1987. Under the Employment Contracts Act, 1991 the former system of national collective agreements or awards was replaced by a system under which it is open to employers and employees to elect to enter into either individual employment contracts or collective employment contracts. The Mediation Service has been abolished. In its place there has been established an Employment Tribunal. Although this Tribunal's functions are, broadly speaking, the same as those of the former Mediation Service, the parties to employment contracts are not restricted to using the members of the Tribunal as they were previously restricted to using the members of the Mediation Service. The Act provides for the parties to agree on an alternative dispute resolution procedure not involving the use of the Tribunals.

There has been a professional institute in New Zealand since 1982, when the Zealand Branch of the Chartered Institute of Arbitrators was established. In 1988 that branch evolved into the independent Arbitrators' Institute of New Zealand. Initially, the focus of the Institute was entirely on arbitration. However, importance of mediation and other ADR techniques was quickly recognized by Council of Institute. The Arbitrators' and Mediators' Institute has been instrumental in establishing a two-year extramural course at Massey University in Palmerston.\(^{51}\)

Among the prominent foreign arbitral institutions which have helped a lot in promotion of ADR at international level mention can be made of Permanent Court of Arbitration (PCA), World Trade Organization, International Chamber of Commerce, Court of Arbitration for Sport, United Nations Commission on International Trade Law (UNCITRAL), Institute for the Study and Development of Legal Systems, American Arbitration Association (AAA) in USA, London Court of International Arbitration (LCIA) in United Kingdom, Stockholm Chamber of Commerce (SCC) in Sweden and Arbitral Center of the Federal Economic Chamber in Vienna.\(^{52}\)

With the advent of the Internet as a globally recognized vehicle for information travel and exchange, the ADR was re-born both in terms of cost-efficiency and speed. We witnessed the birth of various online ADR websites.

\(^{51}\) Id. nn. 22-58.
\(^{52}\) Id. nn. 59-60.
In the U.S the first website to offer online settlement of financial claims was cybersettle, followed by clicknsettle, cybersettle deals with insurance claims, clicknsettle with any type of monetary claims. BBB Online is developing the online handling of consumer complaints in the U.S. Gimmeabid dealer auction site, www.gimmeabid.com provide services to facilitate dispute resolution between buyers and sellers.

There are web sites like:
1. www.mediate.com,
2. www.novajorum.com,
3. www.icaarthouse.com,
4. www.tribunal.com,
5. www.hellobrain.com,
6. www.virtualmagistrate.org

Providing ODR services across the globe effectively pertaining to multitude of e-disputes. www.emediator.com is first online dispute resolution service provider pertaining to business/commercial and personal disputes. 53

The ADR landscape in India is multifaceted and diverse. 54 The growth in both the use and the development of ADR mechanisms has resulted from initiatives at all levels and from all branches of government-executive, legislative, and judiciary and from many corners of the private sector- community organizations, corporations and the bar. The tribunals are presided over by the experts of the respective fields and the adjudication mechanism is cost effective, thus less costly in comparison to the regular courts and they are effectively resolving the disputes by taking much less time in comparison to the regular courts. With the acceptance of Welfare ideology, there was mushroom growth of public services and public servants. The courts particularly the High Courts were inundated with cases concerning service matters. The Swarn Singh Committee therefore, inter-alia recommended the establishment of Administrative Tribunals as a part of Constitutional adjudicative system. Resultantly the Constitution (42nd Amendment) Act 1976 inserted Part XIV-A to the Constitution of India consisting of Articles 323A and 323B. Article 323A provides for the establishment of Administrative Tribunals. 55

ADR first started as a quest to find solutions to the perplexing problem of the ever increasing burden on the courts.

53. Id. n. 61.
54. See Supra Chapter 6.
55. Id. n.1.
A thought-process that started off to rectify docket explosion, later developed into a separate field solely catering to various kinds of mechanisms which would resolve disputes without approaching the Formal Legal System (FLS). The reasoning given to these ADR mechanisms is that the society, state and the party to the dispute are equally under an obligation to resolve the dispute as soon as possible before it disturbs the peace in the family, business community, society or ultimately humanity as a whole.  

In India Legal Services Authorities have been created at National, District, Taluka levels to organize Lok Adalats, Legal Aid Clinics and Legal Awareness Camps. They are doing commendable job. Various conferences, symposiums and workshops have been held in India for the promotion and development of ADR.

There is no doubt that the system of justice which obtains today is too expensive for the common man. The small disputes must necessarily be left to be decided by a system of Panchayat Justice. Traditionally the Panchayats have played an important role in dispute resolution in the villages. Elders of the village by sitting in the Panchayat used to solve the disputes between the village folk. In different states different types of compositions of Nyaya Panchayats existed. In Kerala there was a combination of nomination and elections. In Rajasthan, the Naya Panchayat was elected indirectly. The Delhi Panchayati Raj Act 1954 envisaged a circle Panchayat for acting as Nyaya Panchayat. In Uttar Pradesh also, a Nayaya-Panchayat was constituted for each circle under the U.P. Panchayati Raj Act 1947. The Nyaya Panchayats though elected indirectly failed miserably to deliver justice to the poor and had become the tools in the hands of the powerful to exploit the poor villagers. Generally the civil jurisdiction conferred upon existing Nayaya Panchayats which were constituted of lay judges only. Under U.P. Panchayat Raj Act 1947, the Nyaya Panchayats were also given the jurisdiction to try revenue case. All the states which had established Nyaya panchayats conferred upon them the jurisdiction to try minor and simple offences under IPC. In addition to offences under IPC, the Nyaya Panchayat could also take the cognizance of certain offences under section 24 of Cattle Trespass Act 1871 and offences connected with gaming house under Public Gambling act 1867.

