CHAPTER I
ALTERNATIVE DISPUTES RESOLUTION

1.1 CONCEPT AND NEED

It is a known fact that a man is a social animal, due to the inherent desire to communicate and express his thoughts, man invented language. Though he did not perceive that this language would be the instrument of misunderstanding, it did help bring out his desire to complain.

It is not surprising when we say that every person has his own way of doing things, this is due to the fact that people have different levels of understanding. Due to this different level of understanding their wants and needs are different, excluding the basic needs which are similar to everyone. This different level of understanding and way of doing things has made man to invent the word ‘CONFLICT’.

There are conflicts in each and every home. A conflict is just an assertion of different views of people. The question which now arises is how to resolve this conflict.

In earlier times no one knows how conflicts were resolved, but our ancient scriptures do throw light as to how these conflicts were resolved. These scriptures showcase the mentality of people, as to how they intended to reach to an amicable settlement.

In The Ramayana Angadha son of Vali approached Ravana and delivered the message of Lord Rama to opt the path of peaceful settlement. Even in Mahabharata, Lord Krishna endeavored to mediate between the Pandavas and Kauravas.
Therefore it can easily be said that the mentality of people to resolve disputes were through amicable settlements. This project will divulge into the intricacies of conflicts and the ways which have been formulated to resolve such disputes.

Human conflict are inevitable. Disputes are equally inevitable. It is difficult to imagine our human society without conflict of interests. Disputes must be resolved at minimum possible costs both in terms of money and time, so that more time and more resources are spared for constructive pursuits.

For resolution of disputes there is a legal system in every legal society, every injured person is supposed to go to courts for his redressal. All the legal systems are trying to attain a legal ideal that whenever there is a wrong, there must be a remedy. So that nobody shall have to take law into his own hands.

In pursuit of redressal which would resolve the dispute at minimum possible costs, both in terms of money and time. Thus, began the search for an alternative to the conventional court system.

A large number of quasi-judicial and administrative tribunals have been created for quicker relief. These tribunals and forums are in a way an alternative method of dispute redressal. But even such tribunals and forums have become overcrowded with the result that they are not able to provide relief within good time. Consumer forums came into being to provide quick, effective and costless relief to buyers of goods and hirers of services. Persons suffering from poor quality of merchandize and services in the market turned out to be great in number that consumer redressal forums and commissions have proved to be inadequate to the volume of complaints.
There thus remains a need for an alternative remedy which will not be let down by costs and delays. Therefore, this search for and alternative method of dispute resolution should culminate in a remedy in which there is minimum role of official authorities and where the focus is on delivering justice and not on technicalities of the procedural laws.

The new mentality of dispute settlement should inculcate in the present legal system the idea of reducing hostility between parties, regaining a sense of control, resolving conflicts in a peaceful manner, and achieving a greater sense of justice in each individual case.

The Judicial system developed by the Britishers was very expensive and time consuming and due to these reasons the people’s faith on such legal system was being diminished. After the independence it was realized that there is need to have such an alternative means of dispute resolving system or machinery which may be economical and less time consuming.¹

The quest for the ideal dispute resolution system is endless. This is more so in the Indian context, where delays in the system are endemic, costs are stupendous and retribution never an adequate deterrent. The willful defaulter almost always drags litigation on endlessly and the genuine promoter is usually saddled with debts he cannot liquidate easily. As the system is unlikely to change overnight, all effort must be directed towards finding solutions before resorting to litigation. Mediation is one such method. The study focuses on mediation, an Alternative Dispute Resolution (ADR) process institutionalized in India by the Code of Civil Procedure (Amendment) Act, 1999.

¹ V.G.Ranganath: Need for amalgamation of alternative dispute resolution with civil procedure code http://www.legalindia.in/need-for-amalgamation-of-alternative-dispute-resolution-with-civil-procedure-code
To ensure the maintaining of the rule of law, two things are necessary i.e. public confidence in the justice system and accessibility of the system to the general public. People should be able to make informed decisions about the best way of resolving their disputes. However, accessible justice does not mean that everyone with a grievance should be encouraged to go to courts; courts are a valuable and limited resource. Moreover, not all disputes are suited to resolution in the courts. Achieving access, therefore, means ensuring that members of the community have access to legal advice about how best to manage their dispute.

Courts or formal justice system have its own limitation like mystification, delays expenses and costs, geographical location and hence is a limited resource. These problems have been the main driving force behind the zeal for exploring the remedial measures. Recent trend, all over the world, is to shift from litigation towards Alternative Dispute Resolution. Alternative Dispute Resolution encompasses arbitration, mediation, conciliation, and other methods for resolving disputes. Alternative Dispute Resolution offers several advantages over a lawsuit. It is less adversarial and in some cases can be faster and less expensive. It can also reduce court workloads for these reasons its use is being promoted by court reformers in many developing countries.

ADR can be used in almost all types of contentious matters that are capable of being resolved, under law by mutual agreement of the parties. These techniques have been employed with positive results in various categories of disputes like commercial, civil, industrial and family disputes. In particular, these techniques have been shown to work across the full range of business disputes, banking, contract performance and interpretation, construction contracts, intellectual property rights, insurance coverage, joint ventures, partnership differences, personal injuries, product liability,
professional liability, real estate and securities. ADR process can be broadly divided into two categories i.e. adjudicatory and non-adjudicatory. The adjudicatory procedures such as arbitration lead to a binding ruling that decides the case. The non-adjudicatory methods like negotiation, mediation, etc. contribute to resolution of disputes by agreement of the parties without adjudication.

1.2 ALTERNATE DISPUTE RESOLUTION AND THE COMMON MAN

‘Discourage litigation; persuade your neighbours to compromise whatever you can. Point out to them how the normal winner is often a loser in fees, expenses, cost and time’ - Abraham Lincoln

Speedy disposal of cases is an important issue for all concerned with the proper administration of justice. Alternate Dispute Resolution is a less adversarial alternative to traditional litigation system. These methods can be employed in all those cases that can be litigated, such as disputes relating to insurance, trade, technology, divorce and other family matters etc. Alternate Dispute Resolution is not open to public, all hearings and awards are private and confidential. Common man gets trapped in year long litigation processes, which erodes the very purpose of delivery of justice. Common man with development in the sphere of Alternate Dispute Resolution will be provided with an opportunity to showcase their dispute, as well as reach resolution amicably, in a suitable and congenial atmosphere, without falling deep into the complexities of litigation.

Alternate Dispute Resolution system is not a new phenomenon for the people of this country; it has been prevalent in India since time immemorial. Ancient system of dispute resolution made a significant

---

contribution, in reaching resolution of disputes relating to family, social groups and also minor disputes relating to trade and property. Village Level Institutions played the leading role, where disputes were resolved by elders, comprising Council of Village (popularly called Panchayats), which was an informal way of mediation. In earlier days disputes hardly reached courts. Decisions given by the elderly council were respected by all. But subsequently boon accompanied bane, the very system lost its aura due to intervention of political and communal elements. Before coming of the Legal Services Authority Act, 1985, Lok Nyayalayas did not have statutory recognition and also presently, the Gram Nayayalayas Bill, 2007, establishes Gram Nayayalayas, as the lowest tier of the judiciary for rural areas.

The concept was also prevalent in other parts of the world in various forms and manners, like in case of Philippines the leader of the local area tried to resolve minor issues which erupted amongst the parties. Similarly in case of Latin America, an officer of the State juece de paz could use informal procedures to mediate or Conciliate between parties. Alternate Dispute Resolution was also existent in UK, when matters in nearly 1947 were decided by such processes of arbitration, conciliation etc. In China and Japan mediation was the foremost step taken for the resolution purposes.

In US, the idea of Alternate Dispute Resolution, have been introduced only few decades prior to this country but it has been found that 94% cases are referred to be solved by Alternate Dispute Resolution process, wherein 46% of such cases are decided without contest. The Law Commission headed by Sh. M.C. Setalvad gave the Fourteenth Report which deals comprehensively with all the areas where reformation is required and it states that litigation tailored with its rich bags frustrates the common man thereby denying him access to justice. The Indian Constitution provides for
the settlement of International disputes by Arbitration in Article 51(d) as a Directive Principle of State Policy.

Alternate Dispute Resolution is also popular by the name of Additional Dispute Resolution and Appropriate Dispute Resolution. In the case of Hussainara Khatoon v. Home Secretary, State of Bihar Supreme Court has held that ‘right to speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of Indian Constitution’. The principle of ubi jus ibi remedium also conveys the same message that whenever a wrong is done to a person, he has the right to approach the court. Assistance from the court must not be denied, on financial basis.

**The five general subtypes of Alternate Dispute Resolution are:**

**NEGOTIATION:** In this process no intervention from the third party takes place, to bring about amicable settlement whereas advice of a skilled person or a social worker as a third party may be respected on certain issues. The participation from both the parties is voluntary in nature.

**MEDIATION:** In this case a third party, known as a mediator tries to facilitate the resolution process but he cannot impose the resolution, parties are to decide according to their convenience and terms.

**COLLABOURATIVE LAW:** The attorneys try to facilitate process of resolution in accordance with the terms of the contract mentioned specifically. The agreements are prepared with the help attorneys. The resolution reached cannot be imposed on the parties by the attorneys.

**ARBITRATION:** In case of arbitration the third party adjudge and bring about peaceful settlement can very well impose the resolution on the parties. Arbitration generally grows when the parties through the contract
agrees to resort to arbitration process, in case of disputes that may arise in 
future regarding contract terms and conditions.

CONCILLIATION: In this case, parties submit to the advice of a 
conciliator, who talks to the parties separately and try resolving their 
disputes.
There are some more forms of Alternate Dispute Resolution like Evaluation, 
Early Neutral Evaluation, Neutral Fact Finding, Ombudsman etc practiced in 
other part of the world. Alternate Dispute Resolution can be conducted 
online too; such process is called online dispute resolution. These services 
can be provided by the government, but such methods cannot assure 
efficiency.

There are two different ways to adopt the process of Alternate 
Dispute Resolution:

1. **Alternate Dispute Resolution with filing of a lawsuit:** In 
   this case by way of mediation, conciliation etc either the 
judge or some court officer will make an attempt to resolve 
the disputes between the parties and reach an amicable 
settlement. If the positive happens case is dismissed thereby 
saving the time of the court and expenses of the parties. The 
very practice has been followed via system of Lok Adalats 
in India.

2. **Alternate Dispute Resolution by way of free standing:** 
   This is generally the case of commercial arbitration, where 
the parties to the dispute agree, not only to have a third party 
as their arbitrator, but also agrees to what rules shall be 
binding and whether the decision of the third party will be 
either binding or advisory in nature.
1.3 DISPUTES

The disputes can be mere difference of opinion of no consequence. The disputes can take the shape of arguments of scholarly nature. The dispute can also be of the proportions and scale, which may continue to exist for a long period of time without any end in sight; like the disputes of political nature. The disputes, which we are talking about here, are the disputes, which flow from the legal rights and obligation of the parties. The disputes, which can be agitated in a court of law or enforced by a court of law. In other words, at the moment we are only concerned with legal disputes per se or the disputes, which revolve around legal rights.

What we intend to do with disputes

No civil society wants disputes within. The disputes not only disrupt peace in the society but also hinder its progress. We desire that the disputes in a society should be resolved as early as possible. The disputes can be resolved in a court of law or outside the court of law.

Dispute

Dispute resolved outside the Court

Dispute adjudicated in the Court

Dispute Resolved

These two channels of dispute resolution exist independent of each other. They can be followed independent of each other. They do not stand as alternative to each other.

The dispute resolution outside the court of law is the main dispute resolution process.
The courts of law with all its paraphernalia are the most conspicuous symbol of resolving disputes. We, therefore, tend to believe that this is the main method of resolving disputes. There are innumerable channels, which exist in society outside the court system to resolve the disputes. In fact, the courts are the last resort for most of the people to get their disputes resolved. It is not difficult to find people on the street who may say that they have never been to court in their entire life. It surly cannot mean that they never had any dispute in their lives. It only means that they had their disputes resolved by not going to the court but outside it.

In India and in other parts of the world there are communities like the tribes and other marginalized Sections of the society who have no access to the courts of law. The entire court system of resolving disputes is alien to them. To say that they do not have disputes among themselves would be denying the obvious. It cannot be claimed by anyone that their disputes do not get resolved. That is to say their disputes get resolved not inside the courts of law but outside.

The purpose of saying all this is simple. There are far more number of disputes, which get settled outside the court system of adjudication than inside. To call such dispute resolution processes as ‘alternative’ can only be described as a misnomer.

**All disputes cannot be adjudicated:** If all disputes cannot be resolved outside the court and necessarily have to be adjudicated, than there are also disputes, which cannot be adjudicated, but can only be resolved outside the court. Prime examples of such disputes are the injunctions that cannot be supervised by the court.

