CHAPTER -3
HISTORICAL ANALYSIS

INTRODUCTION

The dispute resolution processes, which are “alternative” to the traditional Court proceedings, are often referred to as alternative dispute resolution processes. A method of resolving a dispute can be considered as alternative if it resolves the dispute and provide justice, with a consensual process between the parties to the dispute. The dispute resolution may be done with the help of a neutral third person who acts as a mediator or a middle person between the parties to the dispute and tries to reduce the gap of differences between the parties with the help of different process such as arbitration, conciliation, mediation or negotiations. In the Year 1989 Supreme Court of India in the case of Food Corporation of India Vs Joginder Pal, held that alternative dispute resolution process does not supplant but it supplements the existing adjudicatory machinery through Courts of law. Alternative dispute resolution processes are said to be flexible, cheap, speedy and less formalistic in nature thus making it a viable alternative for adjudication through the Courts of law

Following the perceptive study of the concepts of dispute, the need and the necessity of resolving the disputes for peace, prosperity and the very existence of the society in earlier chapter of this research paper, the researcher now proceeds towards the next step of, studying the different stages in the evolutionary history of dispute redressal process in India.

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63 AIR 1989 S.C.1263.
3.1 EVOLUTION OF DISPUTE RESOLUTION SYSTEM IN INDIA

In India, there is no authentic account available for the judicial and political institution and civilization period prior to Aryans. The available indigenous literature pertaining to that period is contained in Vedas and sacred religious books. In ancient times, it is found that the supreme duty of the King was considered to be, punishing the wicked and protecting the righteous. In the Vedic period, the King in return for the taxes paid to him by the people, performed the duty of a Judge\textsuperscript{64}. In those early times, administration of justice did not form a part of a State’s Duty\textsuperscript{65}.

The study of ancient Indian literature, illustrate the conditions where the aggrieved party himself had to take steps as he could in order to get the wrong redressed. The public devoured one another as the strong fish devour the weaker ones in the water\textsuperscript{66}. This arrangement could not hold for long. As such, this method was not satisfactory and there was a dire need to create the office of Kingship to avoid the situation of weaker being exploited by the stronger one and there upon Lord Brahma is said to have introduced Kingship upon Manu. The people agreed to pay certain taxes and prayed that in turn the King should destroy their enemies to enable them to lead a peaceful life\textsuperscript{67}. The Vedic King as the head of the Judiciary claimed himself as the upholder of Dharma. Thus, the origin of judicial system in India can be traced from pre-historic Vedic times more than 3000 odd years old, if not older still\textsuperscript{68}.

With the passage of time, the King used to impart Justice with the aid of his Ministers and Legal experts and the references to this is found

\textsuperscript{64} Birendra Nath, Judicial Administration in Ancient India (1979), p.27.
\textsuperscript{65} Dr. A.S. Altekar, State and Government in Ancient India (1977), p 245.
\textsuperscript{66} C.P. Ramaswamy Aiyar, Some Aspects of Social and Political evolution in India” (1969), p497.
\textsuperscript{68} P.B. Mukherji, The Hindu Judicial System, p434.
in the Manusmriti. The King became the holder of Law and was not a source of law. He was guided by Dharma. He was expected to live up to the ideals of Kingship as laid down in the Dharmasastra. The Dharmasastra and Nitisstra regarded the King as the fountain source of all Justice. The King was the highest Court of appeal and was expected to decide cases according to Law. The Ancient Hindu period of Indian legal system can be discussed chronologically under the following heads of Vedic or per Sutra period, Dharma Sutra period and the Post Smriti period.

3.1.1 VEDIC or PRE - SUTRA PERIOD

The Vedic or Pre-Sutra period can be studied under the Aryan Civilization. In the Vedic period law, religion and justice were closely interconnected and there was no clear cut demarcation. The Vedas are said to be four in number namely Rig-Veda, Yajur Veda, Sama Veda and Athurva Veda. Of these Vedas, Rig-Veda explains the structure of the society and the social and political institutions that existed in the Vedic period. There was absence of central control of organized government in the modern sense. The entire territory was divided into small Kingdoms ruled over by the King, as the head of the State and not of the Society. The State and the Society had distinct sphere of activities. National life and activities in the earliest times as on record were expressed through popular assemblies and institutions. There were a gradation of Courts and the King was the highest Court of appeal. Appeal lay from the lower Courts to higher Courts. The three most important and popular bodies were Parishad, Samiti, and Sabha.

69 R.C.Majumdar, The History and Culture of the Indian People: The Vedic Age (1965), p475.
70 S. Varadachariar, The Hindu Judicial System, p 10
71 Dr. Radha Kumul Mookerjee, Local Government in Ancient India, p22.
The ‘Parishad’ was an advisory body on religious matters but it also discharged some judicial functions. ‘Samiti’ was the body for general deliberations where all kinds of policy matters were discussed. This body also discharged legislative and judicial functions. It was the assembly of whole of the People. The most important function of Samiti was the election and re-election of the King. The King considered himself duty bound to participate in the deliberations of the Samiti and thus emerged to be the sovereign body. The ‘Sabha’ was a body of selected persons presided by the king himself. Sabha was the national judicature, due to the reasons that the resolutions of the Sabha were considered to be binding on all the persons.

### 3.1.2 Dharma Sutra Period

Dharma sutra period is also called as the golden period of Indian Legal History. With the advancement of time and society, the people progressed towards Civilization. The law propounded by the Smriti writers was more systematic and comprehensive in nature and laid down certain sets of principles to be followed by the people and the King alike. The principal Sutras are the Dharma Sutra of Gautama and Baudhyana, Sutras of Apastamba, Harita, Vashista, and Visnu. The areas that were mainly dealt by the Sutras were rules of civil and criminal Law, marriage, inheritance, succession interest and partition.