The announcement by Union law minister, regarding the setting up of 7,000 village courts, raises new hopes in clearing the pending cases.

56. Id. nn. 2-3.
57. Id. nn. 4-5.
58. Id. n.6.
59. Id. n.7.
Setting up of 7000 village courts is a golden chapter in India’s judiciary system. Gram Nyayalayas in India is not a new concept. In ancient India justice was administered by Gram Panchayats. The Gram Nyayalaya Bill 2005 is a step towards strengthening the age old institutions. The ‘grameena nyayalayas’ (village courts) are planned on the lines of Munsif Magistrate courts which enjoyed dual powers of civil and criminal justice delivery. They would function like mobile courts.

Some steps have been taken in various states. In Chhattisgarh, there is one village court for every 10 gram panchayats. In Meghalaya, in the tribal areas of Meghalaya, District Council Courts and other subordinate courts owe their origin to the Sixth Schedule of the Constitution of India. The hierarchy of these courts begins from the village courts presided over by Lyngdohs, Dolois or Headmen right up to the District Council Court at the apex which is presided by an officer designated as a Judge. The District Council have jurisdiction to try only cases where all or both the parties are tribals resident in the area.

“Gram Swaraj”, an innovative and bold experiment in Madhya Pradesh has come into force in the State from January 26, ushering in democracy and self-rule at the village level. The MP Government has also introduced village courts which is indeed a bold step. The State Government issued a notification on the eve of Republic Day enforcing the Madhya Pradesh Gram Nyayalaya Adhiniyam in the state, excluding scheduled areas, to facilitate setting up of village courts in the State from Republic Day.  

The Lok Adalat Movement was started in Gujrat in March, 1982 and the first Lok Adalat was held at village Una in Junagarh district. Lok Adalat (people’s courts) established by the government settles dispute through conciliation and compromise. The First Lok Adalat was held in Gujarat in 1982. Lok Adalat accepts the cases which could be settled by conciliation and compromise and pending in the regular courts within their jurisdiction. The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat. The procedural laws and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat. Main condition of the Lok Adalat is that both parties in dispute should agree for settlement. The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process.

60. Id. nn. 8-9.
No appeal lies against the order of the Lok Adalat. Lok Adalat is very effective in settlement of money claims. Disputes like partition suits, damages and matrimonial cases can also be easily settled before Lok Adalat, as the scope for compromise through an approach of give and take is high in these cases.61

Another strategy for reaching the poor and delivery of justice on the spot evolved recently by the social service minded executive in Chindwara District of M.P. is Mobile Court. This programme was launched in Chindwara in Dec. 1980 and since then every month (except Monsoon) in every tehsil one mobile court is organised. The Mobile courts, though mainly revenue courts, also entertain complaints against sarpanch, patwaris or other authorities and other incidents of injustice against daughters by father, against tribals by rich zamindars etc. are enquired into on the spot and settled forthwith. Other small problems e.g. application for use of canal water, loans from govt. are also decided on the spot. Those cases which require civil or criminal procedure, or are already pending in the court are not accepted.

The Himachal High Court has started another experiment by setting up conciliation court in Shimla in September, 84, which resolved about 500 disputes amicably within one year. The session sub-judge cum chief judicial magistrate was designated as the "Conciliation Court". This Himachal High Courts experiment of Conciliation Courts is similar to the concept of "Pre-trial review" in England. Any case filed before the county court is first sent to the Registrar who is of the rank of assistant, for the "pre-trial review" and if the case is not settled by the Registrar, then it is sent for adjudication.62

Various Institutions have come up providing ADR services in India, interalia; The International Centre for Alternative Dispute Resolution (ICADR) was established and registered as a society under the Societies Registration Act, 1860 on 31st May 1995. It is an independent non-profit making organization for the promotion and development of ADR facilities and techniques. The headquarters of ICADR at New Delhi was inaugurated by the Prime Minister of India Shri P.V. Narasimha Rao on October 6, 1995 in a function which was attended by more than forty delegates from the SAARC countries. The main objective of ICADR is to propagate, promote and popularize the settlement of domestic and international disputes by different modes of ADR.

61. Id. nn. 10-15.
62. Id. n.16.
63. Id. n.17.
The Indian Council of Arbitration 64 established in 1965, is the premier arbitral institution whose arbitral clause is today relied upon by most public sector companies, government departments and several domestic and multi-national corporations amongst others. Malaviya Centre for Peace Research (MCPR) 65 is based in the Faculty of Social Sciences of Banaras Hindu University. It aims to analyse and contribute to the peaceful resolution of intra and inter-state conflict. Since May 2005 Meta-Culture has been engaged in a very comprehensive training and consulting project with one of India's leading apparel manufacturing companies. It has designed a comprehensive conflict management system incorporating custom designed system of procedures, processes and mechanisms to address differences when they arise in the company. Setup in 1929, Indian National Committee of International Chamber of Commerce (INC-ICC) 66 is one of the most active chapters of the ICC, the world's apex business organization. It helps members to avail services of ICC i.e. International Court of arbitration for the settlement of commercial disputes; the ATA Carnet System for temporary duty-free imports; the ICC Institute of International Business Law and Practice; the International Maritime Bureau, which combats maritime fraud; and Counter-feiting Intelligence Bureau. The Executive Committee of ICC India after its meeting on 23rd December, 1999, set-up a Grievance Redressal Cell for Banking Disputes. The swift growth of e-commerce and web site contracts has increased the potential for conflicts over contracts which have been entered into online. This has necessitated a solution that is compatible with online matters and is netizens centric. This challenging task can be achieved by the use of ODRM in India. It is high time that we must build a base for not only offline ADRM but equally ODRM in India. 67 With the increased inclusion of ADR clauses in domestic and international commercial agreements and more widespread publication of ADR successes, it is expected that ADR use in India will continue to expand.