**The bypass model is flawed:** It is more then often said that the alternative dispute resolution processes’ are like channels created to decongest the courts. In other words, since there are large of number cases
pending in courts therefore we need to have ‘alternative dispute resolution processes’ in place in order to reduce the number of cases in the court. Conversely, as the number of cases in courts goes down, the necessity of having ‘Alternative Dispute Resolution Process’ in place would also go down. The other reason given for adopting the ‘alternative dispute resolution processes’ is that it is cost effective. In other words if the cost of litigations is reduced the necessity of ‘alternative dispute resolution processes’ will also decline. These arguments are flawed for at least two reasons. One that there will be always be influx of some cases in the adjudicatory process, which the system will not be able to adjudicate. Two, dispute resolution processes have some obvious advantages over the normal adjudicatory process like the cutting down the progression of litigation in the forms of appeals, revisions etc. on the one hand and putting an end to prospective litigation between the parties on the other hand.

The fact that these dispute resolution processes can also resolve the disputes pending before the courts thus contributing to reduction of cases in courts is a by- product of such dispute resolutions processes and not a reason for their existence.

The existence of large number of cases in the courts, which cannot be adjudicated, is one of the disguised reasons contributing to the ever-increasing number of cases in courts. Therefore, there is a greater need for having these resolution processes work hand-in-hand with court adjudicatory process not as an alternative but complimentary to it.

The dispute resolution process outside the court system in focus: The disputes resolution processes outside the court system were always in existence but they were never in focus of the civil society like they are seen now. These processes are being discussed not only by legal experts but also community leaders and business professionals. The old methods of
dispute resolutions are being rediscovered and fine-tuned to meet the requirements of the society and new ones are being evolved. As we realize that these dispute resolution processes outside the court system exist not as an alternative to the court system but independently, it would help us understand and work these processes better. It would encourage greater research and confidence in these processes. They have the potential for being made applicable in all walks of life wherever there exist possibility of any dispute, a potential only waiting to be tapped.

1.4 DELAY IN DISPOSAL OF CASES

The Judicial Officers of today have to realize that they are inheriting a legacy of huge arrears. The pendency of cases is huge because earlier methods of disposal were not very effective. Therefore, the Judicial Officers of today have to look at the problem of case disposal differently and to adopt different alternative methods of dispute resolution. To illustrate the point of arrears, I would like to quote from report in which it is said:

‘Unless a Court can start with a reasonably clear slate improvement of methods is likely to tantalize only. The existence of a mass of arrears takes the heart, out of a Presiding Judge, so long as such arrears exist, there is temptation to which many Presiding Officers succumb, to hold back the heavier contested suits and devote attention to the lighter ones. The turnout of decisions in contested suits is thus maintained somewhere near the figure of institution, while the real difficult work is pushed into the background.’

This may appear to be a quotation from report that could have been prepared only yesterday, but in fact it is from the Justice Rankin report of 1925. The situation does not seek to have changed over the last 75 years
and that is why some non-conventional methods have to be adopted to tackle the huge pendency of cases.

Our justice delivery system is bursting at the seams and may collapse unless immediate remedial measures are adopted not only by the judiciary but also by the legislature and the executive. It has been said by Lord Devlin:

‘If our business methods were as antiquated as our legal system, we would have become a bankrupt nation long back.’

Different wings of the State are plagued with corruption. Nepotism, redtapism. There is hardly any law and order in this society. There are problems of poverty hunger malnutrition and food adulteration. Even after more than 57 years of independence, we have not been able to provide safe drinking water to the people of this country. It is in this background that the common people of this country, with a hope that the judiciary will remove these ills with which society is suffering, see our courts as a last resort. However, today even the judiciary is at cross-road and it is a matter of concern to all of us. People had lost faith in the other two wings of the State much earlier. Unfortunately, the faith of a common man in the judiciary is also being eroded.

We all know that people indisputably have been trying to avoid law courts. Sometimes they are forced to do so. As is the case in some of the States people are forced to take their disputes only to the extra constitutional courts. Should we, being a part of the society, allow this to happen? When for avenging a murder another murder takes place; when a landlord instead of approaching the Court of law hires the services of goods or where the services of the criminals are hired for settling all types of disputes; can we say that we are living in a civilized society governed by the Rule of Law? Answer to this question must be rendered in the negative.
We have to take remedial steps to prevent this erosion any further, and one of the major requirements for this is to deliver speedy and inexpensive justice to the common man.

Recently in *H.P.A. International Vs. Bhagwandas Fateh Chand Daswani and others*, the Supreme Court while deciding a matter arising out of the Specific Relief Act lamented the delay in disposal of the suit, thus:

The facts of the present case should be an eye opener to functionaries in law courts at all levels that delay more often defeats justice invariably adds complications to the already complicated issues involved in cases coming before them, and makes their duties more onerous by requiring them to adjust rights and equities arising from delay.

In a litigation ridden commercial society also it is essential to explore consensual dialogue between disputants so as to enable them to arrive at an amicable solution. The job of facilitator is not that of an arbitrator. Whereas an arbitrator decides issues between the parties, a conciliator would bring them together with the object of settling the disputes. An ADR practitioner unlike a lawyer is a healer of conflicts and not a combatant.

ADR was at one point of time considered to be a voluntary act on the part of the parties which has obtained statutory recognition in terms of Code of Civil Procedure Amendment Act, 1999, Arbitration and Conciliation Act, 1996, Legal Services Authority Act, 1987 and Legal Services Authority Amendment Act, 2002.

The Parliament apart from the litigants and the general public as also the statutory authorities like Legal Services Authority have not thrown the ball into the Court of Judiciary. What therefore, now is required would

---

3 AIR 2004 SC 3858
be implementation of the parliamentary object. The access to justice is a human right fair trial is also a human right. In some countries, trial within a reasonable time is a part of the human rights legislation. In our country, it is a constitutional obligation in terms of Article 14 and Article 21. Recourse to ADR as a means to have access to justice may, therefore, have to be considered as a human right problem. Considered in that context the judiciary will have an important role to play but the goal cannot be achieved unless requisite infrastructure is provided and institutional framework is put to place.

1.5 PENDENCY OF CASES IN VARIOUS COURTS AND NEED FOR ADRS

As per statistics available the pendency of cases in various subordinate courts as on 30.9.2010, a total of 2.8 crore cases are pending in subordinate courts and 42 lakh in High Courts. Approximately 9% of these cases have been pending for over 10 years and a further 24% cases have been pending for more than 5 years.4

The Union Law Minister recently launched the ‘Mission Mode Programme for Reduction of Pendency of Arrears in Courts’. According to media reports, the programme aims to dispose of 40 per cent of the cases pending in subordinate courts across the country, in the coming six months.5

---

4 Text of Speech – Union Law Minister on the programme to reduce pendency in courts (July 1, 2011), http://pib.nic.in/newsite/erelease.aspx?relid=72970
5 ‘Nationwide programme to reduce pending court cases’, The Hindu (July 2, 2010), http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/article2152615.ece
1.6 PENDENCY OF CASES ACROSS INDIAN COURTS

1.6.1 Pendency Before Hon'ble Supreme Court

![Supreme Court Graph]

1.6.2 Pendency Before Different Hon'ble High Courts

![High Courts Graph]
1.6.3 Pendency Before Subordinate Courts

![Subordinate Courts chart]

1.7 FILING AND RESOLUTION OF CASES

<table>
<thead>
<tr>
<th>Category</th>
<th>Supreme Court (Thousand)</th>
<th>High Court (Lakh)</th>
<th>Subordinate Courts (Crore)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pending (start of year)</td>
<td>56</td>
<td>40</td>
<td>2.7</td>
</tr>
<tr>
<td>Fresh cases filed</td>
<td>78</td>
<td>19</td>
<td>1.8</td>
</tr>
<tr>
<td>Cases resolved</td>
<td>79</td>
<td>17</td>
<td>1.7</td>
</tr>
<tr>
<td>Pending (end of year)</td>
<td>55</td>
<td>42</td>
<td>2.8</td>
</tr>
</tbody>
</table>
1.8 INSTITUTION, DISPOSAL AND PENDENCY OF CASES BEFORE HON'BLE HIGH COURTS

(2002-2008)

Table -I

<table>
<thead>
<tr>
<th>YEAR</th>
<th>INSTITUTION</th>
<th>DISPOSAL</th>
<th>PENDENCY AT THE END OF THE</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>932186</td>
<td>842646</td>
<td>2554963</td>
</tr>
<tr>
<td>2003</td>
<td>988449</td>
<td>982580</td>
<td>2560832</td>
</tr>
<tr>
<td>2004</td>
<td>1016420</td>
<td>863286</td>
<td>2811382</td>
</tr>
<tr>
<td>2005</td>
<td>1082492</td>
<td>934987</td>
<td>2870037</td>
</tr>
<tr>
<td>2006</td>
<td>1082667</td>
<td>979275</td>
<td>2968662</td>
</tr>
<tr>
<td>2007</td>
<td>1064925</td>
<td>1001775</td>
<td>3030549</td>
</tr>
<tr>
<td>2008</td>
<td>1099152</td>
<td>1028248</td>
<td>3103352</td>
</tr>
</tbody>
</table>

Table -II

<table>
<thead>
<tr>
<th>YEAR</th>
<th>INSTITUTION</th>
<th>DISPOSAL</th>
<th>PENDENCY AT THE END OF THE</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>402016</td>
<td>343900</td>
<td>532085</td>
</tr>
<tr>
<td>2003</td>
<td>396869</td>
<td>367143</td>
<td>561811</td>
</tr>
<tr>
<td>2004</td>
<td>432306</td>
<td>375917</td>
<td>613077</td>
</tr>
<tr>
<td>2005</td>
<td>460398</td>
<td>403258</td>
<td>651246</td>
</tr>
<tr>
<td>2006</td>
<td>507312</td>
<td>471327</td>
<td>686191</td>
</tr>
<tr>
<td>2007</td>
<td>525891</td>
<td>503298</td>
<td>712511</td>
</tr>
<tr>
<td>2008</td>
<td>548098</td>
<td>489051</td>
<td>770738</td>
</tr>
</tbody>
</table>
1.8.1 CONSOLIDATED INSTITUTION, DISPOSAL AND PENDENCY OF CASES BEFORE HON’BLE HIGH COURTS

(2002-2008)

Table -III

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL INSTITUTION</th>
<th>TOTAL DISPOSAL</th>
<th>PENDENCY AT THE END OF THE</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>1334202</td>
<td>1186546</td>
<td>3087048</td>
</tr>
<tr>
<td>2003</td>
<td>1385318</td>
<td>1349723</td>
<td>3122643</td>
</tr>
<tr>
<td>2004</td>
<td>1448726</td>
<td>1239203</td>
<td>3424459</td>
</tr>
<tr>
<td>2005</td>
<td>1542890</td>
<td>1338245</td>
<td>3521283</td>
</tr>
<tr>
<td>2006</td>
<td>1589979</td>
<td>1450602</td>
<td>3654853</td>
</tr>
<tr>
<td>2007</td>
<td>1590816</td>
<td>1505073</td>
<td>3743060</td>
</tr>
<tr>
<td>2008</td>
<td>1647250</td>
<td>1517299</td>
<td>3874090</td>
</tr>
</tbody>
</table>

1.9 INSTITUTION, DISPOSAL AND PENDENCY OF CASES BEFORE SUBORDINATE COURTS

(2002-2008)

Table -IV

<table>
<thead>
<tr>
<th>YEAR</th>
<th>INSTITUTION</th>
<th>DISPOSAL</th>
<th>PENDENCY AT THE END OF THE</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>3385715</td>
<td>3342653</td>
<td>7254871</td>
</tr>
<tr>
<td>2003</td>
<td>3170048</td>
<td>3121978</td>
<td>7302941</td>
</tr>
<tr>
<td>2004</td>
<td>3697242</td>
<td>3726970</td>
<td>7042245</td>
</tr>
<tr>
<td>2005</td>
<td>4069073</td>
<td>3866926</td>
<td>7254145</td>
</tr>
<tr>
<td>2006</td>
<td>4013165</td>
<td>4019383</td>
<td>7237496</td>
</tr>
<tr>
<td>2007</td>
<td>3777348</td>
<td>3757403</td>
<td>7280737</td>
</tr>
<tr>
<td>2008</td>
<td>4049733</td>
<td>3855719</td>
<td>7539848</td>
</tr>
</tbody>
</table>
### Table -V

**CRIMINAL CASES**

<table>
<thead>
<tr>
<th>YEAR</th>
<th>INSTITUTION</th>
<th>DISPOSAL</th>
<th>PENDENCY AT THE END OF THE YEAR</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>11159996</td>
<td>10177254</td>
<td>15185505</td>
</tr>
<tr>
<td>2003</td>
<td>11635833</td>
<td>10874673</td>
<td>15946665</td>
</tr>
<tr>
<td>2004</td>
<td>11888475</td>
<td>10857643</td>
<td>17624765</td>
</tr>
<tr>
<td>2005</td>
<td>13194289</td>
<td>12442981</td>
<td>18400106</td>
</tr>
<tr>
<td>2006</td>
<td>11809666</td>
<td>11975308</td>
<td>17842122</td>
</tr>
<tr>
<td>2007</td>
<td>11322073</td>
<td>11040103</td>
<td>18052011</td>
</tr>
<tr>
<td>2008</td>
<td>12305802</td>
<td>11577091</td>
<td>18869163</td>
</tr>
</tbody>
</table>

### 1.9.1 CONSOLIDATED INSTITUTION, DISPOSAL AND PENDENCY OF CASES BEFORE SUBORDINATE COURTS (2002-2008)

### Table -VI

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL INSTITUTION</th>
<th>TOTAL DISPOSAL</th>
<th>PENDENCY AT THE END OF THE YEAR</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>14545711</td>
<td>13519907</td>
<td>22440376</td>
</tr>
<tr>
<td>2003</td>
<td>14805881</td>
<td>13996651</td>
<td>23249606</td>
</tr>
<tr>
<td>2004</td>
<td>15585717</td>
<td>14584613</td>
<td>24667010</td>
</tr>
<tr>
<td>2005</td>
<td>17263362</td>
<td>16309907</td>
<td>25654251</td>
</tr>
<tr>
<td>2006</td>
<td>15822831</td>
<td>15994691</td>
<td>25079618</td>
</tr>
<tr>
<td>2007</td>
<td>15099421</td>
<td>14797506</td>
<td>25332748</td>
</tr>
<tr>
<td>2008</td>
<td>16355535</td>
<td>15432810</td>
<td>26409011</td>
</tr>
</tbody>
</table>
• About 55,000 cases are currently pending with the Supreme Court, 42 lakh with High Courts and 2.8 crore with subordinate courts.