The important Smritis, which contributed immensely towards the development, are Manu Smriti, Yajnavalkya Smriti, Narada Smriti, Brihispati Smriti and the Katyana Smriti. The study of Arthasastra of Kutilya reveals that there were two types of Courts viz., Dharmasthiya or

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73 Dr. S.K. Puri, Indian Legal and Constitution History(1980), P2,3.
the Civil Courts and Kantakasodhana of Criminal Courts\textsuperscript{74}. The administration of Justice was decentralised in order to avoid delay and other complications connected with the investigation of cases. Kautilya and Manu\textsuperscript{75} have given different system of gradation of Courts. Kautilya has given much importance to Popular Courts and in his scheme Courts were instituted at Sangrahana, Dronamukha, Sthaniya and where the District met. According to the scheme of Manu that was adopted by Yajnavalkya, Narada, Brihaspati and Katyayana, the Sabha system formed the basis of forming and grading Courts. The Courts were known as Popular Courts and were termed as Kula, Sreni, and Gana Courts and the idea behind these Courts was to enable each and every person to receive justice without delay\textsuperscript{76}.

In the Sutra and the Smiriti period there were hierarchies of Courts at different levels. At the apex of the Judicial hierarchy was the Royal Court called ‘Sabha’. It was staffed by experienced Councilors who advised the King on the Points of Law in accordance with the law laid down in the sacred textbooks and the local customs. The rulers of ancient India who administered justice were subject to certain traditional obligations and customary limitations. They had to take into consideration the laws of the guilds in administering justice. Secondly, all were not equal in the eyes of law. The punishment for the offences depended on the social status of the offender. The cast of the offender also influenced the judgments\textsuperscript{77}.

The Yajnavalkya mentions three types of Popular Courts namely the Kula, Shreni, and the Pugha. The ‘Kula’ was the assembly of persons

\textsuperscript{74} Birendra Nath, Judicial Administration in Ancient India (1979),p.27.
\textsuperscript{75} S.D.Sharma, Administration of Justice in Ancient India(1988),p71,p72
\textsuperscript{76} Mulla,Hindu Law,(1974),p15,16,23.
\textsuperscript{77} H.V. Sreenivasa Murthy, V.S. Elizabeth ,History of India,p8.
of the same family or community tribe, cast or race and charged with the function to decide the disputes amongst the persons who felt equality bound by its decisions. The ‘Shreni’ was the assembly or association of persons following the same avocations or trade and the ‘Pugha’ is interpreted in three senses namely companies of traders, association of persons differing in castes and the riders on the elephants and horses. The existence of jury system is specifically mentioned in the Smritis. It was the duty of the jury to consider the truth or the cause before the Court. The existence of People’s Court in ancient India finds mention in Narada Smriti. The Jurors in ancient India were selected from the higher classes and those who were the most respectable in the society. The main qualification for the person to be juror was that, he was well versed with the question of law and fact involved in the dispute referred by the parties.

3.1.3 THE POST SMRITI PERIOD

This period mainly pertains to Nibandhakars and Digest writers. The study of Kutilya’s Arthashastra reveals that the Courts of Dharmasthas were located at the junction of two territories or Janapadas and the Head quarters of 800, 400 and 10 Villages called Sthaniya, Samgrahana and Dronamukha respectively. There was decentralization of Judiciary to a great extent. Arthashastra of Kautilya deals with the rights, duties and responsibility of the King in the administration of the State including judicial administration. The systematic and exclusive treatment of law was a distinct feature of Arthashastra. The Nibandahas and Tikas commentaries had significant part in the development of law and it even flourished in India during the Muslim Period. It gave rules as to, in case

78 P.V. Kane, History of Dharmasastra(1973), p281
79 K.P. Jaiswal Hindu Polity P 312.
of conflict the Suri will prevail over Smriti, and when ever there was conflict between the two texts in Suritis or Smritis then the text that was supported by reason and usage would prevail. Thus, it can be said that the task was to lay down the rules of interpretation with guidelines.

The aim of every judicial administration is to be just, honest and make available speedy remedy to the aggrieved persons who as a last resort seek the assistance of the Courts. Form the above study it is enlightened that the entire judicial administration in ancient India functioned under the supervision of the King and the Courts derived their authority from King. The Hindu system was not prepared to trust the judgments of a single individual, how so ever learned and eminent he might have been.

The King discharged his judicial function with the aid and assistance of his ministers, Purohit and Sabhyas. Later on times, the King due to his inability to attend personally to the judicial functions except in special circumstances used to depute the learned Brahmins to take his place and do justice. In order to give speedy and proper Justice, there existed well set principles which governed the proceedings in the Courts. The Courts existing in the ancient India also enjoyed discretionary powers to deliver justice to the aggrieved persons. The study of the ancient Indian dispute redressal system reveals that, India was conversant with many of the modern judicial system. The success of any dispute redressal system depends on the two basic elements, firstly a well–regulated system of Courts following a simple and orderly procedure and secondly a definite, easily ascertainable and uniform body of law. Thus,

81 Dr. V.C. Sarkar, Epics of Hindu Legal History, Pg 83(1958)
these two basic elements certainly formed the basis of ancient Indian Judicial system\textsuperscript{82}.

The procedure that was followed for doing Justice to the aggrieved persons was not very technical. The basic considerations were upholding dharma and to avoid needless and vexatious litigations compounding. Withdrawing the complaint was treated as cheating the King. The social interest cases were not sustainable in the Courts. Thus, these are the indication to say that different forms of dispute redressal machineries and People’s Court existed, continued to function down to the eighteenth century, and existed in India thereafter.

The Village Courts or the Panchayat played a significant role in settling local disputes, both in ancient and medieval times in India. It is significant to note that the Law Commission of India, in its 14th report (1958) has mentioned that the functioning of such different alternative arrangements like People’s Courts as dispute redressal mechanisms along with the Courts had successfully reduced the burden of the central judicial administration\textsuperscript{83}.