“Constitutional goal” of achieving Complete Justice in India is an ideal before the legislators and judiciary alike. 68 The following judgments of the Hon'ble Supreme Court of India and various other High Courts of different states in India will help jurists, lawyers and students in understanding the concept and law relating to arbitration and conciliation in India.

64. Id. nn. 18-19.
65. Id. nn. 20-21.
66. Id. n.22.
67. Id. n.23.
68. See Supra Chapter 7.
The Supreme Court in Food Corporation of India Case 69 said that the legislative intent is to minimise the supervisory role of the court in the arbitral process and quick nomination or appointment of arbitrator, leaving all contentious issues to be decided in arbitration. The Supreme Court observed in Narain Khamman Case 70 that though the Statement of Objects and Reasons accompanying a legislative Bill cannot be used to determine the true meaning and effect of the substantive provisions of a statute, it is permissible to refer to the Statement of Objects and Reasons accompanying a Bill, for the purpose of understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy. Again in Fuerst Day Lawson Ltd Case 71 the Supreme Court observed that the object of the Act is to provide speedy and alternative solution to the dispute and avoid protraction of litigation. The provisions of the Act have to be interpreted accordingly.

The judicial approach with respect to ADR is quite healthy except few cases in which the position is not clear for instance Sundaram Finance Ltd. Case and Konkan Railway Corp. Ltd. Case. The Supreme Court held in Sundaram Finance Ltd. Case 72 that in order to get help construing these provisions, it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act.

But in Konkan Railway Corp. Ltd. Case 73 the Supreme Court held that the Arbitration and Conciliation Act, 1996 has been drafted according to the UNCITRAL Model Law. The Act and the Model law are however not identical and therefore the judgments and the literature thereon cannot be taken as a guide to the interpretation of the Act 1996.

The Supreme Court held in Bhatia International Case 74 that general provisions such as those given under Sections 9 and 17 are applicable to all types of arbitration.

72. Sundaram Finance Ltd. v. NEPC Indian Ltd. (1999) 2 SCC 479: AIR 1999 SC 565. See also Supra Chapter 7 n. 7.
It has also been held that Part I of the Act applies compulsorily to all arbitrations held in India and all proceedings relating thereto. The parties can only derogate from the provisions to the extent permissible. In *Fuerst Day Lawson Ltd. Case* 75 it was held that for all practical and legal purposes Act shall be deemed to have been effective from 25.1.1996.

In *Manohar Lal Case* 76 it was held that an Arbitral Tribunal is not a Court within the meaning of Section 195 of Cr.P.C. In *M/s Pandey & Co. Builders Pvt. Ltd. Case* 77 it was held that there exists a distinction between an appeal and an application. Whereas S.42 of 1996 Act provides for an application, S. 37(2) of 1996 Act provides for a statutory appeal forum of appellate court must be determined w.r.t. definition of Court in S. 2 (1) (e) and a High Court if it does not exercise the original civil jurisdiction, it would not be a court within the meaning of S. 2(1) (e).

In *Popular Construction Case* 78 the court concluded that the time prescribed under Section 34 to challenge the award is absolute and not extendible by court under section 5 of the Limitation Act. In *Mankanner Jain Social Welfare Society Case* 79 the Madras High Court held that the New Act has widened the powers of the arbitral tribunal to decide upon the questions relating to appointment of the arbitrator, jurisdiction by the arbitral tribunal etc. The Civil Court can intervene only where it has been expressly provided for by the Act.

In *Baltic Confidence Case* 80 the Supreme Court held that the arbitration agreement of one contract may be incorporated into that of the other contract, which does not contain any such clause but such incorporation should not lead to inconsistency, insensibility and absurdity.

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75. *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* AIR 2001 SC 2239; 2001 Lab IC 2073. See also *Supra* Chapter 7 n. 10.
78. *Union of India v. Popular Construction Co.* (2001) 8 SCC 470. See also *Supra* Chapter 7 n. 18.
In **M.M. Aqua Technologies Limited Case** 81 the Delhi High Court held that a person not a party to arbitration agreement cannot invoke it merely on the ground that a part of the job under the main contract containing the agreement had been assigned to him.

In **M/s Afcons Infrastructure Ltd. Case** 82 the Kerla High Court said that “Depending on the nature of the case, the facts the contentions and possible resolution, it is open to Court that the even if the parties do not agree they can be referred to one or other methods of dispute resolution. No person under section 9 of CPC has any invariable right to resolution of dispute by adjudication by regular Court. Merely because resort to procedure under section 9 of CPC is not available the law can not be held unfair, unjust and unreasonable.” This is historical one in terms of judicial reference to arbitration.

In **P. Anand Gajapati Raju Case** 83 the Supreme Court held the language of the section 8 is peremptory and the court is under an obligation to refer the parties to arbitration once the conditions stated in section 8(1) and (2) are satisfied. In **Baba Arya Case** 84 it was held that relief under section 9 cannot be granted where the dispute does not arise from the breach of terms of agreement or from their non-compliance.

In **Narayan Prasad Lohia Case** 85 the court held that an arbitration agreement will not be held invalid merely because it provides for the appointment of two or even number of arbitrators. In **M.M.T.C. Limited Case** 86 the court held that there is nothing in section 7 to indicate the requirement of the number of arbitrators as part of the agreement.