• Pendency has increased by 148% in the Supreme Court, 53% in High Courts and 36% in subordinate courts in the last 10 years.

• Increase in backlog over the past few years, some measures have been taken by the government to facilitate expeditious disposal of cases. These include schemes for computerisation, infrastructural augmentation, promotion of Alternate Dispute Resolution mechanisms, Lok Adalats etc.⁶

• Despite these initiatives, the rate of case disposal has not kept pace with the rate of case institution. As a result, the total number of pending cases has increased.

• Between October 2009 and October 2010, subordinate courts settled 1.73 crore cases as compared to 1.24 crore in 1999, an increase of 49 lakh. During the same period, the fresh cases filed increased by 52 lakh.⁷,⁸

The above figures would show that arrears are increasing almost every year on account of institution almost every year being more than the disposal.

Sanctioned strength of the High Court Judges was 886 and working strength was 606 as on 1st of January, 2009 leaving 280 vacancies. Sanctioned strength of Subordinate Judges was 16685 and working strength was 13556 leaving 3129 vacancies as on 31st December, 2008.

---

⁶ Rajya Sabha Unstarred Question No. 1173 (March 07, 2011)
⁸ Court News, Supreme Court of India, http://supremecourtofindia.nic.in/courtnews.htm
The average disposal per Judge comes to 2504 cases in High Courts and 1138 cases in subordinate Courts, if calculated on the basis of disposal in the year 2008 and working strength of Judges as on 31st December, 2008. Applying this average, we require 1547 High Court Judges and 23207 subordinate Court Judges, only to clear backlog in one year. The requirement would come down to 774 High Court Judges and 11604 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 fresh institution, the backlog cannot be reduced without additional strength, particularly, when the institution of cases is likely to increase in coming years.

This is also known fact that the Courts do not possess a magic wand by which they can wave to wipe out the huge pendency of cases nor can they afford to ignore the instances of injustices and illegalities only because of the huge arrears of the cases already pending with them. If the courts start doing that, it would be endangering the credibility of the Courts and the tremendous confidence reposed in them by the common man. However, the heartening factor is that people’s faith in our judicial system continues to remain firm in spite of huge backlogs and delays. It is high time we make a scientific and rational analysis of the factors behind accumulation of arrears and devise specific plan to at least bring them within acceptable limit, within a reasonable timeframe. Time has now come for us to put our heads together and find out ways and means to deal with the problem, so as to retain the confidence of our people in the credibility and ability of the system.

1.10 MECHANISM AND EFFECTIVE IMPLEMENTATION

Alternative Dispute Resolution mechanism which provides for an additional forum in the dispute resolution mechanism has now come to say.
A dispute precedes a litigation. A dispute is raised because of ignorance on the part of the disputant. The relationship between the litigants becomes bitter when his ignorance about his right is fuelled by his ego. With a view to resolve the dispute, its source must be traced. The mool mantra of mediation, conciliation is empowerment. The disputant must be empowered which would mean that they must have adequate knowledge as regards existence or extent of their right under a statute or a custom. Once a disputant is empowered by making him aware of his right or the extent thereof, the dispute may come to an end.

Mediation should be part of the juvenile criminal justice system. For non-violent offenders, victim-offenders mediation may be applied under the supervision of the criminal justice system caseworkers, which would help both sides to humanize and rehabilitate each other. Mediation may be a part of family counseling. It is a way for members of the family who are splitting into parts to know as to how to deal with the changes in roles, duties and opportunities and to face the same with emotional balance. It may also be a part of the civil court system where parties to law suits are aided in settlement negotiations aimed at helping them find their own best interest. It may be a part of the community action. It may be employed in labour dispute seeking to improve any conflict and feelings in the workplace. It is, however, not always alternative to the formal justice system purported to be conducted by ‘real human beings’ rather than lawyers.

The concept of employing alternative dispute resolution has undergone a sea change with the insertion of Section 89 in the Code of Civil Procedure. The Parliament intervened having regard to the success stories of its effective implementation in other countries, particularly, in United States of America where the settlement rate rose upto 94%. Initially, there would be resistance to the system both from a Section of the Bar and the Bench but a
positive change in the outlook is necessary. As a lawyer or a judge each at one time of his life or other play some role in settlement of a few cases and thus, there is no reason as to why at least some of us would not buy the idea.

Conciliation and mediation should now be a regular process in every case which comes to the court as it is now empowered to force the purpose for taking recourse to mediation and conciliation or arbitration as well as to judicial settlement. Legislation however, by itself may not be sufficient. It must be done by motivating others. Settlement at mediation or conciliation, however, must ensure a fair procedure. No party should go back with a feeling that some settlement had been forced upon them although the same may be arrived as a result of reasonable persuasion.

1.11 HISTORY OF ADR-IN INDIA

1.11.1 Settlement of Disputes - During Vedic Period

In Roman law, there was no struggle to establish the jurisdiction of ordinary courts as against rival tribunal’s. Accordingly, contracts for submissions of disputes to the decision of persons were recognized, and there were rules as to their effect and enforcement.\(^9\)

Disputes were settled by the method of arbitration in Greece during the sixth century B.C. The disputes included boundary fixation, title to colonies and land, assessment of damages that occurred due to hostile invasion monetary claims between states and religious matters.\(^10\)

Even in India during the Vedic period Yajnavalkya and Narad have referred to various grades of arbitrators in ancient India, such as.

a. Puga: a board of persons belonging to different sects and tribes, but residents of the same locality

\(^10\) ADR – Edited by P.C. Rao and William Sheffield.
b. Sreni, belonging to different sects and tribes or assemblies and meetings of tradesmen and artisans belonging to different tribes, but having some kind of connection with one another through the profession practiced by them.

c. The Kula or meetings of kinsmen or assemblages of relations. There was hierarchy in appeals also. From the decision rendered by Kula, an appeal lay to Sreni and from the decision rendered by Sreni to Puga and from the decision of Puga to the king’s judge and also to the king himself.\textsuperscript{11}

Therefore it can rightly be said that the process of dispute settlement was not adversarial as it exists in the present time, but it was oriented towards the amicable resolution of the dispute.

In the ‘Ramayana’ Angadha son of Vali approached Ravana and delivered the message of Lord Rama to opt the path of peaceful settlement. Even in ‘Mahabharata’, Lord Krishna endeavored to mediate between the Pandavas and Kauravas.

Therefore it can easily be said that the mentality of people to resolve disputes were through amicable settlements. This project will divulge into the intricacies of conflicts and the ways which have been formulated to resolve such disputes. It would be pertinent to quote Eminent Jurist Nana Palkiwala in the context of this project.

‘If longevity of litigation is made an item in Olympics, no doubt the Gold will come to India’.

\textsuperscript{11} P.V.Kane, History of Dharmashastra, Vol.III, (1946) p.242
1.12 LEGISLATIVE HISTORY OF ADR

Alternate Dispute Resolution picked up pace in the country, with the coming of the East India Company, Bengal Resolution Act, 1772 and Bengal Regulation Act, 1781 provided parties to submit the dispute to the arbitrator, appointed after mutual agreement and whose verdict shall be binding on both the parties. The Regulating Act, 1781 mentioned that judges should recommend parties to Alternate Dispute Resolution methods, no award of arbitrator could be set aside unless there are two witnesses to the fact that arbitrator had committed an error. In case of *Guru Nanak Foundation v. Rattan & Sons* Court observed that, ‘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’.

Alternate Dispute Resolution in India gained importance under Arbitration Act, 1940, while sometime later Arbitration and Conciliation Act, 1996 was passed in consonance with UNCITRAL Model Law of Arbitration, which brought the nation, on an international platform. The need arose as there was no provision in the Indian Arbitration Act, 1940 to resolve a dispute between an Indian and a non Indian; it caused difficulties to refer such matter for arbitration For the sake of convenience and uniformity, most of the countries have based their legislation on UNCITRAL Model Law, as this law gives the binding force to arbitral award and lays down various rights and duties for commercial parties handling disputes. Some important International Conventions on Arbitration are: The Geneva Protocol on Arbitration Clauses, 1923, the Geneva Convention on the Execution of Foreign Award, 1927, the New York Convention of 1958 on the recognition and Enforcement of Foreign Arbitral Award.
The concept of Conciliation was introduced in the statute of Industrial Disputes Act, 1947. The Conciliation is generally conducted by an officer appointed by Government under Industrial Disputes Act, 1947. Industrial Disputes Act, 1947 provides provisions for the parties to settle disputes through Negotiation, Mediation and Conciliation, for example Section 12, Section 18, etc. Alternate Dispute Resolution plays a major role in the family disputes settlement. Section 5 of the Family Court Act, 1984 provides provisions for the association of social welfare organizations to hold Family Courts under control of government. Section 6 of the Act provide for appointment of permanent counselors to enforce settlement decisions in the family matters. Further Section 9 of the Act imposes an obligation on the court to make effort for the settlement before taking evidence in the case. In addition to all provisions referred above, Indian Contract Act, 1872 most importantly gives a mention about Arbitration Agreement as an exception to Section 28 that renders an agreement void if it restrains a legal proceeding. Alternate Dispute Resolution whether sorted for or not can be easily inferred from presence or absence of the ‘Arbitration clause’.

Alternate Dispute Resolution procedures are mostly divided into two segments: Adjudicatory and Non Adjudicatory. In case of adjudicatory process case reaches a stage where decision gets a binding effect, for example in case of arbitration. And the other is non-adjudicatory; it contributes to resolution without adjudication, such as process of Negotiation, Mediation etc

Section 89 was introduced to Civil Procedure Code which formulates four methods to settle disputes outside the court namely, Arbitration, Conciliation, Mediation and Lok Adalats. In case of Advocate Bar Association v. UOI Supreme Court directed the setting up of committee
that would look into the implementation of various provisions, including Section 89. Section 89(1) of Civil Procedure Code provides for settlement of disputes outside court. There are certain lacunae in this Sections that goes unnoticed, firstly whether reference by court to Alternate Dispute Resolution is discretionary or mandatory, secondly, few details in relation to opinion of expert mediators, conciliators incentives, compensation and much more are less comprehensive and explanatory. Alternate Dispute Resolution received recognition after enactment of Civil Procedure Code, 1859 it provides various related Sections as, Section 312-325 lays down the procedure of Arbitration and Section 326-327 provides for Arbitration without courts intervention. It can be mentioned that various methods and processes have been incorporated in Indian legal system to achieve speedy disposal of cases, the concept of Alternative Dispute Resolution is a western approach where as Lok Adalat one of its specie is purely a national concept.

Alternate Dispute Resolution is more of corporate friendly, commercial parties enter into contract with Arbitration Clause. Most of the companies resort to Alternate Dispute Resolution, as it is less complicated, least expensive and most importantly confidential. Litigation takes year’s long time with bundled up procedures which affects the working processes of the companies, causing uncertainties in financial sphere of their commercial sectors. Due to development of trade at an International level it has become difficult for the corporate sector to maintain pace with traditional ways of litigation. Companies are desperate to get the dispute resolved outside court, as it is beneficial to them in all ways.

Resolution can be of great advantage to common man yet the idea doesn't acclimatize in all the developing countries of the world, as it contradicts with the domestic laws of that country, special care must be taken that the resolution reached, must depend upon honesty, trust, so as not
to loosen ties of subsisting relationship and moreover, courts lack command to submit disputes to Alternate Dispute Resolution Methods. Various steps have been taken to make the process of Alternate.

1.13 ADR MOVEMENT IN INDEPENDENT INDIA

It was only after independence and after realization that the formal legal system will not be in a position to bear the entire burden, it was felt that the system required drastic changes. The mounting arrears in the courts, inordinate delays in the administration of justice and expenses of litigation have gradually undermined the people’s faith in the system. The need was felt to examine and choose methods of dispute resolution which are less costly, less time consuming, less strenuous and which is able to preserve the relations between the parties to the dispute.