3.2 MUSLIM PERIOD

The study of history of Indian legal system reveals that the recognized Hindu period changed with the Muslims invasion. In Medieval period, the society in India was broadly divided in to two parts Hindus and Muslims. The Muslim invasion was made by Mohammud-bin-quasim in 712 AD. He came to India as invader and returned thereafter. Qutub-uddin Aibek made the real penetration into India. He in reality established himself firmly in India after waging series of wars. The

\textsuperscript{82} M.P.Jain. Outline of Indian Legal History, 5\textsuperscript{th} ed,p.3.
\textsuperscript{83} Dr.A.S.Altekar , State and Government in Ancient India (1977), p 252 ;Law Commission of India, 14\textsuperscript{th} report (1958)II,p874.
Muslims thereafter continued to rule over India until 1857 when the Britishers dethroned the last Mughal King Bahadhadur Shah Zafar. Their holy books, certain rules of practices and traditions governed the Hindus and Muslims in their social relations and political organization. The judicial structure, which existed in India during Muslim rule, is studied under the ‘Sultanate Period’ from 1206 AD to 1526 AD and under the ‘Mughal Period’ starting from 1526 AD that lasted up to 1680 AD.84

In this period, the civil and canon law cases pertaining to the Hindus were heard by learned Brahmans appointed for the purpose, while the criminal cases were tried according to Islamic Law. The revenue cases were tried according to the local tradition. The Muslim Rulers did not interfere with the Law of Hindus and Hindus continued to be governed by their own laws in personal matters.85 The judicial structure gave due place to the then existing institution in India, such as Village Panchayat which served as extremely useful in the settlement of dispute during ancient India. Panchayat were the lowest trial Courts and their findings were final in petty cases. The characteristic of the Sultanate Period was that the Sultan was the Supreme authority to administer Justice in his Kingdom. The Justice was administered in the name of the Sultan in three capacities. Firstly, as the arbitrator in the disputes of his subjects, he dispensed justice through the Diwan-e- Qaza. Secondly, as the head of the bureaucracy, he dispensed justice through the Diwan-e- Mazalim. Finally, as the Commander-In-Chief of Forces, through his military commanders who constituted Diwan-e- Siuasat , tried the rebels and those charged with high treasons. As in case of ancient India, during the Muslim rule also, all were not treated as equals in the eyes of law and

84 M.B.Ahmad, The Administration of Justice in Medieval India, Pg 98.
the Hindus as well as poor were discriminated against the Muslims and the rich respectively\textsuperscript{86}.

The culture of the Muslim ruler and the Hindu subjects differed materially but there was great affinity with regard to the law as both the system had their origins in the religion. Therefore, both the systems of law were given due recognition by the Courts in settling the disputes between the parties with regard to civil matters but the entire Criminal administration of Justice was based on the Criminal Law principles followed by the Mohammedan. The punishment were inflicted upon criminals in accordance with the provisions of the criminal law governing Mohammedan \textsuperscript{87}.

The Muslim ruler while ruling over India regarded themselves as the servants of the God (Allah). Mohammad, the Prophet of Islam, also preached this message. It is pertinent to note that they considered the administration of justice as an essential act for the fulfillment of this responsibility\textsuperscript{88}.

As laid down in Fatwa- Alamigiri, the Courts in India were to be guided by the following authorities while deciding the disputes. Firstly, the sacred book of Muslims the Quran; it collected the revelations of Mohammed in a definite written form. The Mohammedans were and are still governed by this sacred book. Secondly, the Sunna, which is the words, deeds, and silent approval of prophet during his lifetime, which were reduced to writing, and came to be termed as Sunna or traditions. These traditions gradually laid the foundations of Islam\textsuperscript{89}. Thirdly, the concurrent opinion of the Prophet’s companions called the Ijma, literal

\textsuperscript{86} H.Beveridge, History of India (1914),p102.
\textsuperscript{87} Dr.V.C.Sarkar, Epichs in Hindu Legal History, Pg.200-203, (ed.1958)
\textsuperscript{88} M.B.Ahmad, The Administration of Justice in Mediaeval India, Pg70.
\textsuperscript{89} Sir.A.Rahim, Mohammedan Jurisprudence, Pg. 59.
meaning of it is “agreeing upon”. Those disputed point of law which was resolved by the agreement of the persons who have right, in the nature of knowledge, to form a Judgment of their own after the death of Prophet thus came to be regarded as a valid source of law. Finally, judgments according to the individual discretion of the Judge based on the doctrine of Justice, Equity and Good Conscience guided the function of resolution of disputes.ter.

There was very systematic classification of the gradation of the Courts during the Muslim Rule in India. The Central Court were six in number namely, the King’s Court, Diwan-e- Muzalim, Diwan-e- Risalat, Sadre Jahan’s Court, Chief Justice Court and Diwan-e- Siyasat. The Provincial Courts were five in number namely, Adalat Nazim Sabha, Adalat Qazi-e- Subah, Governor’s Bench (Nizam-e- Subha), Diwas-e-Subah and Sader Subah. At the District level Qazi, Dadbaks or Mir Adils, Faujdaris, Sader Amirs and Kotwals were functioning. At each Parghnah headquarter two Courts were established namely Qazi - e- Parganah and Kotwal. According to Abu Hanifah, the Quazi could act on the Principle of Istihsan (Public good) Istislah (Public policy) or Istishab (Concordance). A Parganah was further divided into the village assembly or Panchayat, which were vested with enormous powers to decide civil and criminal cases of purely local character. The lowest on the ladder of hierarchy of Courts were the village council popularly known as Lok Adalat of today. The Qazi were entrusted primarily with both civil and criminal administration and their counter parts in the provinces and districts. Nevertheless, it cannot be denied that there existed qazis who

91 B.M.Ganddhi, V.D.Kulshreshtha’s Landmark in Indian Legal and Constitutional History (19992), p 19, p20
were well known for their character, integrity and sound knowledge of law. During this period, the gift system was a recognized institution. The Emperor did not consider any petition unless it was supported by gifts. Thus, there existed a well organized judicial institution with clearly defined procedure similar to institutions in modern times. The Mughal Dynasty continued up to 1850 and normally up to 1857, when there after the queen of England took over the control of India.