The Apex Court in landmark judgment of **Konkan Rly. Corp. Case** 87 held that an order of appointment by the Chief Justice or his designate is an order of administrative nature and therefore would not be subject to judicial review under

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82. **M/s Afcons Infrastructure Ltd. & Anr. v. M/s. Cherian Varkey Construction Co. (P) Ltd Kochi & Ors., AIR 2007 KER 233.** See also Supra Chapter 7 n. 25.

   See also Supra Chapter 7 n. 26.

84. **Baba Arva v. Delhi Viduvat Board** 2002 Arb. W.L.J. 508 (Del) :2001(3) Arb. LR 547 (Del.). See also Supra Chapter 7 n. 32.


Article 136 or Article 32 of the Constitution of India.

In Konkan Railways Corp. Case 88 the court once again decided that The UNCITRAL model law was only taken into account while drafting the Arbitration and Conciliation Act 1996. The model law and the New Act are not identical. The model law and judgments cannot therefore be taken as a guide in interpreting the provisions of the Arbitration and Conciliation Act 1996.

In Indian Engineering Works (Bombay) Pvt. Ltd. Case 89 it was held that the court has to be approached for the appointment of the arbitrator only after the procedure prescribed under the arbitration agreement is exhausted or it becomes difficult. If an application is made without setting in motion the procedure set up in the agreement, it shall not be maintainable as being premature. In Konkan Railways Corp. Ltd. Case 90 it was held that the party that has justifiable doubts as to the independence and impartially of the arbitrator may challenge the appointment of the arbitrator.

In Ashalata S. Lahoti Case 91 the court held that an Arbitral Tribunal consisting of even number of arbitrators is not in accordance with section 10 of the Act. Hence the Court can under section 14(2) decide about the termination of the mandate of such a tribunal.

In Wellington Associates Ltd. Case 92 the Hon'ble Supreme Court held that Section 16 uses the word "may" which indicates that it does not give an exclusive power to the arbitration tribunal to decide upon such questions. The Chief Justice can also decide upon such questions if it is raised by the respondent in reply to the petition filed for the appointment of an Arbitrator under Section 11.

In Nirma Ltd. Case 93 Court held that a ruling by the arbitral tribunal on its jurisdiction is an order/decision and not an award.

89. Indian Engineering Works (Bombay) Pvt. Ltd v. Chairman, Coal India Ltd. and Others 2003(1) Arb. LR 433 (Jharkand). See also Supra Chapter 7 n. 43.
90. Konkan Railways Corp. Ltd. v. Rani Constructions (P) Ltd. (2002) 2 SCC 388; AIR 2002 SC 778. See also Supra Chapter 7 n. 47.
93. Nirma Ltd. v. Lurqi Enerqi and Entsorgung GMBH and Others, /2003/18 CLA-BL. Supp(Snr.) 17 (Gujarat). See also Supra Chapter 7 n. 53.
In Sanshin Chemicals Industry Case 94 Hon'ble Supreme Court held that the decision of the arbitral tribunal on the question of venue under s.20 would not come within making of an arbitral award.

In Shetty's Constructions Company Case 95 Hon'ble Supreme Court held that the date of commencement of arbitral proceeding is the date on which the request for referring the dispute to arbitration was received by the respondents.

In M.M.T.C. Limited Case 96 it was held that an arbitral award cannot be challenged on the ground that the agreement is invalid because it provided for even number of arbitrators. The validity of arbitration agreement depends upon section 7. Section 10, which provides for the number of arbitrators is a part of machinery provision for the working of the arbitration agreement and hence will not affect the validity of the agreement.

In Indian Commercial Company Ltd. Case 97 Bombay High Court held that the Court in execution cannot decide the legal misconduct of an arbitrator since it is not a question relating to execution, discharge or satisfaction of decree, but involves the determination of the manner in which the Arbitrator conducted the proceedings. Also legal misconduct is not one of the grounds provided under section 34 for setting aside the award. It was held in BFIL Finance Ltd. Case 98 that an award cannot be set-aside on ground of public policy and non-application of mind, merely because another view of the matter is possible.

In Em and Em Associates Case 99 it was held that where on perusal of relevant clauses of the contract, many views are possible; the Court cannot under Section 34 impose its own interpretation on that of the Arbitrator, where Arbitrator has already given a view.

97. Indian Commercial Company Ltd. v. Amrish Kilachan and Others 2003(1) Arb. LR 10 (Bombay) See also Supra Chapter 7 n. 63.
98. BFIL Finance Ltd. v. G. Tech Stone Ltd. [2003]7 CLA-BL Supp. (snr.) 6 (Bom). See also Supra Chapter 7 n. 64.
99. Em and Em Associates v. DDA. [2003] 8 CLA-BL Supp. (Snr.) 4 (Delhi). See also Supra Chapter 7 n. 65.
In *Popular Construction Co. Case* 100 Hon’ble Supreme Court held that the Arbitration Act is a special Law and provides for a limitation period different from the Limitation Act. Hence the limitation period provided for under the Arbitration Act will apply.

In *Satish Chander Gupta Case* 101 Court held that Section 13(5) and Section 34 of the New Act are not ultravires and contrary to each other. In *ONGC Case* 102 it was held that the term public policy should be interpreted in the context of the jurisdiction of the court where the award is challenged.

In *S. Kumar Case* 103 it was held that once the application under section 34 is refused the award becomes a decree and the date of this decree remains same that is the date of award. In *LC.D.S. Ltd. Case* 104 it was held that the proper Court for execution of arbitral award is the one to which the application under section 34 can be filed.