The concept of ADR got legislative recognition in free India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are charged with the duty of mediating in and promoting the settlement of Industrial disputes. Arbitration, as dispute resolution process was recognized as early as 1879 and also found a place in the Code of Civil Procedure. When the Arbitration Act was enacted in 1940, the provision for arbitration under Section 89 of the Code of Civil Procedure was repealed. There were significant developments which gave needed impetus to recognizing conciliation as a useful alternative for dispute resolution as compared to the court system. In 1984, faced with the problems of mounting arrears in subordinate courts, the Himachal Pradesh High Court evolved a project for disposal of pending cases by conciliation, insisting on pre-trial conciliation in the cases. The experiment was in the nature of the Michigan Mediation and the Mediation Project tried in Canada in a few pending cases though not on the scale practiced in Himachal Pradesh. The success of the Himachal experiments was widely welcomed. The Law
Commission of India in its 77th and 131st Reports, the Conference of Chief Ministers and the Chief Justices in their Resolution on December, 1993 and the Calcutta Resolution of the Law Ministers and Law Secretaries meeting in 1994 commended other States to follow the Himachal Project in their subordinate courts.

The Indian Legislature made another headway by enacting the Legal Services Authorities Act, 1987 by constituting the National Legal Services Authorities Act, 1987 and by constituting the National Legal Services Authority as a Central Authority with the Chief Justice of India as its Patron-in-Chief. The Central Authority has been vested with the duty to encourage the settlement of disputes by way of negotiations, arbitration and conciliation. Later in 1995-96, the Supreme Court of India under the leadership of the then Chief Justice, Mr. A. M. Ahmadi, undertook an Indo-US joint study for finding out the solutions of the problem of delays in the Indian Civil Justice System and every High Court was asked to appoint a study team which worked with the delegates of the Institute for Study and Development of Legal Systems (ISDLS), a San Francisco based institution. After gathering information from every state, a central study team analyzed the information gathered and made some further concrete suggestions to make provisions for immediate application of concepts of Case Management in Civil Procedure Code with special reference to the Indian scenario. Also in 1996, the Indian Parliament enacted the Arbitration and Conciliation Act, 1996, which was modeled on the United Nations Commission of International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration for developing a system of arbitration and other forms of ADR systems in a modern and a well-conceived legal framework. Further, the Law Commission of India in its 127th and 129th Reports,

---

emphasized the desirability of the courts being empowered to compel parties to a private litigation, to resort to arbitration or mediation. Following the recommendation made by Justice Malimath Committee, and Law Commission in its 129th Report and the Committee on Subordinate Legislation (11th Lok Sabha), the Code of Civil Procedure Amendment Act, 1999 and 2002 were passed and Section 89 was inserted in the Code of Civil Procedure, 1908. The statement of objects and reasons appended to the CPC Amendment Bill stated as follows:\textsuperscript{13}:

‘with a view to implement the 129th Report of the Law Commission of India and to make conciliation scheme effective, it is proposed to make it obligatory for the court to refer the disputes after issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalats. It is only after the parties fail to get their disputes settled through anyone of the alternative disputes resolution methods that the suit shall proceed further in the court in which it was filed.’

This is a special provision made for settlement of disputes outside the Courts. A litigant is free to settle his dispute on reference made by the court by resorting to either arbitration or any other method of ADR. The success of Himachal experiment of disputes resolution by conciliation has given a new dimension to the concept of dispute resolution. Instead of the disputing, parties willingly come together with the aims of arriving at a mutually agreeable settlement of their dispute with the assistance of a neutral third party mutually chosen. The conciliation on Himachal pattern is a court-induced conciliation, making it mandatory for the parties to attempt a

conciliation for settlement of their dispute and approach the court if conciliation fails\textsuperscript{14}.

The newly added Section 89 in the Code of Civil Procedure provided for mandatory reference of cases pending in the courts along with other new cases which will be filed in the courts. This was a great moral booster for the implementation of ADR procedures in India. To bring into effect this provision, the first elaborate training of mediators was conducted by American trainers sent by ISDLS in Ahmedabad followed by a few advance training workshops conducted by AMLEAD, a Public Charitable Trust settled by two senior Lawyers of Ahmedabad. On 27\textsuperscript{th} July 2002, the Hon’ble Chief Justice of India, Mr. Justice B. N. Kirpal, formally inaugurated the Ahmedabad Mediation Centre - the first lawyer’s managed Centre. The Chief Justice of India summoned a meeting of the Chief Justices of all the High Courts of the Indian States in November 2002 at New Delhi and laid stress on the importance of implementing mediation provisions in the CPC. By that time, the Chennai Mediation Centre was opened and started effectively operating in the premises of the Madras High Court. This Centre soon became the first Court-Annexed Mediation Centre in India. AMLEAD and Gujarat Law Society introduced in January, 2003, a thirty – two hours certificate course for ‘Intensive Training in Theory and Practice of Mediation’. The US Educational Foundation of India (USEFI) organized training workshops at Jodhpur, Hyderabad and Bombay in 2003. The Delhi Judicial Academy organised a series of mediation training workshops and opened a Mediation Centre in the Academy’s Campus appointing its Deputy Director as the Mediator\textsuperscript{11}. In the meantime, the Supreme Court of India upheld the constitutional validity of the new law reforms in the case filed by Salem Bar Association and appointed a Committee chaired by Mr. Justice

\textsuperscript{14} Ibid, supra note 7
Jagannadha Rao, the Chairman of the Law Commission of India, to suggest and frame rules for ironing out the creases, if any, in the new law and for implementation of mediation procedure in civil courts. The Law Commission prepared consultation papers on Mediation and Case Management Rules and framed and circulated Model Rules\textsuperscript{15}. The Supreme Court approved the Model Rules and directed every High Court to either adopt the Rules or frame them.\textsuperscript{16} Later, the Law Commission of India organised an International Conference on Case Management, Conciliation and Mediation at New Delhi in May 2003, which was a great success. Keeping in tune with the time, the Delhi District Courts also invited professional trainers from ISDLS to train the judges as mediators and for helping to establish Court-Annexed Mediation Centres.\textsuperscript{17} Later, Karnataka High Court also started a Court-Annexed Mediation and Conciliation Centre. Now, Court-Annexed Mediation Centres have been started at Ahmedabad, Lucknow, Chandigarh, Ahmedabad, Rajkot, Jamnagar, Surat, etc.

Currently, Court-Annexed Mediation and Conciliation Centres have started working at several courts in India and the courts have been referring cases to such Centres. In Court Annexed Mediation, the mediation services are provided by the Court as a part and parcel of the same judicial system as against Court Referred Mediation, wherein the court merely refers the matter.

Human conflict are inevitable. Disputes are equally inevitable. It is difficult to imagine our human society without conflict of interests. Disputes must be resolved at minimum possible costs both in terms of money and time, so that more time and more resources are spared for constructive pursuits.

\textsuperscript{15} Salem Advocate Bar Association, Tamil Nadu v. Union of India, (2003) 1 SCC49
\textsuperscript{16} Salem Advocate Bar Association v. Union of India, (2005) 6 SCC 344
\textsuperscript{17} Ibid, supra note 3
For resolution of disputes there is a legal system in every legal society, every injured person is supposed to go to courts for his redressal. All the legal systems are trying to attain a legal ideal that whenever there is a wrong, there must be a remedy. So that nobody shall have to take law into his own hands.

In pursuit of redressal which would resolve the dispute at minimum possible costs, both in terms of money and time. Thus, began the search for an alternative to the conventional court system.

A large number of quasi-judicial and administrative tribunals have been created for quicker relief. These tribunals and forums are in a way an alternative method of dispute redressal. But even such tribunals and forums have become overcrowded with the result that they are not able to provide relief within good time. Consumer forums came into being to provide quick, effective and costless relief to buyers of goods and hirers of services. Persons suffering from poor quality of merchandise and services in the market turned out to be great in number that consumer redressal forums and commissions have proved to be inadequate to the volume of complaints.

There thus remains a need for an alternative remedy which will not be let down by costs and delays. Therefore this search for an alternative method of dispute resolution should culminate in a remedy in which there is minimum role of official authorities and where the focus is on delivering justice and not on technicalities of the procedural laws.

The new mentality of dispute settlement should inculcate in the present legal system the idea of reducing hostility between parties, regaining a sense of control, resolving conflicts in a peaceful manner, and achieving a greater sense of justice in each individual case.
The Judicial system developed by the Britishers was very expensive and time consuming and due to these reasons the people’s faith on such legal system was being diminished. After the independence it was realized that there is need to have such an alternative means of dispute resolving system or machinery which may be economical and less time consuming.  

1.14 ADR IN MODERN INDIA  

It is heartening to note that the Parliament has very recently enacted the Gram Nyayalayas Act 2008. Justice to the poor at their doorstep as the common man’s dream is sought to be achieved through the setting up of Gram Nyayalayas which will travel from place to place to bring to the people of rural areas speedy, affordable and substantial justice.

The first avenue where the conciliation has been effectively introduced and recognized by law is in the field of labour law, namely, Industrial Disputes Act 1947. Conciliation has been statutorily recognized as an effective method of dispute resolution in relation to disputes between workers and the management. The provision in the Industrial Disputes Act 1947 makes it attractive for disputing parties to settle disputes by negotiation and failing that through conciliation through an officer of the Government, before resorting to litigation.

In *Rajasthan State Road Transport Corporation v. Krishna Kant* 19, the Supreme Court observed:

---

18 V.G.Ranganath: Need for amalgamation of alternative dispute resolution with civil procedure code

http://www.legalindia.in/need-for-amalgamation-of-alternative-dispute-resolution-with-civil-procedure-code

19 1995 (5) SCC 75
“The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute-resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of the courts and tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute.”

The only field where the courts in India have recognized ADR is in the field of arbitration. The arbitration was originally governed by the provisions contained in different enactments, including those in the Code of Civil Procedure; the first Indian Arbitration Act was enacted in 1899, which was replaced by the Arbitration Act 1940. The courts were very much concerned over the supervision of Arbitral Tribunal and they were very keen to see whether the arbitrator has exceeded his jurisdiction while deciding the issue which was referred to him for arbitration.

There was much delay in settlement of disputes between parties in law courts, which prevented investment of money in India by other countries. India has undertaken major reforms in its arbitration law in the recent years as part of economic reforms initially in 1991. The Arbitration and Conciliation Act of 1996 was thus enacted by the Parliament bringing in substantial reforms in arbitration, regarding domestic and international disputes.
The decision of the Supreme Court in *Konkan Railway Corpn. Ltd. v. M/S. Mehul Construction Co.* summarizes the evolvement of the Arbitration & Conciliation Act 1996 and the main provisions of the Act thus:

“At the outset, it must be borne in mind that prior to the 1996 Act, the Arbitration Act of 1940, which was in force in India provided for domestic arbitration and no provision was there to deal with the foreign awards. So far as the Foreign Awards are concerned, the same were being dealt with by the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961. The increasing growth of global trade and the delay in disposal of cases in Courts under the normal system in several countries made it imperative to have the perception of an alternative Dispute Resolution System, more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the UNCITRAL Model Law of International Commercial Arbitration and since then number of countries have given recognition to that Model in their respective legislative system. With the said UNCITRAL Model Law in view the present Arbitration and Conciliation Act of 1996 has been enacted in India replacing the Indian Arbitration Act, 1940, which was the principal legislation on Arbitration in the country that had been enacted during the British Rule. The Arbitration Act of 1996 provides
not only for domestic arbitration but spreads its sweep to International Commercial Arbitration too. The Indian law relating to the enforcement of Foreign Arbitration Awards provides for greater autonomy in the arbitral process and limits judicial intervention to a narrower circumference than under the previous law. To attract the confidence of International Mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalisation policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in UNCITRAL model and, therefore, in interpreting any provisions of the 1996 Act Courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of a Court of Law. Under the new law the grounds on which an award of an Arbitrator could be challenged before the Court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the arbitrator or want of proper notice to a party of the appointment of the arbitrator or of arbitral proceedings. The powers of the arbitrator have been amplified by insertion of specific provisions of several matters. Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by an
express provision inasmuch as if a party knowingly keeps silent and then suddenly raises a procedural objection will not be allowed to do so. The role of institutions in promoting and organising arbitration has been recognised. The power to nominate arbitrators has been given to the Chief Justice or to an institution or person designated by him. The time limit for making awards has been deleted. The existing provisions in 1940 Act relating to arbitration through intervention of Court, when there is no suit pending or by order of the court when there is a suit pending, have been removed. The importance of transnational commercial arbitration has been recognised and it has been specifically provided that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute. Under the new law unless the agreement provides otherwise, the arbitrators are required to give reasons for the award. The award itself has now been vested with status of a decree, inasmuch as the award itself is made executable as a decree and it will no longer be necessary to apply to the court for a decree in terms of the award. All these aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of Law so that the trade and commerce is not affected on account of litigations before a court. When United Nations established the Commission on International Trade Law it is on account of the fact that the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade. The General Assembly regarded the Commission on International Trade Law as a medium which could play a more active role in reducing or removing the
obstacles. Such Commission, therefore, was given a mandate for progressive harmonization and unification of the law of International Trade. With that objective when UNCITRAL Model has been prepared and the Parliament in our country enacted the Arbitration and Conciliation Act of 1996 adopting UNCITRAL Model, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act. The Statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimise the supervisory role of Courts in the arbitral process.”