3.3 BRITISH PERIOD

India had flourishing trade with the western world and the balance of trade was always in the favor of India. Much of the trade was carried on through land routes. Portuguese were the pioneers in finding the new sea routes. Vasco da Gama landed at Calicut and thus the cape route to India was discovered. During the 16th century the Portuguese maintained supremacy in Indian Ocean. The spectacular success of the Portuguese attracted other European countries and Dutch, the English and the French, in that order, began to compete with the Portuguese. The British East India Company received its Charter from Queen Elizabeth in 1600, and the Emperor Jahangir issued a Firman to the Company in 1613 to establish a permanent factory at Surat. This became the chief settlement of the company in India. In the due course of time, specifically after the battle of Plassey in 1757 and until the annexation of Oudh in 1856, the British were successful in establishing their paramount in India. Thus, by this time the British East India Company was supreme from Himalayas to Kanayakumari and from Sind to Burma. The Impact of West brought about momentous changes in India, which was not anticipated by the Europeans. English replaced Sanskrit as the language of the intelligentsia, and English language seemed to be Lingua Franca that is, the Common all

94 A.B. Pande, Society and Government in Medieval India, p166.
India language. It is thus very significant to point out that, it was through this medium the first fifteen years of the Indian national movement was confined to those, who had learned and mastered the English language and were brought up essentially in the western style\textsuperscript{95}.

The dispute redressal function in the beginning of British Raj was delegated to the native people for the reason the Britishers were unaware of the local language and the local Laws. The Britishers also had the fear that the act of the punishment of the members of the native population could lead to agitation at any time\textsuperscript{96}. With the induction of British judges trained in Common Law into the Indian Judicial system, the Courts were reorganized and the entire working of local Courts was reshaped. The judicial administration in three presidency towns namely, the Calcutta Presidency, Madras Presidency and Bombay Presidency prior to 1726 were found wanting in uniformity and remained disoriented, informal and unsatisfactory. The Charter Act of 1726, introduced a uniform judicial system by the creation of Mayors Court in each of the presidency towns, namely Madras, Bombay and Calcutta and later territories surrounding the presidency towns were brought under its control\textsuperscript{97}. In the year 1772 Warren Hasting took over Bengal, Bihar and Orissa and established a well-organized judicial system. The Chief features of this Adalat System were Mofussil Diwani Adalat (Civil Court), Mofussil Fauzadari Adalat (Criminal Court), Court of the Head Farmer of Parganas dealing with petty civil cases, Sadar Diwani Adalat to hear appeals from the decisions given by Mofussil Diwani Adalat and Sadar Nizamat Adalat to hear appeals from the decisions given by Mofussil Nizamat Adalat\textsuperscript{98}. Numbers of regulations were newly introduced and the old ones were repealed to

\textsuperscript{95}H.V. Sreenivasa Murthy, V.S. Elizabeth ,History of India,p 9, to 14.
\textsuperscript{96}R.C.,Majumdar, An Advanced History of India, (1977), p553.
\textsuperscript{97}M.P.Jain, Indian Legal History(1966),85.
\textsuperscript{98}Dr. S.K.Puri , Indian Legal and Constitution History(1980) ,p 45-46
reform the judicial administration in India. The Government of India Act, 1935 proposed a federal form of government for the whole of India and the provinces were given some autonomous character and they began to be treated on a federal basis. Thus, Federal Court was created which were the independent Courts, to decide the future disputes between the units. First Federal Court was set up at Delhi in 1937. Federal Court possessed exclusive original jurisdiction to determine disputes between the units inter se or between the center and the units on the objective interpretation of the provisions of the Act. As appellate body, it heard appeals from the High Courts on the certificate that the case involved a substantial question of law for decision. Through the advisory jurisdictions, the Federal Court rendered advice to the Governor-General on any point of law referred by him in an open Court in the presence of Lawyers of all the parties. Thus, it was the highest Court in India. The appeals against the decision of the Federal Court lay to the Privy Council, which was the highest Court of appeal for India in England.

Some of the regulations made during British Rule, played an important role in the survival of alternative methods of resolving the disputes, along with the system of adjudication through Courts. The Bengal Regulation Act, 1772 that provided that, in all cases of disputed accounts, parties are to submit the same to arbitrators whose decision are deemed a decree and shall be final. The Regulation of 1781 provided for the judges to recommend without any compulsion, prevail upon the parties to submit to the arbitration before a person that is mutually agreed upon by the parties to the dispute. The regulation of 1787 empowered the Court to refer suits to arbitration with the consent of the parties. The procedure of conducting the arbitration was introduced by the regulation

99 M.V.Paylee, Constitutional History of India(1600-1950),p.86.
of 1793. The Madras Presidency Regulation VII of 1816 authorized the District Munsif to convene district panchayat for civil suits relating to real and personal property\textsuperscript{100}. Bombay Presidency Regulation VII of 1827 provided for arbitration of Civil Disputes. India was governed by combination of conflicting laws and systems of administration of justice before the British rulers enacted The Charter Act, 1833. The codification of laws was the beginning of legal and judicial reforms in India. When the East India Company started taking over administrative control, the Presidency Governments in Bengal, Madras and Bombay enacted ‘Regulations’\textsuperscript{101}.

The Charter Act of 1833 provided for the establishment of the legislative council for India in the year 1834. The Act VIII of 1857 codified the procedure of Civil Courts. Sections 312 to 325 of this Act dealt with arbitration in suits and Sections 326 and 327 provided for arbitration without the intervention of Court. The Code of Civil Procedure was revised in the year 1882 and the provisions relating to arbitration was reproduced under Section 506 to 526. The provision for filing and enforcement of awards on such arbitrations was made in 1882 Act No. XIV. The first Indian Arbitration Act was introduced in the year 1899 based on the English Arbitration Act of 1889. It was the first Substantive law on the subject of arbitration. Due to several defects in this Act, in the 1908 the Code of Civil Procedure was re-enacted and the provisions relating to arbitration were set out in the Second Schedule of the code, though no substantial changes were made in the law of Arbitration. In 1925, the Civil Justice Committee recommended several changes in the arbitration law. On the basis of the recommendations by this Committee, the Indian legislature passed the Arbitration Act of 1940.

\textsuperscript{100} Epoch, Hindu Legal History, (1958), p335.
\textsuperscript{101} Thomson and Garratt, Raise and fulfillment of British Rule in India (1958) ,p300-301.
In the year 1940, the Arbitration Act was enacted\textsuperscript{102}. This Act replaced the Indian Arbitration Act of 1899, Section 89, Clauses (a) to (f) of section 104(1) and Second Schedule of Code of civil Procedure 1908. Thus, Arbitration Act of 1940 finally amended and consolidated the Law relating to arbitration in the British India.