In *Nirma Ltd. Case* 105 Court decided that an order or decision of arbitral tribunal is not an award and hence cannot be challenged under section 34. Such an order or decision can be appealed for under section 37 if it falls among the appealable orders.

In *Fuerst Day Lawson Ltd. Case* 106 it was held that the application for enforceability and execution of the foreign award can be filed in the same proceedings. There is no need to file two different applications. Since the object of New Act is to provide speedy and alternative solution to the dispute.

In *Mysore Cements Ltd. Case* 107 Hon’ble Supreme Court took the view that the conciliator can formulate a settlement agreement as per Section 73 considering its acceptability to both parties.

100. *Union of India v. Popular Construction co.* (2001) 8 SCC 470. See also Supra Chapter 7 n. 67.
The conciliator may reformulate his draft after receiving the observations of the parties. The agreement shall be final and binding on the parties when they sign it.

The Court further held that the procedure prescribed under Section 73 is a pre-requisite under Section 74. Any agreement that has been made without following the procedure prescribed under Section 73 does not have the effect or status of an arbitral award under Section 30.

In Sundaram Finance Ltd. Case 108 Supreme Court held that the High Court should make use of the powers vested in them by Section 82, which provides them with the power to make rules to carry out the provisions of the Act. In Fuerst Day Lawson Ltd. Case 109 Supreme Court held that a foreign award rendered after the commencement of the Arbitration and Conciliation Act, 1996 would be governed by the New Act even if the proceedings were initiated and had commenced prior to the commencement of the Act. The formal courts dispensing justice have not lost ground in the settlement of disputes and still play a major role in interpretation and laying down rules of law and justice as is evident in the cases listed above.

C. SUGGESTIONS

The increasing dissatisfaction with the traditional methods of dispute resolution calls for very serious thought to be given to institutionalizing alternative methods even in respect of categories of cases which do not fall within the description of ‘minor disputes’. It will be prudent to monitor the degree of acceptability with which ADR methods function before further steps to expand the concept to graver disputes is attempted. Regard must be given to the very nature of the matter in dispute rather than the monetary value of the dispute. However it could be said that unless definitive steps are taken and speedily taken the erosion of confidence in the adversarial process could result in an alarming situation. Innovative methods of dispute resolution may be the only response to the challenge of improving our judicial system. That challenge is perpetual.

The dispute resolution mechanisms will, therefore, naturally become more diverse and essential to our thoughts on justice for the common man. In view of above the present researcher humbly submits the following suggestions:

See also Supra Chapter 7 n. 86.
1. Establishment of Students Legal Services Clinic (SLSC)

The present researcher recommends that SLSC can work as conciliation office to sort out the dispute between the parties amicably by arranging meetings of the parties and giving them opportunities of appreciating the position of each other and evolving a settlement themselves and part as friends. After judicial decision which is an imposed decision the parties nurse permanent grudge against each other. If as a rule the civil cases or petty criminal cases are referred to students Legal Aid Clinic for Pre-Trial Conferences and conciliation, most of the cases will not go to the court and the load on the courts will be considerably reduced. In a number of cases it has been observed in villages that parties keep on waiting for somebody to intervene so that their dispute is solved without any bad blood, expenditure and waste of time. Such a pre-trial conference will provide them an opportunity to reconcile with honour.

Law schools should induct in their curriculum some courses in non judicial dispute resolution. Alternative methods of dispute resolution deserve more attention and should be taught both in class rooms and clinics. The students trained in alternatives will be better able to act as conciliation men to resolve the disputes outside the courts.

2. Establishment of Nyaya Panchayats

It is being realised that indigenous justice delivery system through panchayats can very successfully serve the needs of the poor. The institution of Nyaya Panchayats would be in conformity with the ideal of democratic decentralisation. It would ensure participatory, expeditious and inexpensive delivery of justice at the door steps of the villagers. The Law Minister, Government of India, realising the need for village level justice system made the following policy statement in the Rajya Sabha in 1959: “There is no doubt that the system of justice which obtains today is too expensive for the common man. The small disputes must necessarily be left to be decided by a system of Panchayat Justice - Call it a people's court, call it the popular court, call it anything - but it would certainly be subject to such safeguards as we may devise - the only means by which for ordinary disputes in the village level the common man can be assured of the system of judicial administration which would not be too expensive for him and which would not be too dilatory for him.”

It is submitted a Nyaya Panchayat constituted on the following lines will be more suitable for delivering justice to the village people. From every village ten persons, each above forty years of age should be elected by adult franchise, to be on the village panel of Nyaya Panchayat. Scheduled castes/tribes and women should be duly represented. The
eligibility conditions for election should be education, integrity, honesty and clean past record. There should be one panchayat judge who should be either a retired judge or a senior lawyer dedicated to social service, for a block with its head-quarter at the Block headquarter, who should visit every village at least once a fortnight. The gramsevak, or panchayat Secretary or some other village level worker should be made incharge of village office of the Nyaya Panchayat. Whosoever has to file a complaint shall do so in writing and suggest two names out of the panel judges to decide his case. The village level worker will inform the other party about the complaint and ask him to suggest two names of the panel judges. On the appointed day the panchayat judge would visit the village and along with these four lay judges would hear the case and try for conciliation between the parties and if they do not agree, would adjudicate upon the case in the presence of other residents.