The Family Courts Act 1984 was enacted 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. Section 5 of the Family Courts Act provides enabling provision for the Government to require the association of Social Welfare Organisations to help a Family Court to arrive at a settlement. Section 6 of the Act provides for appointment of permanent counsellors to effect settlement in family matters. Further, Section 9 of the Act imposes an obligation on the Family Court to make efforts for settlement before taking evidence in the case. To this extent the ADR has got much recognition in the matter of settlement of family disputes. Similar provision is contained in Order XXXIIA CPC which deals with family matters. According to Section 4(4) (a) of the Act, in selecting persons for appointment as Judges for Family Courts, every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected.
Another right and welcome step taken was the enactment of the Consumer Protection Act 1986 for the settlement of consumers’ disputes. The Act provides effective, inexpensive, simple and speedy redressal of consumers’ grievances, which the civil courts are not able to provide. This Act is another example of ADR for the effective adjudication of consumers’ disputes. The Act provides for three-tier fora, that is, District Forum, State Commission and the National Commission for redressal of grievances of consumers. Large numbers of consumers are approaching these fora to seek quick redressal of their grievances. There has also been a spurt in social action litigation on behalf of consumers by Consumer Activists, Voluntary Consumer Organisations and other Social Action Groups.

In *Sitanna v. Marivada Viranna*\(^2\) the Privy Council affirmed the decision of the Panchayat in a family dispute. Sir John Wallis, J. stated the law in the following words:

“Reference to a village Panchayat is the time-honoured method of deciding disputes of this kind, and has these advantages, that it is comparatively easy for the panchayatdars to ascertain the true facts, and that, as in this case, it avoids protracted litigation which, as observed by one of the witnesses, might have proved ruinous to the estate.

Looking at the evidence as a whole their Lordships see no reason for doubting that the award was a fair and honest settlement of a doubtful claim based both on legal and moral grounds, and are therefore of opinion that there is no grounds for interfering with it.”

---

\(^2\) AIR 1934 PC 105
If the ADR method is successful, it brings about a satisfactory solution to the dispute and the parties will not only be satisfied, the ill-will that would have existed between them will also end. ADR methods, especially mediation and conciliation not only address the dispute, they also address the emotions underlying the dispute. In fact, for ADR to be successful, first the emotions and ego existing between the parties will have to be addressed. Once the emotions and ego are effectively addressed, resolving the dispute becomes very easy. This requires wisdom and skill of counselling on the part of the Mediator or Conciliator.

The ADR method is participatory and there is scope for the parties to the dispute to participate in the solution-finding process. As a result, they honour the solution with commitment. Above all, the ADR methods are cheaper and affordable by the poor also. As of now, there are some aberrations when it comes to the expenses incurred in arbitration. In course of time, when there is good number of quality arbitrators, the expenses of arbitration will also decrease. The promotion of institutional arbitration will go a long way in improving the quality of ADR services and making them really cheaper.

The development of ADR methods will provide access to many litigants. It helps in reducing the enormous work-load that is put on the Judiciary. This will go a long way in improving not only the access to justice, but even the quality of justice.

We have discussed above about arbitration, which is a process of dispute-resolution between the parties through the arbitration tribunal appointed by the parties to the dispute or by the Chief Justice or a designate of the Chief Justice under Section 11 of the Arbitration and Conciliation Act 1996. The parties have the option to go
for *ad hoc* arbitration or institutional arbitration depending on their convenience.

Ad hoc arbitration is arbitration agreed to and arranged by the parties themselves without recourse to an arbitral institution. In *ad hoc* arbitration, if the parties are not able to agree as to who will be the arbitrator or one of the parties is reluctant to cooperate in appointing the arbitrator, the other party will have to invoke Section 11 of the Arbitration and Conciliation Act 1996 where under the Chief Justice of a High Court or the Supreme Court or their designate will appoint the arbitrator. In case of domestic arbitration, it will be the Chief Justice of a High Court or his designate. In case of international commercial arbitration, it will be the Chief Justice of India or his designate. In *ad hoc* arbitration, the fee of the arbitrator will have to be agreed to by the parties and the arbitrator. The present Indian experience is that the fee of the arbitrator is quite high in *ad hoc* arbitration.

Institutional arbitration is an arbitration administered by an arbitral institution. The parties may stipulate in the arbitration agreement to refer an arbitral dispute between them for resolution to a particular institution. The Indian institutions include the Indian Council of Arbitration and the International Centre for Alternative Dispute Resolution. International institutions include the International Court of Arbitration, the London Court of International Arbitration and the American Arbitration Association. All these institutions have rules expressly formulated for conducting arbitration. These rules are formulated on the basis of experience and hence, they address all possible situations that may arise in the course of arbitration.

The following advantages accrue in the case of institutional arbitration in comparison with *ad hoc* arbitration:
In ad hoc arbitration, procedures will have to be agreed to by the parties and the arbitrator. This needs cooperation between the parties. When a dispute is in existence, it is difficult to expect such cooperation. In institutional arbitration, the rules are already there. There is no need to worry about formulating rules or spend time on making rules.

In ad hoc arbitration, infrastructure facilities for conducting arbitration is a problem, so there is temptation to hire facilities of expensive hotels. In the process, arbitration costs increase. Getting trained staff is difficult. Library facilities are another problem. In institutional arbitration, the arbitral institution will have infrastructure facilities for conduct of arbitration; they will have trained secretarial and administrative staff. There will also be library facilities. There will be professionalism in conducting arbitration. The costs of arbitration also are cheaper in institutional arbitration.

In institutional arbitration, the institution will maintain a panel of arbitrators along with their profiles. The parties can choose from the panel. It also provides for specialized arbitrators. While in ad hoc arbitration, these advantages are not available.

In institutional arbitration, many arbitral institutions have an experienced committee to scrutinize the arbitral awards. Before the award is finalized and given to the parties, it is scrutinized by the experienced panel. So the possibility of the court setting aside the award is minimum.
This facility is not available in *ad hoc* arbitration. Hence, there is higher risk of court-interference.

- In institutional arbitration, the arbitrator’s fee is fixed by the arbitral institution. The parties know beforehand what the cost of arbitration will be. In *ad hoc* arbitration, the arbitrator’s fee is negotiated and agreed to. The Indian experience shows that it is quite expensive.

- In institutional arbitration, the arbitrators are governed by the rules of the institution and they may be removed from the panel for not conducting the arbitration properly, whereas in *ad hoc* arbitration, there is no such fear.

- In case, for any reason, the arbitrator becomes incapable of continuing as arbitrator in institutional arbitration, it will not take much time to find substitutes. When a substitute is found, the procedure for arbitration remains the same. The proceedings can continue from where they were stopped, whereas these facilities are not available in *ad hoc* arbitration.

- In institutional arbitration, as the secretarial and administrative staff is subject to the discipline of the institution, it is easy to maintain confidentiality of the proceedings. In *ad hoc* arbitration, it is difficult to expect professionalism from the secretarial staff.

In *Food Corporation of India v. Joginderpal Mohinderpal*\(^2\), the Supreme Court observed:

“We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations, but must

\(^2\) (1989) 2 SCC 347
be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating sense that justice appears to have been done.”

The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of parties' choice.\textsuperscript{23}

Favouring institutional arbitration to save arbitration from the arbitration cost, the Supreme Court has recently in \textit{Union of India v. M/S. Singh Builders Syndicate} \textsuperscript{24} observed:

“When the arbitration is by a Tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired Judge/s. When a retired Judge is appointed as Arbitrator in place of serving officers, the government is forced to bear the high cost of Arbitration by way of private arbitrator’s fee even though it had not consented for the appointment of such non-technical non-serving persons as Arbitrator/s. There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge/s are Arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a

\textsuperscript{23} \textit{Union of India v. M/S. Singh Builders Syndicate}, 2009 (4) SCALE 491

\textsuperscript{24} Ibid
disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the Arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the Arbitrator and one party agrees to pay such fee, the other party, who is enable to afford such fee or reluctant to pay such high fee, is put to an embarrasing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the Arbitrators’ fees is not fixed by the Arbitrators themselves on case to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held. Another solution is for the court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned. Third is for the retired Judges offering to serve as Arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an Arbitrator whose fees are in their ‘range’ having regard to the stakes involved. What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such Arbitrator. It is unfortunate that delays, high cost, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute
resolution process. Delay and high cost are two areas where the Arbitrators by self regulation can bring about marked improvement”.

Section 89 providing for settlement of disputes outside the Court was inserted in CPC in 1999 and brought into force with effect from 01.07.2002. The ‘Notes on Clauses’ of the CPC (Amendment) Bill 1999 stated with regard to this provision thus:

“Clause 7 provides for the settlement of disputes outside the court. The provisions of Clause 7 are based on the recommendations made by Law Commission of India and Malimath Committee. It was suggested by Law Commission of India that the Court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make an attempt to settle the dispute between the parties amicably. Malimath Committee recommended to make it obligatory for the court to refer the dispute, after issues are framed, for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternate dispute resolution method that the suit could proceed further. In view of the above, clause 7 seeks to insert a new Section 89 in the Code in order to provide for alternate dispute resolution.”

Section 89 has been introduced for the first time for settlement of disputes outside the Court, with the avowed objective of providing speedy justice:

1. It is now made obligatory for the Court to refer the dispute after issues are framed for settlement either by way of -
(a) Arbitration,
(b) Conciliation,
(c) Judicial settlement including settlement through Lok Adalat, or
(d) Mediation.

2. Where the parties fail to get their disputes settled through any of the alternative dispute resolution methods, the suit could proceed further in the Court in which it was filed.

3. The procedure to be followed in matters referred for different modes of settlement is spelt out in sub-Section (2).

4. Clause (d) of sub-Section (2) of Section 89 empowers the Government and the High Courts to make rules to be followed in mediation proceedings to effect the compromise between the parties.

In *Salem Advocate Bar Association v. Union of India*[^25], the Supreme Court rejected the challenge to the constitutional validity of the amendment made in CPC and took note of the Reports of the Committee headed by M. Jagannadha Rao, J., a former Supreme Court Judge and Chairman of the Law Commission of India, including the one dealing with Model Alternative Dispute Resolution and Mediation Rules.

We should endeavour to inspire parties to settle their disputes outside the Court by more and more utilizing Section 89 CPC. It is a very beneficial provision.

A new Section 16 has been inserted in the Court-fees Act 1870 by the CPC (Amendment) Act 1999, which reads as follows:

[^25]: AIR 2003 SC 189 and (2005) 6 SCC 344
“Where the Court refers the parties to the suit to any one of the mode of settlement of dispute referred to in Section 89 of the Code of Civil Procedure, 1908, the plaintiff shall be entitled to a certificate from the Court authorising him to receive back from the collector, the full amount of the fee paid in respect of such plaint.”

Where a matter referred to a Lok Adalat in terms of Section 89(2) CPC read with Section 20(1) of the Legal Services Authorities Act is settled, the refund of the court-fee is governed by Section 16 of the Court-fees Act read with Section 21 of the Legal Services Authorities Act and the plaintiff is entitled to the refund of the whole of the court-fee paid on the plaint.26

1.15 HISTORY OF ADR-IN USA

ADR originated in the USA in a drive to find alternatives to the traditional legal system, felt to be adversarial, costly, unpredictable, rigid, over-professionalised, damaging to relationships, and limited to narrow rights-based remedies as opposed to creative problem solving. The American origins of the concept are not surprising, given certain features of litigation in that system, such as: trials of civil actions by a jury, lawyers' contingency fees, lack of application in full of the rule ‘the loser pays the costs’.

Beginning in the late nineteenth century, creative efforts to develop the use of arbitration and mediation emerged in response to the disruptive conflicts between labour and management. In 1898, Congress followed initiatives that began a few years earlier in Massachusetts and New York and authorized mediation for collective bargaining disputes. In the ensuing years, special mediation agencies, such as the Board of Mediation and Conciliation for railway labour, (1913) (renamed the National Mediation

26 Vasudevan V. A. v. State of Kerala, AIR 2004 Kerala 43
Board in 1943), and the Federal Mediation and Conciliation Service were formed and funded to carry out the mediation of collective disputes. Additional state labour mediation services followed. The lands Act and later legislation reflected the belief that stable industries could be achieved through the settlement of collective bargaining settlement in turn could be advanced through conciliation, mediatory and voluntary arbitration.27

At about the same time, and for different reasons, variations in mediation for non-labour matters were introduced in the courts: a group of lawyers and jurists spoke on the topic to an American Bar Association meeting in 1923, they were able to assess cooperation on conciliation programs in Cleveland, Minneapolis, North Dakota, Chicago, and Milwaukee.