The ascendance of the People’s Court in British India was not deliberate but was gradually weakened by several factors. The extension of civil and criminal Courts with adversary system of adjudication, which was unknown and new to the village population, the progress of English education, the Police organisation, the migration of people from villages to towns, the growing pursuits of individual interest and consequential lessening of community influence over the people can be regarded as the main factors, which gradually contributed to the decay of the People’s Court in India. There was a complete centralization of judiciary and the local Courts were discouraged and replaced by the Royal Courts\textsuperscript{103}. Technicalities were introduced into the Indian judicial system; the adjudicatory process became more and more formal with the introduction of Anglo-Saxon system. The poor man found it difficult to enter into the portals of the Courts, and found difficulty in to use of the legal process. The advent of British rule finally led to the decline of People’s Court in India. The People’s Court thus entered into the era of lessening importance, and finally vanished, as a result of British policy of Feudalistic control of the countryside.

The legislations introduced by the British Rule brought about a perceptible change and uniformity in the administration of justice in

\textsuperscript{102} Salil K. RoyChowdhury, H.K. Saharay, Arbitration Law, (III Ed), p6, 7.
\textsuperscript{103} K.N.C. Pillai, Criminal Jurisdiction of Nayaya Panchayats, JILI (1977), p438, 439.
India. The influence of English, after the fall of Muslim rule in India, made a massive structure of Indian law and jurisprudence resembling the height and symmetry and grandeur of the Common law of England. The ‘Adversarial System’ of justice was introduced in India, where two opposite parties are pitched against each other, both given level playing field and opportunity to present their case before the judge.

3.4 AFTER INDEPENDENCE

After the dawn of freedom in India, powerful voices were raised for providing speedy, inexpensive and substantial justice, which suit the genius of Indian people. The drawbacks of Anglo Saxon Judicial system was recognized and founding fathers of the National Charter made an effort to recognise the existing system on the lines of home-grown legal system that existed in India since the dawn of its civilization. The drafters of the Constitution aimed that, the judicial process must be reorganized and justice must be brought near to the people. The sole of the good government is providing justice to the people; as such, the Preamble of the Constitution highlighted the aspect of political, social and economic justice to the people. The Article 39-A of the Constitution of India, secures the operation of the legal system, promotes justice on the basis of equal opportunity, so that no citizen is denied access to justice on account of financial or other disability. With the enforcement of the Constitution in 1950, the Supreme Court of India is established as the apex Court in the country. On 26th January 1950 the Federal Court yielded the place to the Supreme Court, all the judges became the judges of the Supreme Court. It was invested with the original, appellate and advisory

105 Dr. H.R. Bhardwaj, Legal And Judicial Reforms In India
107 V.N. Shukla, Constitution Of India(2003), p 1.
108 Ins. by the Constitution (42nd Amendment) Act, 1976, S.8 (w.e.f. 3-1-1977)
jurisdiction in the constitutional, civil, criminal and other matters. Next the High Courts where established in each State or a group of Union territory and the States. The lower judicial setup in civil judicial setup consists of the District Courts, Sub-Courts, and the Munsif Court. The Criminal cases are dealt as per the Section 6 of Code of Criminal Procedure 1973. This section states that besides the High Court and the Courts constituted under any law, other than this Code, there shall be Courts of Sessions, Judicial Magistrate of First class and Second class Courts and Executive Magistrates.

Indian judiciary has transversed a long way since the days of rule of East India Company. By the end of the Second World War in 1945, particularly after independence in 1947, the trade and industry received a great fillip. The commercial community became more inclined towards arbitration for settlement of their disputes. It was the development as against litigation in Courts, which involved long delays and heavy expenses. With increasing emphasis on arbitration, there was the judicial grist exposing the infirmities, shortcomings and lacunae in the Act of 1940.

The Arbitration Act of 1940 could not give desired result. One of the main difficulties faced in international arbitration was relating to the recognition and enforcement of an arbitral award made in one country by the Courts of other countries. This difficulty was sought to be removed through various international Conventions such as the Geneva Convention and the New York Convention. India became a party to certain international conventions dealing with the enforcement of foreign arbitral awards. The Geneva Protocol on Arbitration Clauses, 1923, came

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109 V.N.Shukla,Constitution Of India(2003),p304

The liberalisation of Indian economy opened the gates for inflow of foreign investment. India opened its economy and took several measures of economic reforms in the early 90’s. After the development in the international trade and commerce, with the increasing role of GATT and later WTO, there was a spurt in trading in goods, services, investments and intellectual property. Disputes arose between the trading parties, which were diverse in nature and complex, involving huge sums. Such disputes required quick and amicable settlement since the parties could not tolerate the prolonged legal process in Courts, appeal, review and revision\textsuperscript{113}.

Indian judiciary played a very substantial role in the process of emphasizing the need for the change in the then existing arbitration laws. Along the same lines, the apex Court had also recognised the alternate forum in its various decisions. In Sitanna v. Viranna, AIR 1934 SC 105,

the Privy Council affirmed the decision of the Panchayat and Sir John
Wallis observed that, the reference to a village panchayat is the time-
honored method of deciding disputes. It avoids protracted litigation and is
based on the ground realities verified in person by the adjudicators and
the award is fair and honest settlement of doubtful claims based on legal
and moral grounds.

In the year 1981, the Supreme Court of India in Guru Nanak
Foundation V/S Rattan & Sons\textsuperscript{114} 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 procedure claptrap and this led them to
Arbitration Act, 1940. However, the way in which the proceedings under
the 1940 Act are concluded and without an exception challenged in the
Courts, had made lawyers laugh and legal philosophers weep. Experience
showed and law reports bore ample testimony that the proceedings under
the 1940 Act had become highly technical, accompanied by unending
prolixity, at every stage providing for a legal trap to the unwary. Informal
forum chosen by the parties for expeditious disposal of their disputes had
by decisions of the Court been clothed with ‘legalese’ of unforeseeable
complexity.”