This procedure would be somewhat akin to arbitration with a law knowing person as umpire in the chair. This would inspire confidence in the mind of the plaintiff and the defendant because they would have the satisfaction of having the judges of their choice. The presence of law knowing person as the chairman, and the open hearing in the presence of other residents of the village, would make the commission of injustice impossible. This will be an ideal arrangement for, door to door delivery of justice to the rural poor, and for promotion of social harmony in the village. The village judiciary will have the benefit of separation from the executive but it will not be ignorant of the village customs, habits and propensities. The four lay judges chosen by the two parties would be under an obligation to know the background social and economic, of both the parties to apprise the Panchayat Judge of the factual situation. Since there would be four persons on the bench from the same village, it will be impossible for the parties or the witnesses to tell a lie since the lay judges on the bench will have the first hand knowledge of the true facts from their own sources. The disputant should not be allowed to choose his relative as one of the judges.

The presence of man trained in law would eliminate the possibility of arbitrary or irrational decision. Lay judges even if elected directly will be under the control of the Panchayat Judge and not under the influence of Sarpanch. The Nayaya panchayat would be a good training ground for village people for doing justice. Power should be vested in the District magistrate to remove any Nyaya Pancha for his misconduct after due enquiry. This provision already exists under some state Acts. Out of the ten lay justices from each village as suggested, one fifth should retire every year and new persons be elected in their
place. This staggering arrangement will keep the uniformity of approach to justice and also enhance the scope of training to more and more villagers. There should be no bar to re-election to the Nyaya Panchayat.

3. **Creation of Conciliation Cell at District Level**

The Report on National Juridicare, Equal Justice social justice, also recommends the creation of conciliation courts, constituted of men of unquestionable honesty and integrity and commanding respect and confidence of people for their impartiality and objectivity, attached to every Legal Aid Committee at the District and Tehsil level. Every application considered fit for Legal Aid should first be referred to conciliation cell. The conciliation cell must try to bring out a settlement through conciliation. If the applicant does not agree, he should be refused the legal aid, and if the other party does not agree, the applicant should be given legal aid. For this purpose of conciliation, the students Legal Aid Clinics can play a significant role.

The suggestion of the committee is worth implementing and if the experience shows commendable results then the pending cases before the courts may also be transferred to conciliation cell for pre-trial scrutiny and settlement. For fresh cases before the courts, the rule can be made first to refer the case before framing of issues to conciliation cell for settlement and only on its failure report, the court should proceed for adjudication. This will reduce the case load on the courts and also bring amity amongst the disputants who will go back as friends.

In Slovenia, a federal unit of Yugoslavia, according to the law of self governing courts (1977), conciliatory councils mediate in interpersonal disputes in local communities. In criminal cases initiated on private accusations and in civil cases disputing a minor value, reconciliation by the council must first be attempted, and only there after may the case be taken up by regular courts. Thus the disputants in Slovenia are under obligation to first to go to the conciliatory council.

In U.S.A. also it is widely being felt that existing legal system has become too complex and unresponsive to meet community needs for justice. It has led to two types of efforts. One is to simplify and streamline the court structure and procedures, and the other involves the attempts to remove disputes from the court entirely by taking them to less formal and more responsive forums. On the lines of popular Tribunals in Cuba, neighbourhood or community moots have been proposed by many scholars as alternatives to intimidating courts to try simple criminal and civil cases.
4. **Establishment of Mobile Courts**

Some offences need on the spot trial and decisions, for better impact on the society. Few examples are cases of eve-teasing, driving without license or without lights at night, street frays, cruelty to animals, and consumer problems. If without going into sophistications of procedure, such cases are tried by summary trial on the spot, it will have more deterrent effect. For this purpose Mobile Courts or Courts in the Van can work very effectively. On receiving the complaint the mobile court constituted of a magistrate, or even a trainee judicial officer or some other duty magistrate along with legal aid counsel will reach the spot, take the evidence informally and pronounce the sentence then and there. In petty civil cases also mobile courts can deliver the spot justice. Such mobile courts with some improvements can be set up throughout the country. Some mobile hospitals are very successfully working in Haryana. On the lines of mobile hospitals, Mobile Courts can efficiently work. In the beginning some areas can be adopted. By and by the activities can be extended to other areas. Justice Krishna Iyer appropriately remarks that “Many classes of people are too poor and too backward and court justice must go to them rather than injustice drive them to court. Mobile courts, he said, for trying many offences on the spot will be a boon to the poor and even to the other citizens.” Eve teasing, street brawls can be speedily dealt with by mobile magistrates. In cities, a well publicised mobile consumer court would work magically to prevent hoarding and profiteering. Mobile courts do reach the doors of the poor villagers whose villages are scattered and too remote and inaccessible even to the voluntary agencies. Travelling to court from such remote areas is a great problem for them and thus the constitutional guarantees like equality of opportunity, right against exploitation are just the paper promises for vast majority of rural tribals who are being subjected to exploitation and injustice. The mobile courts will prove a boon for those unfortunate villagers as it has been shown in Chhindwara District of M.P.

5. **Fixed Time in Resolution by ADR**

The time lag between justice demanded and justice delivered should be considerably reduced and a fixed time period should be laid down in the 1996 Act for settlement of any kind of dispute by alternative dispute resolution mechanism. The society and legal fraternity should be made responsive to the perverse justice delayed is the justice denied. The Law should be simple, less technical providing for quick and amicable settlement of disputes. The Law of Arbitration should be totally freed from the formal judicial system i.e. litigation in courts. Lok Adalats and Fast Track
Arbitration can help in a big way and can be a foot forward in the direction of amicable settlement of disputes.