Conciliation in a different form also appeared in domestic courts. An outgrowth of concern about rising divorce rates in the 1940's and the 1950's, the primary goal of these programs was to reduce the number of divorces by requiring efforts at reconciliation rather than facilitate the achievement of divorces through less adversarial procedures. Following privately funded mediation efforts by the American Bar Association and others in the late 1960s, the Community Relations Service (CRS) of the United States Department of Justice initiated a mediation program for civil rights disputes.

Although a small number of individual lawyers interested in and were practicing mediation ADR in Britain for some time, it was only in 1989 when the first British based ADR company - II Ltd. - bought the idea across the Atlantic and opened its doors for business. This was the start of ADR Group. Since then many other companies have developed and expanded the field of alternative dispute resolution.

27 http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/history.htm
organizations, including CEDR (Centre for Dispute Resolution), followed suite and assisted in the development and promotion of ADR in the UK.\textsuperscript{28}

ADR, or mediation (as it is now synonymously known as), is used world-wide by Governments, corporations and individuals to resolve disputes big or small, of virtually any nature and in most countries of the world.

In developing countries 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’. However, the blame for the large number of pending cases in these developing countries or docket explosion, as it is called, cannot be attributed to the Courts alone. The reason for it being the non-implementation of negotiation processes before litigation. It is against this backdrop that the mechanisms of Alternative Dispute Resolution are being introduced in these countries. These mechanisms, which have been working effectively in providing an amicable and speedy solution for conflicts in developed economies, are being suitably amended and incorporated in the developing countries in order to strengthen the judicial system. Many countries such as India, Bangladesh and Sri Lanka have adopted the Alternative Dispute Resolution Mechanism. However, it is for time to see how effective the implementation of these mechanisms would be in these countries.

\textbf{1.16 CONSTITUTIONAL REQUIREMENTS AND ADR}

The Indian Constitution guarantees justice to all. All Indian citizens are guaranteed equal rights of life and personal liberty, besides

\textsuperscript{28} http://www.adrgroup.co.uk/history.html
many other fundamental rights. There are various other legal rights conferred by different social welfare legislations, such as, Contract Labour (Regulation and Abolition) Act 1970, Equal Remuneration Act 1976, Minimum Wages Act 1948. But, these rights are of no avail if an individual has no means to get them enforced. Rule of law envisages that all men are equal before law. All have equal rights, but, unfortunately, all cannot enjoy the rights equally. Enforcement of the rights has to be through courts, but the judicial procedure is very complex, costly and dilatory putting the poor persons at a distance.

The Constitution of India through article 14 guarantees equality before the law and the equal protection of the laws. Article 39A of the Constitution mandates the State to secure that the operation of the legal system promotes justice on a basis of equal opportunity, and ensure that the same is not denied to any citizen by reason of economic or other disabilities. Equal opportunity must be afforded for access to justice. It is not sufficient that the law treats all persons equally, irrespective of the prevalent inequalities. But the law must function in such a way that all the people have access to justice in spite of economic disparities. The expression ‘access to justice’ focuses on the following two basic purposes of the legal system:

1. The system must be equally accessible to all.

2. It must lead to results that are individually and socially just.

Traditional concept of "access to justice" as understood by common man is access to courts of law. For a common man a court is the place where justice is meted out to him/her. But the courts have become inaccessible due to various barriers such as poverty, social and political backwardness, illiteracy, ignorance, procedural formalities and the like.
To get justice through courts one has to go through the complex and costly procedures involved in litigation. One has to bear the costs of litigation, including court fee and, of course, the lawyer’s fee. A poor litigant who is barely able to feed himself will not be able to afford justice or obtain legal redressal for a wrong done to him, through courts. Further a large part of the population in India is illiterate and live in abject poverty. Therefore, they are totally ignorant about the court-procedures, are terrified and confused when faced with the judicial machinery. Thus, most of the citizens of India are not in a position to enforce their rights, constitutional or legal, which in effect generates inequality.

It is one of the most important duties of a welfare state to provide judicial and non-judicial dispute-resolution mechanisms to which all citizens have equal access for resolution of their legal disputes and enforcement of their fundamental and legal rights. Poverty, ignorance or social inequalities should not become barriers to it. The Maneka Gandhi principle, as enunciated by the Indian Supreme Court, that fundamental rights do not constitute separate islands unto themselves but constitute a continent ushered in what Krishna Iyer, J. terms the jurisprudence of access to justice. He said:

"We should expand the jurisprudence of Access to Justice as an integral part of Social Justice and examine the constitutionalism of court-fee levy as a facet of human rights highlighted in our Nation's Constitution. If the State itself should travesty this basic principle, in the teeth of Articles 14 and 39A, where an indigent widow is involved, a second look at its policy is overdue. The Court must give the benefit of doubt

29 (1978) 1 SCC 248
against levy of a price to enter the temple of justice until one day the whole issue of the validity of profit-making through sale of civil justice, disguised as court-fee is fully reviewed by this Court”.\textsuperscript{30}

Article 39A, as noted above, provides for equal justice and free legal aid. The said article obligates the State to in particular provide free legal aid, by suitable legislation or schemes or in any other way, to promote justice on the basis of equal opportunity. Article 39A puts stress upon legal justice. The directive requires the State to provide free legal aid to deserving people so that justice is not denied to anyone merely because of economic disability. The Supreme Court in \textit{Sheela Barse v. State of Maharashtra}\textsuperscript{31} has emphasized that legal assistance to a poor or indigent accused arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by article 39A but also by articles 14 and 21 of the Constitution. In the absence of legal assistance, injustice may result. Every act of injustice corrodes the foundation of democracy and rule of law. Article 39A makes it clear that the social objective of equal justice and free legal aid has to be implemented by suitable legislation or by formulating schemes for free legal aid.

Though Article 39A was introduced in the Constitution in 1976, its objective of providing access to justice could never have been fulfilled but for the majestic role played by the Supreme Court in ‘Public Interest Litigation Movement’. This is a movement whereby any public-spirited person can move the Court for remedying any wrong affecting the public. This is a significant step by the Supreme Court in giving access to justice to the people belonging to the lowest strata of

\textsuperscript{30} State of Haryana v. Darshana Devi, AIR 1979 SC 855
\textsuperscript{31} AIR 1983 SC378
society. Further, it was only through cases filed in public interest that the Supreme Court was able to encourage legal aid service to poor and indigent persons. Through public interest litigation the courts are able to deal with poor people suffering from injustice and exploitation, such as, bonded labour, dalits, women, children, physically challenged, mentally challenged and so on.

1.17 OVERVIEW OF ADR

Alternative dispute resolution encompasses a range of means to resolve conflicts short of formal litigation. The modern ADR movement originated in the United States in the 1970s, spurred by a desire to avoid the cost, delay, and adversarial nature of litigation. For these and other reasons, court reformers are seeking to foster its use in developing nations. The interest in ADR in some countries also stems from a desire to revive and reform traditional mediation mechanisms.

ADR today falls into two broad categories: court-annexed options and community-based dispute resolution mechanisms. Court-annexed ADR includes mediation/conciliation—the classic method where a neutral third party assists disputants in reaching a mutually acceptable solution—as well as variations of early neutral evaluation, a summary jury trial, a mini-trial, and other techniques. Supporters argue that such methods decrease the cost and time of litigation, improving access to justice and reducing court backlog, while at the same time preserving important social relationships for disputants.32

Community-based ADR is often designed to be independent of a formal court system that may be biased, expensive, distant, or otherwise inaccessible to a population. New initiatives sometimes build on traditional models of popular justice that relied on elders, religious leaders, or other

community figures to help resolve conflict. India embraced Lok Adalat village-level people’s courts in the 1980s, where trained mediators sought to resolve common problems that in an earlier period may have gone to the panchayat, a council of village or caste elders. Elsewhere in the region, bilateral donors have recently supported village-based shalish mediation in Bangladesh and nationally established mediation boards in Sri Lanka. In Latin America, there has been a revival of interest in the juece de paz, a legal officer with the power to conciliate or mediate small claims.

Some definitions of ADR also include commercial arbitration: private adversarial proceedings in which a neutral third party issues a binding decision. Private arbitration services and centers have an established role in the United States for commercial dispute resolution, and are spreading internationally as business, and the demand for harmonization, expands. In the last decade, more countries have passed legislation based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, which makes an arbitral award legally binding and grants broad rights to commercial parties choosing arbitration.

It is important to distinguish between binding and non-binding forms of ADR. Negotiation, mediation and conciliation are non-binding forms, and depend on the willingness of parties to reach a voluntary agreement. Arbitration programs may be binding or non-binding. Binding Arbitration produces a third party decision that the disputants must follow even if they disagree with the result much like a judicial decision. Non-binding Arbitration produces a third party decision that the parties may reject.

It is also important to distinguish between mandatory processes and voluntary processes. Some judicial systems require the parties to negotiate, conciliate, mediate or arbitrate, prior to court action. ADR
processes may also be required as part of prior contractual agreement between parties. In voluntary processes, submission of a dispute to an ADR process depends entirely on the will of the parties.

These forms of ADR along with a lot of other hybrid processes are discussed in the next chapter of the paper. Therefore, it can observed that the term ‘Alternative Dispute Resolution’ can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other, prior to some other legal process, to arbitration systems or mini-trials that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included into the rubric of ADR.

Elaborate explanation of the various kinds of ADR mechanisms:

Arbitration: Arbitration, in the law, is a form of alternative dispute resolution — specifically, a legal alternative to litigation whereby the parties to a dispute agree to submit their respective positions (through agreement or hearing) to a neutral third party (the arbitrator(s) or arbiter(s)) for resolution.33

Species of arbitration

Commercial arbitration: Agreements to arbitrate were not enforceable at common law, though an arbitrator's judgment was usually enforceable (once the parties had already submitted the case to him or her). During the Industrial Revolution, this situation became intolerable for large corporations. They argued that too many valuable business relationships were being destroyed through years of expensive adversarial litigation, in

---

courts whose strange rules differed significantly from the informal norms and conventions of business people (the private law of commerce, or jus merchant). Arbitration appeared to be faster, less adversarial, and cheaper. Since commercial arbitration is based upon either contract law or the law of treaties, the agreement between the parties to submit their dispute to arbitration is a legally binding contract. All arbitral decisions are considered to be ‘final and binding.’ This does not, however, void the requirements of law. Any dispute not excluded from arbitration by virtue of law (e.g. criminal proceedings) may be submitted to arbitration.34

Other forms of Contract Arbitration: Arbitration can be carried out between private individuals, between states, or between states and private individuals. In the case of arbitration between states, or between states and individuals, the Permanent Court of Arbitration and the International Center for the Settlement of Investment Disputes (ICSID) are the predominant organizations. Arbitration is also used as part of the dispute settlement process under the WTO Dispute Settlement Understanding. International arbitral bodies for cases between private persons also exist, the International Chamber of Commerce Court of Arbitration being the most important. The American Arbitration Association is a popular arbitral body in the United States. Arbitration also exists in international sport through the Court of Arbitration for Sport.

Labour Arbitration: A growing trend among employers whose employees are not represented by a labour union is to establish an organizational problem-solving process, the final step of which consists of arbitration of the issue at point by an independent arbitrator, to resolve employee complaints concerning application of employer policies or claims of employee misconduct. Employers in the United States have also embraced

34 Ibid
arbitration as an alternative to litigation of employees' statutory claims, e.g., claims of discrimination, and common law claims, e.g., claims of defamation. Arbitration has also been used as a means of resolving labour disputes for more than a century. Labour organizations in the United States, such as the National Labour Union, called for arbitration as early as 1866 as an alternative to strikes to resolve disputes over the wages, benefits and other rights that workers would enjoy. Governments have also relied on arbitration to resolve particularly large labour disputes, such as the Coal Strike of 1902. This type of arbitration is commonly known as interest arbitration, since it involves the mediation of the disputing parties' demands, rather than the disposition of a claim in the manner a court would act. Interest arbitration is still frequently used in the construction industry to resolve collective bargaining disputes. Unions and employers have also employed arbitration to resolve employee grievances arising under a collective bargaining agreement.\textsuperscript{35}

**Judicial Arbitration:** Some state court systems have promulgated court-ordered arbitration; family law (particularly child custody) is the most prominent example. Judicial arbitration is often merely advisory, serving as the first step toward resolution, but not binding either side and allowing for trial de novo.

**Proceedings:** Various bodies of rules have been developed that can be used for arbitration proceedings. The two of the most important are the UNCITRAL rules and the ICSID rules. The general rules to be followed by the arbitrator are specified by the agreement establishing the arbitration. Some jurisdictions have instituted a limited grace period during which an arbitral decision may be appealed against, but after which there can be no appeal. In the case of arbitration under international law, a right of appeal

\textsuperscript{35} Supra n. 5
does not in general exist, although one may be provided for by the arbitration agreement, provided a court exists capable of hearing the appeal.