In the year 1981, Justice D.A.Desai of the Supreme Court in Ramji
Dayawala and Sons (P) Ltd Vs Invest Import\textsuperscript{115} case accentuated that, the
protracted, time consuming, exasperating and atrociously expensive
Court trails impelled an alternative mode of resolution of disputes
between the parties thus, arbitrate-don’t litigate. Arbitration being a mode
of resolution of dispute, by a Judge of the choice of the parties, can be

\textsuperscript{114} AIR 1981 SC 2075 ;( 1981)4 SCC 634.
\textsuperscript{115} AIR 1981 SC 2085 ;( 1981) 1 SCC 80.
considered to be preferable to that of adjudication of disputes by Court. If expeditious, less expensive resolution of disputes by a Judge of the choice of the parties was the consummation devoutly to be wished through arbitration, experience shows and this case illustrates that the hope is wholly belied because in the words of Edmond Davis, J in Price Vs Milner\textsuperscript{116}, these may be disastrous proceedings.

In the year 1995 in the case of, Trustees for the Port of Madras Vs Engineering Construction Corporation\textsuperscript{117}, Supreme Court of India said that the Act of 1940, which contained the general law of Arbitration, had become outdated and was not in harmony with the arbitral mechanism available to resolve the disputes in most of the countries in the world.

A number of foreign investors started expressing restrain, as they would not like to invest in India unless disputes arising out of their investments are settled abroad. Under the 1940 Act, the parties had to go to the Court to make the awards final. Interference by the Courts at the instance of one party or the other and a considerable delay in disposal of matters gave rise to demands to repeal the 1940 Act. These factors acting together made it essential for India to devise a new legal regime relating to both domestic and international commercial arbitration. To attract the confidence of the international mercantile community in the context of growing volume of India's trade and our commercial relationship with the rest of the world after the new liberalization policy of the Government, The Arbitration and Conciliation Act, 1996 Act was passed. This Act was in harmony with the UNCITRAL Model Law on International Commercial Arbitration, 1985\textsuperscript{118}.

\textsuperscript{116} (1966)1WLR 1235
\textsuperscript{117} AIR1995 SC 2423;1995(2)Arb LR 331.
\textsuperscript{118} N.K. Acharya, Law Relating to Arbitration and ADR (2004), p2,3
The Arbitration Act, 1940 (the 1940 Act) governed the law relating to arbitration until it was replaced by the Arbitration and Conciliation Act, 1996 (the 1996 Act). The 1940 Act had a number of drawbacks, including provisions for Court intervention at a number of stages in the proceedings, which resulted in delays. The 1996 Act remedied these procedural defects. It was enacted to cover comprehensively international commercial arbitration and conciliation as well as domestic arbitration and conciliation. It aimed to make the arbitral process fair, efficient and capable of meeting the needs of arbitrations. The 1996 Act introduced, among others, the changes such as the arbitral tribunal must give reasons for passing an award and must remain within the limits of its jurisdiction. An arbitral award must be enforced in the same manner as if it were a decree of a Court. The arbitral tribunal is permitted to use Conciliation during arbitral proceedings to encourage settlement of disputes (with a view to minimizing the supervisory role of the Courts in the arbitral process). A settlement agreement reached by the parties as a result of Conciliation proceedings, will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by the arbitral Tribunal. For the purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international conventions relating to foreign arbitral awards to which India is a party applies is treated as a foreign award.

consolidates the two Acts for enforcement of ‘Foreign Awards’. Part III of the Act provides for Conciliation. Part IV of the Act contains supplementary provisions. The basic features of the 1996 Act can be summarised as, it provides for the party autonomy, minimum judicial intervention and maximum judicial support. The main objectives of the 1996 Act as per the preamble of the Act are to cover international and domestic arbitration comprehensively, to minimize the role of Courts and treat arbitral award as a decree of Court ,to introduce concept of conciliation and Lastly, to provide speedy and alternative solution to the dispute\textsuperscript{119}.

3.4.1: REPORTS OF COMMITTEES AND COMMISSIONS

To understand and establish the role of alternate dispute redressal methods, that can substitute the formal method of settlement of disputes within the framework of formal procedures conceived in the Code of Civil Procedure through the Courts and other enactments, the Government has time and again appointed various Committees and Commission. The reports of these Committees and Commission have always played a major part in the various legislative amendments and recommendations proposed by the Law Commission India in its study on various aspects of judicial reforms.

In 1949, Justice Sudhi Rajan Das High Court Arrears Committee was constituted to look into the problem of delays. The committee recommended the curtailment of appeals and revision to reduce the backlog of cases in the High Courts. In 1951, Justice Das Committee made recommendations to unify and consolidate the legal profession. In

\textsuperscript{119} O.P Malhotra, Indu Malhotra,The Law and Practice of Arbitration and Conciliation,p1,32
1972, Justice Shah Committee was constituted to report on the arrears in the High Courts.

The Seventy-seventh Report of the Law Commission was assigned exclusively to the problem of "Delays and Arrears" in Trial Courts. This was published in 1978. In this report, the Commission fairly admitted that, "The problem of delay in the disposal of cases pending in law Courts is not a recent phenomenon. It has been with us since a long time. A number of Commissions and Committees have dealt with the problem, and given their reports. Although, the recommendations, when implemented, have had some effect, the problem has persisted. Of late, it has assumed gigantic proportions. This has subjected out judicial system, as it must, to severe strain. It has also shaken in some measure the confidence of the people in the capacity of the Courts to redress their grievances and to grant adequate and timely relief".

In 1989, the Government of India, on the advice of then Chief Justice of India, constituted Arrears Committee (189-1990) under the Chairmanship of Justice Malimath, who was the Chief Justice of the Kerala High Court. The terms of reference of the Committee were inter-alia, to suggest ways and means, to reduce and control the arrears in the High Courts and the subordinate Courts. The Committee submitted its comprehensive report in 7th August 1990. The other members of this Committee were Dr. Justice A.S. Anand, the then Chief Justice of Madras High Court and Mr. Justice P.D. Desai, the then Chief Justice of Calcutta High Court. The terms of reference of the Committee were, inter alia, to suggest ways and means, “to reduce and control arrears in the High Courts and Subordinate Courts.” It identified the causes of accumulation

120. 77th Law commission of India Report, 1978.
121. Justice Dr. M. K. Sharma, High Court of Delhi, Conciliation and Mediation, p 2,3, www.icadr.org,
of arrears like the litigation explosion; the increased legislative activity; the accumulation of First Appeals; the continuation of ordinary civil jurisdiction in some High Courts; the Inadequate number of Judges; the Appeals against orders of quasi-judicial forums going to High Courts; the unnecessary numbers of revisions and appeals; the lack of modern infrastructure in the High Courts; the unnecessary adjournments; the indiscriminate use of writ jurisdiction in High Courts; the lack of facilities to monitor, track and bunch cases for hearing in Courts; the changing pattern of litigation and lack of strategies to deal with new litigation with new techniques; the social awareness in the masses.