6. **Role of the Courts**
The endeavour of the courts should be to fulfill the Avowed Objective of the Act. The Courts should actively discourage recalcitrant parties who want to use the court procedures to delay arbitration proceedings. After the awards are made, the approach of the Courts should be to uphold the same and minimize the time within which judgment should be passed. Such an approach is all the more necessary in these times of economic liberalization wherein companies, and more especially multinational companies, cannot afford to waste years in pursuing litigations.

7. **ADR at Appeal Level**
Various methods of ADR like mediation and conciliation can be used at appeal level. The same is being done in Sri Lanka with success. An important factor of the mediation in appeals rules must be that settlements so arrived at shall be binding on the parties who have agreed to the terms and the Court of Appeal should be required to give effect to the terms as respects the parties to the agreement but without prejudice to the parties who have agreed thereto.

8. **Creation Of Independent ADR Cell**
Every governmental and non governmental Department must have an independent ADR Cell. The composition of such ADR Cell can be as follows:
1. Presiding Officer- Chairman/head of Department
2. Members:
   (i) One Expert in Law (retd. Judicial Officer or an Advocate)
   (ii) One person from an NGO
   (iii) One Lady Social Worker
   (iv) One Member of Deptt.

9. **Promotion of ADR**
Informative programs, conferences, symposiums and seminars should be held in every department. It should be ensured by Central and State Government that people should have greater access to legal information, legal literacy and increased knowledge of legal rights. Judges should be given ADR training in their judicial training program.

10. **Implementation of Suggestions of National Advisory Council**
THE GRAM NYAYALAYAS BILL, 2005 is under consideration. It is a Bill to provide for the establishment of Gram Nyayalayas for the purposes of providing access to justice
both civil and criminal to the citizens at the grass root level and to ensure that
opportunities for securing justice are not denied to any citizen by reason of social,
economic or other disabilities and for matters connected therewith or incidental thereto.
Original bill says every Gram Nyayalaya shall consist of a Nyayadhikari and two lay
cjudges but National Advisory Council proposes that every Gram Nyayalaya shall consist
of a Nyayadhikari only. Again original bill says Nyayadhikari and two lay judges shall be
appointed by the Governor of the State in consultation with the High Court in accordance
with the rules made in consultation with the State Public Service Commission in this
behalf but National Advisory Council suggests that Nyayadhikari shall be appointed by
the Governor of the State in consultation with the Chief Justice of the High Court in
accordance with the rules made in this behalf. It is submitted that two lay judges will
make the process cumbersome, dilatory and expensive. More over, Judiciary, even in
local courts, needs to be insulated from partisan pulls and pressures. In many states,
already High Court is finalizing selections without the role of Public Service
Commission. So recommendations of NAC ¹¹⁰ seem to be more appropriate and the
researcher submits that recommendations of NAC should be fully implemented.

11. Implementation of Law Commission’s 176 Report

Time slowly unravels the short comings in the enacted statues as the constantly
working human mind surpasses the thought process of the law makers and find
outs new ways and new means to achieve their evil ends. The Arbitration and
Conciliation Act, 1996 that have been enacted with a view to revolutionize the
amicable settlement of disputes has failed in its objectives of speedy disposal and
least court intervention, which were the crucial aspect of the Act. Proposals and
suggestions have been made to bring the Act in conformity with the Model Law
and incorporate certain provisions of the Model Law. As far as International
Arbitration is concerned the provisions of Model Law have more or less been
adopted. The 176th Report of Law Commission of India ¹¹¹ has made certain

¹¹⁰. See APPENDIX-A
¹¹¹. Law Commission of India, Shastri Bhavan, New Delhi – 110001,
Tel. No.3384475. See 176th Report on the “Arbitration and Conciliation
See also Rosabel E. Goodman-Everard- “Directory of Arbitration
Websites and Information on Arbitration Available Online”
recommendations to bring the present Act on a better footing and in tone with the
times. The summary of proposals are given below.

(i) Section 5 of the Act is proposed to be amended by adding an Explanation as
to the meaning of the words 'any other law for the time being in force'.
Under the Explanation, the above words will include the Code of Civil
Procedure (5 of 1908), any law providing for internal appeals within the
High Court (like Letters Patent, or High Court Acts) and any law which
provides for intervention by one judicial authority in respect of orders
passed by another judicial authority (e.g. tribunals under the Consumers
Protection Act). The effect of the Explanation is that intervention by
resorting to remedies under all the above laws will be barred.

(ii) In Section 6, as it stands, states that, in order to facilitate the conduct of
arbitral proceedings, the parties, or the arbitral tribunal with the consent of
the parties, may arrange for administrative assistance by a suitable arbitrator
or person. It is proposed to drop the words 'or the arbitral tribunal with the
consent of the parties'.

(iii) In Section 8, the word 'judicial authority' should be replaced by the word
'court'. The words "unless it finds the agreement is null and void, inoperative
or incapable of being performed" to be included so as to bring sec. 8(1) in
conformity with Art. 8 of Model Law. In sec.8, 'court' means the 'court' in
which suit is filed. Appeals to lie to Division Bench of High Court from the
decision of the court.

(iv) Section 9 is proposed to be amended by restructuring it and bringing the
latter part of the section which deals with the wider powers of the Court to
the forefront and for relegating the enumerated powers of the Court to the
latter part of the Section. As the section now stands, it gives an impression
that the powers of the Court which are referred to in the latter part of the
section are as limited as those in the earlier part of the section. This position
is being clarified by dividing the existing section into sub-sections (1) to (3).
Sub-Section (4) to (6) are proposed to be added to see that a party who
obtains an interim order from the Court, does not refrain from taking steps to
have an arbitral tribunal appointed. Otherwise, he would be reaping the
benefits of the interim order without time limit. The proposed sub-section
(4) to (6) require the Court, while granting interim orders under Section 9 to
further direct that the party must take steps within 30 days to have an
arbitral tribunal appointed under Section 11, and that otherwise the interim
order will stand vacated, unless the time is extended by the Court. It is also
provided that if the party does not take such steps and if the interim order is
vacated, the Court may pass such orders as to restitution as may be necessary,
in the circumstances of the case.