**Arbitrators:** Arbitrators are not bound by precedent and have great leeway in such matters as active participation in the proceedings, accepting evidence, questioning witnesses, and deciding appropriate remedies. Arbitrators may visit sites outside the hearing room, call expert witnesses, seek out additional evidence, decide whether or not the parties may be represented by legal counsel, and perform many other actions not normally within the purview of a court. It is this great flexibility of action, combined with costs usually far below those of traditional litigation, which makes arbitration so attractive. Arbitrators have wide latitude in crafting remedies in the arbitral decision, with the only real limitation being that they may not exceed the limits of their authority in their award. An example of exceeding arbitral authority might be awarding one party to a dispute the personal automobile of the other party when the dispute concerns the specific performance of a business-related contract. It is open to the parties to restrict the possible awards that the arbitrator can make. If this restriction requires a straight choice between the position of one party or the position of the other, then it is known as pendulum arbitration or final offer arbitration. It is designed to encourage the parties to moderate their initial positions so as to make it more likely they receive a favourable decision. To ensure effective arbitration and to increase the general credibility of the arbitral process, arbitrators will sometimes sit as a panel, usually consisting of three arbitrators. Often the three consist of an expert in the legal area within which the dispute falls (such as contract law in the case of a dispute over the terms and conditions of a contract), an expert in the industry within which the dispute falls (such as the construction industry, in the case of a dispute...
between a homeowner and his general contractor, and an experienced arbitrator.

**Some important statistics:** Use and effectiveness of Arbitration as a mechanism of ADR: American case study (source: National Arbitration Forum, Washington)

![Pie charts showing survey results]

Key Findings in the above survey:
- 78% of people find faster recovery in Arbitration
- 83% of people find Arbitration equally or more fair
- 59.3% of people find Arbitration less expensive
- 84.6% of people find ADR equally or more suitable for insurance/reinsurance sector

Another survey:

This survey clearly shows the increase in the number of people over the years who would opt for Arbitration over a lawsuit for the recovery of monetary damages.

Therefore, it is obvious that Arbitration is a growing field with a lot of potential in solving disputes in a speedy manner.

1.18 INTERNATIONAL SCENARIO

A brief look at the international scenario reveals the popularity of the use of ADR methods for dispute resolution. In the Native American culture, peace-making is the primary method of problem solving, more conciliatory than mediation, peacemaking is concerned with sacred justice. Disputes are handled in a way which deals with underlying causes of conflict and mendsrelationships.\(^\text{37}\)

\(^{37}\) The Judge speaks: Dr Justice A.R.Lakshmanan
Mediation was used in China and Japan as primary means of conflict resolution. Mediation was first choice of dispute settlement. China’s principle use of mediation was a direct result of the Confucian view of natural harmony and dispute resolution by morals rather than coercion. Chinese mediation boards and committees made up of several individuals from each local community resolve more than 80% of all civil disputes.

In Japan, conciliation was historically the primary means of dispute resolution with village readers serving as mediator. Current Japanese negotiation style still places an emphasis on the relationship and is often regarded as a purely conciliatory style. Informal dispute resolution was used in many other cultures as well. For e.g., India, Africa, Israeli Kibbutzim. The ADR of informal methods of dispute resolution places emphasis on peace and harmony over conflict, litigation and victory.

In USA mediation as a method of dispute resolution was used in an ad-hoc way since a longtime, though the litigation was the primary method of dispute resolution.

‘Like old clocks, our judicial systems need to be oiled, wound up and set to true time’.

These were the words of Lord Wolf38 which give color to the concept of ADR.

1.19 OVERVIEW OF ADR

ADR gives people an involvement in the process of resolving their dispute that is not possible in a public, formal and adversarial justice system bristled with abstruse procedures and recondite language of the law. It offers a wide range of choices in method, procedure, cost, representation and

38 Chief Justice of England
location. It is often quicker than judicial proceedings and helps to ease burdens on the courts.

The technique of ADR is an effort to design a workable and fair alternative to our traditional judicial system. It is a fast track system of dispensing justice. There are various ADR techniques viz. arbitration, mediation, conciliation, mediation-arbitration, mini-trial, private judging.

These techniques have been developed on scientific lines in USA, UK, France, Canada, China, Japan, South Africa, Australia and Singapore. ADR has emerged as a significant movement in these countries and has not only helped reduce cost and time taken for resolution of disputes, but also in providing a congenial atmosphere and a less formal and less complicated forum for various types of disputes.

The advantage of ADR is that it is more flexible and avoids seeking recourse to the courts. In conciliation/mediation, parties are free to withdraw at any stage of time. It has been seen that resolution of disputes is quicker and cheaper through ADR. The parties involved in ADR do not develop strained relations; rather they maintain the continued relationship between themselves.

ADR techniques are extra judicial in character. They can be used in almost all contentious matters which are capable of being resolved, under law, by agreement between the parties. They have been employed with various encouraging results in several categories of disputes, especially civil, commercial, industrial and family disputes. In particular these techniques have been shown to work across the full range of business disputes: banking, contracts, performance and interpretation; construction contracts, Intellectual property rights, insurance coverage, joint ventures, partnership differences, personal injury, product liability, professional liability, real estate and securities. ADR offers the best solution in respect of commercial disputes of
an international character. The traditional attitude of our courts towards arbitration had been paternalistic almost school-masterly; and with international arbitration there was a generally a lurking suspicion of a revival of foreign dominance in India.

1.20 MODES OF ADR

A wide range of dispute prevention and resolution procedures exist in India that allow the participants to develop a fair, cost-effective, and private forum to resolve disputes. All ADR mechanisms available in the country can be broadly discussed at two levels:

1) Those which are applicable throughout the country &
2) Those which are available at the State / UT level to deal with specific problems arising under their jurisdiction.

The following models for ADR as prototypes for use in disputes redressal exist on national level:

1. Tribunals, Commissions, Boards, etc.
2. Lok Adalats
3. Nyaya Panchayats
4. Arbitration
5. Conciliation
6. Negotiation
7. Fast Track Courts

1.21 CHALLENGES BEFORE ADR SYSTEMS

Conflicts & Economic Growth: In the last 25 years per capita income has doubled in India. According to some estimates rate of gross

39 P.C.Rao: Alternative to litigation in India, ADR-Edited by P.C Rao and William Sheffield
40 F.S.Nariman: Arbitration and ADR in India
domestic product (GDP) of 9% per annum would be sufficient to quadruple per capita income by 2020. Despite the global economic slowdown India has stood its ground. Although there has been an economic slowdown in the last few years, the GDP which was at 9.3 percent in 2007 is likely to slip to 6.9 in 2009, according to IMF, but with economy firmly in control, the recovery may just be round the corner. There is no reason why growth rate of 9 of GDP percent cannot be sustained by 2020. If we want this growth rate to be attained and this growth has the human face, it would be extremely important, apart from all we are doing, that we manage and resolve the conflicts we have and the conflict which may arise as a result such economic growth, effectively and efficiently.

**Community Disputes:** There is another factor which we always need to keep in mind that India still lives in its villages and these villages are no longer ‘Independent Republics’ as they used to be at one time. The new means of communication have bridged the gap between village communities and the other communities. Villages are increasingly coming into contact with the industries outside villages, in urban centres. The life in villages is no more as simple as it used to be. There was a time when all kind of community conflicts in villages were handled by the Gram Panchayats. These institutions have either crumbled to a great extent or are in need of a new orientation or to be empowered with the new tools of resolving disputes.

**Industrial Relations:** Industrial relations or in the larger terms employer-employee relations is another conflict situation which needs attentions. Although conciliation machineries exist under the provisions of the Industrial Disputes Act, 1947, they are incapable of resolving all kinds of employer-employee disputes. At times, they are reduced to mere formal preliminary exercise before an industrial dispute is referred for adjudication.
There is an urgent requirement to evolve mechanisms to in house resolution of disputes before they are taken out for redress to formal institutions.

**Government as the litigant:** The government is itself one of the largest litigants in this country. A lot of tax payers’ money is consumed in useless or avoidable litigation. Sadly, the courts also take years to decide litigations and by the time final decision comes, the ultimate cost (not merely financial) of litigation goes up substantially. There are times like in the case of litigations related to government employees where a dismissed employee is reinstated in service after long drawn litigation and the government has to pay such an employee wages for the periods for which no service has been rendered by the individual. Primarily, the reason invariably is that there is no one prepared to take decisions in respect of the disputes, may be some times because there is no reasonable method of ascertaining the final outcome of the litigation which makes it difficult to take decisions for the bureaucrats.

**Causes of marginalized:** There are many issues on which NALSA can take stand and resort to social justice litigation to address questions concerning people at large in general and poorer and weaker Sections of the society in particular. Unfortunately there is nothing much which has been done in this respect. NALSA needs to activate its legal cell and also instruct the legal service authorities at the state district and the Taluk level to set up similar cells and formulate the policies to identify the causes which may be taken up by way of social justice litigation. Since more than 6 decades we are an independent democratic welfare state where the state is responsible to ensure welfare of its citizens. But a significant percentage of population in the country is poor and awaiting the welfare arm of the state. Unfortunately, there are certain colonial laws still in operation today which criminalize poverty and punish people on the basis of their status such as the Bombay Prevention of Begging Act, 1959.
Illiteracy & Ignorance: A large Section of our society is still illiterate. They have no knowledge of their rights. First of all it may not be possible to make them aware of their rights in the sense one may like them to understand and secondly if even if they are made aware of their rights they may still not be access the forums available for getting relief because of the incapacity to handle the paper work which may be required to be carried out to get the relief. These people may also suffer from some kind of inhibition in approaching the legal service centres at the district level or the talk level. There exists requirement for NALSA should play a proactive role and provide legal services to all such people at their door steps.

Effective implementation of socio-economic laws: There is plethora of laws and statutes enacted with a view to improve the socio-economic conditions of the poor and down-trodden and also to ensure that they are not exploited on account of social and status inequalities, such as the Minimum Wages Act, the Contract Labour (Regulation and Abolition) Act, the Bonded Labour System (Abolition) Act and the Inter-State Migrant Workmen (Regulation and Condition of Service) Act. But unfortunately they are often not properly and effectively implemented in the interest of the poor and the disadvantaged. The implementation of the legislation enacted with a view to improving the socio-economic conditions of the poor and the downtrodden is many a time frustrated and thwarted by the economically powerful Sections of the community with the result that the legislation remains merely a paper tiger without teeth and claws. Even the benefits of various social and economic rescue programmes initiated by the Central and State Governments through administrative measures have not effectively reached the poor and weaker Sections of the community. It’s time that NALSA comes out of its traditionally understood remedial role and avenues of its assuming preventive role are explored as well.
Calamities – man-made or natural: Global scenario is rapidly changing. As the physical boundaries are merging, traditional safety mechanisms for life and liberty appear to be inadequate. There is violation and infringement of the very basic right to live and survive by the actions of unknown and unforeseen forces having the capacity to cause massive destruction in ethnic, communal or terrorist activities. In the wake of natural disasters like earthquake, tsunami, etc., executive branch always doles out relief. But, there has always been disenchantment with such measures, particularly on the score of timeliness of the relief, adequacy, quality, equitable distribution and so on. A welfare state is responsible to guarantee the right to safety to its people and it cannot be absolved of its corresponding duty. We understand that NALSA is required to reach out to the victims of these activities and explore the avenues to play rehabilitative role.

Docket exclusion: The impediments in ‘Access to Justice’ are: (i) where a person is able to approach the courts but may not take his litigation right through the trial; (ii). Where a person has not been able to approach the court at all. The latter can be sub-divided into two categories – (a) where the person is aware of his rights but does not know whom to approach and where to approach, and (b) where the person is not aware of his rights at all. NALSA must find out solutions to reach out to people and to enable them to overcome these barriers.

1.22 THE STRATEGY

The strategy of meeting the aforesaid challenges and to achieve the broader Constitutional objectives under Article 39A would be to focus on empowering and enabling the legal services institutions, at all the levels, empowering people and institutions to resolve their own disputes and to remove barriers to ‘access to justice’ and to bring justice to the door steps of the people.
India to spearhead the Alternative Dispute Resolution system

In order to reduce the waiting period of cases, Alternative Dispute Resolution (ADR) will be the preferred mode of settlement of disputes in Indian courts. ADR centres are already functioning at Delhi, Madras, Karnataka, Punjab and Haryana High Court

Law and Justice Minister, Dr. Veerappa Moily has said that Alternative Dispute Resolution, ADR, will be the preferred mode of settlement of disputes in the future. India is spearheading the ADR movement and has caught up the attention of Courts in the country. He said, India is in the process of amending the Act of 1966 and a very comprehensive consultations have taken place at different parts of the country involving all the stakeholders. The endeavour is to make India the most preferred destination for ADR.

Inaugurating the International Conference on Alternative Dispute Resolution, ADR – Conciliation and Mediation organised by International Centre for Alternative Dispute Resolution in New Delhi, he said there are 52,592 cases pending in the Supreme Court, 39,55,224 cases in High Courts and 2,67,52,193 cases in subordinate courts. To reduce pendency of cases in courts ADR would work as a key tool. He said, towards this endeavour, the legal services authorities’ act 1987 has been amended from time to time to facilitate use of ADR methods. Amendment to Section 89 of the Code of Civil Procedure in 2002 is to introduce conciliation, mediation and pre-trial settlement methodologies for effective resolution of dispute. The Minister said, ADR centres are already functioning at Delhi, Madras, Karnataka, Punjab and Haryana High Courts.
The ICADR has been trying to spread awareness regarding settlement of disputes, commercial or otherwise, through Arbitration, Conciliation and Mediation outside the Courts. It has from time to time organized several Seminars, Conferences, Workshops, Training programmes and Educational Prgrammes to popularize and propagate ADR all over India.