The Malimath Committee made a large number of useful recommendations like the introduction of Conciliation procedure in writ matters and setting up of Neighborhood Justice Centers with statutory status. The function of such centers should be confined to resolving disputes by reconciliation. The Committee also favored the machinery of Conciliation Courts for resolving disputes arising under the Rent Control Act.

The Report of Malimath Committee became the basis of finding solutions of the problems of arrears during the Law Ministers’ meetings which took place in 1992-93 at Bangalore, Pondicherry, Pachmarhi and Calcutta. A joint Conference of the then Chief Ministers of the States and Chief Justices of High Courts was held on 4th December, 1993 at New Delhi under the Chairmanship of the then Prime Minister of India and presided over by the Chief Justice of India. It adopted the following resolution: “The Chief Ministers and Chief Justices were of the opinion that Courts were not in a position to bear the entire burden of justice.
system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, mediation and negotiation. They emphasized the desirability of disputants taking advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial” 123.

The Malimath Committee while making a study on ‘Alternative Modes and Forums for Dispute Resolution’ endorsed the recommendations made in the 124th and 129th Report of the Law Commission to the effect that the lacuna in the law as it stands today, arising out of the want of power in the Courts to compel the parties to a private litigation to resort to arbitration or mediation, requires to be filled up by necessary amendment being carried out. The Committee stated that the conferment of such power on Courts would go a long way resulting in reducing not only the burden of trial Courts but also of the Revisional and Appellate Courts. Thus, there would be considerable divergence of work at the base level and the inflow of work from Trial Courts to the Revisional and Appellate Courts would thereby diminish124.

The Law Commission headed by Shri M.C. Setalvad, after thorough survey of the legal and judicial system, gave the Fourteenth Report dated 9th November 1978. The Report said that the problem of delay in disposal of cases poses a challenge to the system, presence of conflicting decisions on various points, areas where reforms were needed and also pointed out that litigation has increased manifold and costs of litigation have increased frustrating common man's efforts to have access to justice125.

123 Malimath Committee Report, Chapter VIII, p112 and Chapter IX, p168, 170, 171.
124 Justice Dr. M. K. Sharma, High Court of Delhi, Conciliation and Mediation, p 4
125 The 14th Law Commission Report(1958)p, 252-263
The Law Commission in its 129th Report examined at length the nature of litigation in urban areas and highlighted the staggering pendency of cases in various Courts of urban areas. It was pointed out that as on 31st December 1984, 2,48,845 cases were pending in Sessions Courts, 77,41,459 cases in Magisterial Courts, 29,22,293 cases in Civil Courts of original jurisdiction and 10,91,760 cases on the appellate side. Special attention was given in the Report to house rent and possession litigation in urban areas and as an alternative to the present method of disposal of disputes under the Rent Acts, four distinct modes were considered. Firstly, on the establishment of Nagar Nyayalaya with a professional Judge and laying them on lines similar to Gram Nyayalaya and having comparable powers, authority, jurisdiction and procedure. Secondly, on the hearing of cases in Rent Courts by a Bench Judges, with minimum two in number, and no appeal but only a revision on questions of law to the district Court. Thirdly, on the setting up a Neighborhood Justice Centers involving people in the vicinity of the premises in the resolution of dispute; and Finally on the Conciliation Court system, which is was then working with full efficiency in Himachal Pradesh. Thus the above study reveals that, the Law Commission of India has considered the question of delay and arrears in Courts from time to time, and has thus given about 12 reports covering various aspects of the said problem.

3.4.2 LEGISLATIONS ADOPTING THE ALTERNATIVE DISPUTE REDRESSAL METHODS IN INDIA

The enactment of the Arbitration and Conciliation Act, 1996 has provided for an elaborate codified recognition to the concept of Arbitration and Conciliation as discussed in the succeeding chapter of this

research thesis. The Code of Civil Procedure, under section 89 has introduced four alternative methods to settle disputes outside the Court, namely through Arbitration, Conciliation, Lok Adalat and Mediation. The Constitution of India, Article 51, clauses (c) and (d) provide that the State shall endeavor to foster respect for international law and treaty obligations and encourage settlement of international dispute by arbitration. The Constitution of India puts arbitration under the Articles providing for the Directive Principle of State Policy. The Article 39-A of the Constitution provides that, the State shall secure that the operation of the legal system promote justice, on the basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislations or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities 127. There are large numbers of Central and State Acts, which contains statutory provisions for arbitration. Arbitration is recognized under Indian Contract Act, 1872 as the first exception to Section 28, which envisages that any agreement restraining legal proceedings is void128. The Legal Service Authorities Act, 1987 brought another mechanism under alternative dispute redressal method with the establishment of Lok Adalat system129. The Industrial Dispute Act, 1947 statutorily recognized conciliation as an effective method of dispute resolution130. Sometimes the submission instead of being ‘voluntary’ is ‘imposed’ by statute. Such arbitrations are called statutory arbitrations. There are more than 25 Central Acts providing for statutory arbitration in India. Like The Companies Act,1956; The Contonments Act,1924; Co-Operative Societies Act ,1912; Indian Electricity Act, 1910

127 The Constitution (42nd amendment)Act,1976.S.8(w.e.f.3-1-77)
130 Industrial disputes Act 1947, Chapter III, and IV.
Acquisition Act, 1894; Provincial Insolvency Act, 1890; Telegraph Act, 1885; Assam Land Revenue Regulation, 1886; Bombay Land Revenue Code, 1897; Punjab Land Revenue Act, 1887; Punjab Co-operative Societies Act, 1961; U.P Co-operative Societies Act, 1960; Maharashtra Co-operative Societies Act, 1961; Damodar Valley Corporation Act; A.P Co-operative Societies Act, 1964 Madras Town Planning Act, 1920; Madras Co-operative Societies Act, 1932; are few examples in this regard.