(v) Section 11, the words 'Chief Justice of India or his nominee' should be
replaced by the words 'Supreme Court' thereby meaning 'Bench of two or
more learned Judges of the court'. The words 'Chief Justice of High Court
or his nominee' should be replaced by the words 'High Court' thereby
meaning a 'Bench of two more learned Judges of the court'. This will
bring section 11 in conformity with Model Law which uses the word 'court'.
This will clarify that power that is exercised under section 11 is a judicial
power. The Supreme Court and High Court to clear of jurisdictional issues
if raised at the stage of section 11 itself. If oral evidence is necessary, before
the said courts, evidence is to be obtained by appointing Advocate
Commissioners.

(vi) In Sections 12 and 13, decision of the arbitrators on preliminary issue of
bias or disqualification 'rejecting' the plea to be also subject to objections
to court under section 34 or 37. In section 13(4), the word 'shall' should be
replaced by the word 'may'.

(vii) In sections 16, the Act permits arbitral tribunal to decide questions of their
own jurisdiction, including objections as to the existence or validity of the
arbitrations as to the existence or validity of the arbitration agreement.
Arbitral tribunal's decision on preliminary should be replaced by the word
'may'.

(viii) Provision under section 9 (interim measures) in Part I should be made
applicable even to foreign arbitration when the seat of arbitration is outside
India. This will bring the Act in conformity with have laws elsewhere which
are based on Model law.

(ix) Provision under Section 8, 38 and 39 also to apply to foreign arbitration
where seat of arbitration is outside India and where such arbitrations are not
covered by Part II (New York or Geneva Convention Awards). Whether
other provisions in English Act 1996 to support foreign award are to be
introduced? Should there be a definition of 'seat of arbitration'?

(x) A provision similar to sec. 21 of the 1940 Act, enabling any court (before which a suit or other proceeding is pending) to refer the parties to arbitration even if such an agreement is subsequent to the commencement of the suit or proceedings, should be introduced. Provision to be made for challenging the award passed on such reference, in the same court. This will enable all courts, including High Court / Supreme Court to refer issue to arbitration, if parties so agree during the proceedings and deal with the correctness of the award in the same court (on grounds mentioned in section 34 and section 37) rather than give a fresh lease of life to the litigation.

(xi) Section 34 (Section 37) should be amended by providing (1) a right to object to the preliminary decision of the arbitral tribunal under Section 16 whether the tribunal accepts or rejects the jurisdictional pleas; (2) a right to object to the preliminary decision of the arbitrator under section 13 whether the tribunal accepts or rejects the plea.

(xii) Section 34 (or Section 37) to provide for objections to be filed where the arbitral tribunal omits to decide certain questions referred and conferring a power to remit the matter to the arbitral tribunal.

(xiii) Section 34 (or Section 37) should provide for objections to be filed if award does not contain reasons in regard to any dispute and seek a supplement award containing reasons.

(xiv) 'Misconduct' should be included as a specific ground of attack in Section 34. Under it should apply to domestic as well international arbitration.

(xv) "Error of law apparent on the face of the award" should be included as a specific ground in Section 34 (or section 37) (except where a specific question of law is referred to the arbitrators) but only in cases of domestic arbitration.

(xvi) Provision enabling arbitrators to refer a question of law to the court should be included.

(xvii) Provision for modification or remission of award should be included.

(xviii) Power should be granted to court to supersede arbitration (in cases of domestic arbitration only)

(xix) Minority view should be appended to the award for information.
(xx) All awards should be filed in the 'court' for purposes of record by amending sec.31, so that authenticity of awards is taken care of.

(xxi) Awards to be executable by court under Section 36 only if they conform to laws relating to stamp duty / registration.

12. Providing Online Resolution

The researcher takes the stand that not just the traditional ADR (which itself sometimes has proven to be a lengthy process) but Online ADR is what should also be promoted and made use of by both the IT industry and the arbitral institutions. Going through the ICA's website, the present researcher noticed that it provides lots of information regarding ADR. It can, the researcher feels, with proper technical support set up an online ADR webpage. Concentrating specially on negotiation to settle liability issues and conciliation for contractual and performance disputes will be a boon to the IT industry. Facilities like tele-talking and video-conferencing can be provided. Already, ICA has a panel of respected, well-know arbitrators-mediators-conciliators. The purpose is to facilitate dispute resolution from a distance so that persons in dispute, just because of the distance, should not be deprived of arbitration facilities.

Let us conclude with a sound but an imperative caveat that we must be ever mindful of that “Yesterday is not ours to recover, but tomorrow is ours to win or lose”, and, therefore, let us get together, stand united, and strengthen our Bench and Bar irrevocable unique partnership and make collaborative, concerted, cooperative, creative, collective and cohesive endeavours in popularising, proliferating and pioneering, concept and philosophy of important institution - alternative dispute resolution mechanism - so as to strengthen our pluralistic democratic values, rule of law and thereby invigorate the commandment, “Justice shall never be rationed”. Let us therefore make all efforts to advance and strengthen “equal access to justice”, the heart of the Constitution of India, a reality by promoting ADR.