With regard to the absolute necessity to evolve a alternative mechanism of resolution of disputes, Parliament in India has enacted three Acts namely: The Legal Services Authorities Act, 1987 which has been amended by Legal Services Authorities (Amendment) Act, 2002; The Arbitration and Conciliation Act, 1996; and The Code of Civil Procedure (Amendment) Act, 1999, which came into effect from 1 July 2002. With this amendment Sections 26, 27, 32, 60, 95, 96, 100-A, 115 and 148 were amended and Section 89 was inserted to Civil Procedure Code. Likewise, various orders in the first schedule to Civil Procedure Code were also amended and Rules 1-A, 1-B and 1-C of order X were inserted. The researcher has restricted the study only with the provisions relating to alternative disputes resolution with respect to the research topic in this research paper. The Section 89 of Code of Civil Procedure lays down that where it appears to the Court that there exists an element of settlement, which may be acceptable to the parties; the Court shall formulate the terms of settlement and give time to the parties for their comments. On receiving the response from the parties, the Court may formulate the possible settlement and refer to either (i) arbitration (ii) conciliation (iii) Judicial Settlement including the settlement through Lok

131 Telecom District Manager Goa Vs V.S.Dempo & Co. (1996) 8 SCC 753.
Adalat or (iv) mediation. As per sub-section (2) of Section 89 as amended when a dispute is referred to arbitration and conciliation, the provisions of Arbitration and Conciliation Act, 1996 shall apply. When the Court refers the dispute to Lok Adalat for settlement by an Institution or person, the Legal Services Authorities Act, 1987 alone shall apply. It is only in the case of mediation that the Court itself shall affect compromise and shall follow such procedure as may be prescribed by Rules made by the High Court under Section 122 read with Section 130 of the Code of Civil Procedure. Rules 1-A, 1-B and 1-C of Order X deal with different situations. These provisions are applicable where at the first hearing of the suit the Court ascertains from each party or the counsel whether the parties admit or deny the allegations of fact as are made in the plaint or the written statement. After referring to the admissions and denials, the Court shall direct the parties to the suit to opt for either mode of the alternative dispute redressal methods as specified in Section 89 (1) i.e. Arbitration and Conciliation, Lok Adalat or Mediation. The Supreme Court of India has clearly held that, Section 89 does not obligate the Courts to conduct arbitration. However, it enables the Court wherever it is satisfied with reference to the dispute in a pending suit that there is a possibility of settlement either by way of arbitration or conciliation etc., the Court is required to refer the same to the arbitration or conciliation, judicial settlement including settlement through Lok Adalats or mediation. In Rajasthan State Road Transport Co. Vs Nand Lal Sarawat case, the Rajasthan High Court held that, where parties agree for settlement of dispute before the arbitrator, it is imperative for the Court to take steps for settlement of dispute. Where a dispute has been referred for arbitration or conciliation, the provisions of

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135 A.I.R 2005 Raj 112 (113, 114)
the Arbitration and Conciliation Act, 1996 shall apply as if the proceeding for arbitration or conciliation were referred for settlement under the provision of that Act. Where a dispute has to be referred to Lok Adalat, the Court shall refer the same to Lok Adalat in accordance with Section 20 (1) of Legal services Authority Act 1987 and all the provision of that Act shall apply in respect of the dispute so referred to the Lok Adalat. Where a matter which is referred to Lok Adalat in terms of Section 89 (2), read with Section 20 of the Legal services Authorities Act, is settled, the refund of the Court fees is governed by Section 16 of Court Fees Act, read with Section 21 of the Legal Services Authorities Act, the plaintiff is entitled to the refund of the whole of the Court fees paid 136.

Legal Services Authority Act institutionalized the concept of resolution of dispute through arbitration, mediation, conciliation and negotiation. The said Act provides for holding Lok Adalats where disputes are pending before the Courts. It also provides for settlement of disputes at pre-litigation stage. The Legal Services Authority (Amendment) Act, 2002 provides for a radical change. As regards disputes between the consumers and the statutory bodies or public corporations providing public utilities, dispute at the pre-litigation stage may be referred to a permanent Lok Adalat comprising of a judicial officer and experts in the field. The permanent Lok Adalat would try to arrive at a conciliatory settlement but if does not succeed; they may adopt an adjudicatory role 137. No appeal lies from such judgment, which became an executable decree 138. Supreme Court of India held that, the award

136 Vasudevan Vs A.V State of Kerala AIR 2004 Ker 43 (45)
137 The Legal Services Authority (Amendment) Act, 2002
138 The Legal Services Authority Act, 1987, Section 21.
passed by the Lok Adalats are executable like decree of Civil Courts and the same are non-appellable, thus putting an end to litigation

Form the above study of evolutionary history of dispute redressal mechanisms in India, it is evident that, different forms of dispute resolution methods which have now been categorized as alternative dispute redressal methods, are in fact not new to India. These alternative dispute redressal methods have been in existence in some form or the other in India. That is, even before the introduction and the dominant adoption of the modern justice delivery system through Courts, by the Colonial British rulers in India the said alternative dispute redressal methods had been in existence. After the introduction of the modern justice delivery system, the ancient form of dispute resolution took a back seat for many decades. Prior to the British rule, the laws in India were not codified as in modern sense.

The problem of judicial delay and the urgency of reforms needed in the legal system has emphasized and reintroduced the discussion about the need of some alternative dispute redressal methods as discussed in the introductory chapters of this study. Proceeding further with the perception it is found that the problem of judicial delay and accumulation of cases still exists. The need of the day is to explore the possibility of creating some alternative dispute resolving machinery, for redressal of the disputes among the disputants. In this manner the researcher, is trying to find a solution to the crisis of judicial delay and judicial arrears with the introduction or re-introduction of ADR at a pre-litigation, litigation or post-litigation stage, functioning along with the existing process adjudication through Courts.