The conference was attended by H.E. Dr. H.R. Bhardwaj, Governor of Karnataka and Chairman, ICADR, T.K. Viswanathan, Secretary General, Lok Sabha and member, Governing Council, ICADR. Supreme Court judges Hon’ble Mr. Justice Cyriac Joseph, Mr. Justice Deepak Verma, Mr. Justice Dalveer Bhadari, Mr. Justice Swatanter Kumar also attended the conference.

The U.S. was represented by Mr. Richard W. Naimark, Senior Vice President, American Arbitration Association.

**1.23 INDIAN LAW ON ALTERNATIVE DISPUTE RESOLUTION**

Have you ever come across the term ‘Alternative Dispute Resolution’? It is also called as ADR system. The ADR system is relevant when two parties involved in a feud come together to reach mutual consensus, with the help of a neutral third person. The third person is a trained independent individual, who helps the parties to resolve the dispute. The ADR system, under the Indian law, intends to improve the efficiency of legal system and speed up the course of action.

The ADR system includes several methods, such as:

- Mediation
- Adjudication
- Arbitration
- Conciliation
Ombudsman Schemes

Indian Law: Why the ADR System is preferred by Entrepreneurs

A majority of the business houses in India are owned by small entrepreneurs. These companies undertake both written and verbal contracts. However, in many cases, no written contracts are executed and transactions are carried based on oral promises. Dispute arises in cases where one of them fails to fulfill the promises.

Following to the breach of the contract, by one of the parties, the other party files a lawsuit.

However, there are various disadvantages of filing a legal case, such as:

• The parties lose control over the matter.
• The timings and procedure of the case depends solely on the judges and lawyers.
• The court may take years, to sort out the matter.
• The parties can communicate only through their lawyers.
• The parties have to bear huge costs due to the delays and lawyer’s fee.

Typically, these small entrepreneurs have narrow supply chains and their businesses rely mainly on personal relationships. Such lawsuits bring an end to the long lasting business relations. Further, small companies involved in litigations can lose their competitive edge.

Also, the parties are directed by their lawyers to not to discuss the matter with the opposite party, in their absence. This puts an end to the communication, which is an indispensable part of trade and commerce.
Further, if we consider the global business prospective, it is difficult to oblige the overseas corporate houses and to answer in a foreign court.

Indian Law: Mediation as a Part of ADR System

The cost effective, customized, time effective facets of the ADR system provide several ways to resolve inevitable business issues. Top firms across the world are adopting ADR system to resolve their disputes. Most of them resort to mediation, before filing a lawsuit. Mediation, for instance, is an example of a type of method under the ADR system, where a mediator helps both the parties to reach a mutual agreement. Mediation can also be used to settle disputes, such as consumer disputes, contract disputes, housing disputes and neighborhood disputes.41

Following techniques of ADR are being adopted in industry and government in USA:

1. **Arbitration** is one of the oldest forms of ADR. Arbitration involves a formal adversarial hearing before a neutral, called the arbitrator, with a relaxed evidentiary standard. The arbitrator is usually a subject matter expert. An arbitrator or an arbitration panel of two or more arbitrators serves as a ‘private judge’ to render a decision based on the merits of the dispute. Arbitration decisions can be binding or non-binding.

2. **Conciliation** is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions. The conciliator may or may not be totally neutral to the interests of the parties. Successful conciliation reduces inflammatory rhetoric and tension, opens channels of communication and facilitates

41 LIG Report dated 17/08/2010
continued negotiations. Frequently, conciliation is used to restore the parties to a pre-dispute status quo, after which other ADR techniques may be applied. Conciliation is also used when parties are unwilling, unable, or unprepared to come to the bargaining table.

3. **Convening** serves primarily to identify the issues and individuals with an interest in a specific controversy. The neutral, called a convenor, is tasked with bringing the parties together to negotiate an acceptable solution. This technique is helpful where the identity of interested parties and the nature of issues are uncertain. Once the parties are identified and have had an opportunity to meet, other ADR techniques may be used to resolve the issues.

4. **Early Neutral Evaluation** involves an informal presentation by the parties to a neutral with respected credentials for an oral or written evaluation of the parties' positions. The evaluation may be binding or non-binding. Many courts require early neutral evaluation, particularly when the dispute involves technical or factual issues that lend themselves to expert evaluation. It may also be an effective alternative to formal discovery in traditional litigation.

5. **Facilitation** improves the flow of information within a group or among disputing parties. The neutral, called a facilitator, provides procedural direction to enable the group to effectively move through negotiation towards agreement. The facilitator's focus is on the procedural assistance to conflict resolution, compared to a mediator who is more likely to be involved with substantive issues. Consequently, it is common for a mediator to become a facilitator, but not the reverse.

6. **Fact-Finding or Neutral Fact-Finding** is an investigative process in which a neutral ‘fact finder’ independently determines facts for a particular dispute usually after the parties have reached an impasse. It
succeeds when the opinion of the neutral carries sufficient weight to move the parties away from impasse, and it deals only with questions of fact, not interpretations of law or policy. The parties benefit by having the facts collected and organized to facilitate negotiations or, if negotiations fail, for traditional litigation.

7. **Interest Based Negotiation** or Interest Based Bargaining is an established negotiating technique through which the parties meet to identify and discuss the issues at hand to arrive at a mutually acceptable solution. It is a positive effort by the parties to collaborate, rather than compete, to resolve a joint dispute. The focus of negotiations is on common interests of the parties rather than their relative power or position. The goal is to reduce the importance of how the dispute occurred and create options that satisfy both mutual and individual interests. Interest based negotiations are also referred to as ‘principled’ or ‘win-win’ negotiations. This informal process is one of the most fundamental methods of dispute resolution, offering parties maximum control over the process. It does not necessarily require the use of neutrals.

8. **Litigation**, although not an ADR technique, is intertwined with ADR. Not every case can or should be settled. However, each case proceeding toward litigation benefits by an evaluation for resolution. Consideration of using ADR techniques for resolving an aspect of a case such as merit, quantum, attorney fees, or future obligations is common.

9. **Masters or Special Masters** are neutrals appointed by a court in accordance with judicial rules. The master assists the parties to manage discovery, narrow issues, agree to stipulations, find facts, and, occasionally, reach settlement. In non-jury actions, the court may accept the master's findings of fact.
10. **Mediated Arbitration (Med-Arb)** is a combination of mediation and arbitration. Initially, a neutral third party mediates a dispute until the parties reach an impasse. After the impasse, a neutral third party issues a binding or non-binding arbitration decision on the cause of the impasse or any unresolved issues. The disputing parties agree in advance whether the same or a different neutral third party conducts both the mediation and arbitration processes. Use of the same person for both processes creates a problem when the mediator turned arbitrator must ignore previously acquired confidential information.

11. **Mediation** involves a neutral, called a mediator, who assists the parties in negotiating an agreement. The mediator serves as an ‘agent of reality’ to help the parties frame the issues, structure negotiations, and recognize self interests as well as the interests of the other side. Mediators may be, but are not necessarily, subject matter experts concerning the substantive issues in dispute. The parties may meet with the mediator together or individually as the circumstances dictate. A meeting between one party and the mediator, called a caucus, allows the party to privately express emotions and core interests. These private sessions avoid alienation between the parties that might otherwise inhibit open communications. Mediators are not vested with any decision making authority and cannot impose resolution on the parties; the parties make decisions themselves. However, the mediator, like a facilitator, serves as the proponent of the process to keep discussions moving on track.

12. **Minitrial (Mini-trial)** is a misnomer. This technique provides for a summary presentation of evidence by an attorney or other fully informed representative for each side to decision makers, usually a senior executive from each side. After receiving the evidence, the decision makers privately discuss the case. ‘Minitrial’ is not a small trial; it is a sophisticated
and structured settlement technique used to narrow the gap between the parties' perceptions of the dispute and which 'facts’ are actually in dispute. This hybrid technique can occur with or without a neutral's assistance, but neutrals frequently facilitate the processes for presentation of evidence and discussion among the decision makers, and serve as a mediator to reach a settlement. Mini-trials can be more expensive than most other ADR techniques because the cost of presenting even summary evidence to senior executives is high. Therefore, this process is generally reserved for significant cases involving potential expenditure of substantial time and resources in litigation.

1.24 ADVANTAGES OF ADR SYSTEMS AND IT’S LIMITATIONS.

Use ADR when: Working with or within the existing judicial system is unlikely to be effective or receive popular support.

Complex or technical disputes can be handled more effectively by specialized private ADR systems.

Do not use ADR when: Official opposition is sufficiently strong and controlling to suppress competing programs. In these cases, links to the official judicial and legal system may be necessary for success.

When the civil court system has so many institutional weaknesses and failures (inadequate resources, corruption, systemic bias) that there is no near-term prospect of successful civil court reform, ADR programs may be an appropriate way to provide an alternative forum.

Justice for populations not well-served by the courts: In South Africa, India, and Bangladesh, ADR programs were developed to by-pass corrupt, biased, or otherwise discredited court systems that could not provide reasonable justice for at least certain parts of the population (blacks, the poor, or women). In Sri Lanka, the reputation of the courts is relatively good,
but they were ineffective in resolving many local and small disputes because of high costs and long delays. The Mediation Boards there have evolved as a substitute for the courts, but enjoy the support of the judicial system. Bolivia, Haiti, Ecuador, and El Salvador are developing systems involving government support for independent, local, informal dispute resolution panels to serve parts of the population for whom the courts are ineffective (Davis and Crohn, 1996).

Some ADR programs function as the primary institutions for resolving civil disputes, and have effectively replaced or preempted courts. Taiwan and China have the best examples of broadly and deeply institutionalized, community-based ADR (Huang 1996; Jandt and Pedersen 1996b). In both countries, local government officials and well-respected citizens act as conciliators, mediators, and arbitrators for the vast majority of local disputes. Taiwan's ADR system appears to be growing more popular over time, despite social changes that have begun to erode Confucian norms of deference to local notables.

In China, there are now more than one million village-based People's Mediation Courts, which were created by the 1982 constitution. Participation in mediation is voluntary in principle and disputants can take their cases to court if mediation fails. The PMCs handle more than seven million civil cases each year, including family disputes, inheritance issues, land claims, business disputes, and neighbor conflicts. These ADR institutions have evolved not as attempts to substitute for a failing court system, but rather as an outgrowth of traditional, local institutions that have long functioned as alternatives to the civil courts.

**Efficient and satisfactory resolution in highly-technical, specialized areas:** Specialized ADR programs focused on particular types of technical or complex disputes can be more effective and produce better
settlements than courts. In the United States, specialized ADR programs deal with construction, environmental, and patent disputes, among others. These programs act as substitutes for the courts, which may not have the expertise necessary to make the best decisions. In developing countries, specialized ADR programs for commercial disputes are being tried in Uruguay, Thailand, Bolivia, and Ukraine. Private labour-management ADR in South Africa has been so successful that the government has adopted mediation.

As legislatures and courts continue to expand mandates for ADR in federal and state courts, the need to know what, in fact, the ADR revolution has wrought, for good or ill, becomes more pressing.

In the last quarter century, the use of alternative dispute resolution has transformed many aspects of our civil justice system. Many cases are now resolved outside the courthouse through mediation and arbitration—some through binding decisions, some through voluntary agreements. The ICJ is committed to a program of research that will provide accurate information about the use of ADR. In particular, we want to learn about the prevalence of ADR as well as its effects on costs and case outcomes.

The methods like mediation are described as alternative dispute resolution processes because they are considered as alternative to the litigation and the process of adjudication. It is time to recognize that dispute resolution processes stand in their own right and not as an alternative to any adjudicatory process. Theoretically there is a basis for saying so because there are disputes, which can never be adjudicated but can only be resolved outside the court. The normal adjudicatory process has no answer to such disputes. Experience shows that only a fraction of disputes in the society are adjudicated upon. The vast majority of disputes are in fact resolved by the families and communities themselves. There are communities in India and world over such as tribes and other deprived Sections of society who live on the fringes of civil society and have no access to normal court process to get
their disputes adjudicated. To say that there are no disputes in existence in such communities would be denying the obvious reality of life. They may have primitive adjudicatory apparatus in place but most of disputes are resolved and not adjudicated in such communities. We need to give dispute resolution processes their due place and not merely consider them as an appendage or alternative to any other process. If the argument that we should adopt dispute resolution process as an alternative to adjudicatory process only because adjudication in courts takes a long time or the cost of litigation is prohibitive is taken to its logical conclusion then it would mean that if the cost of litigation is reduced to zero and the litigations are decided on day to day basis then the need for such dispute resolution process will disappear. This argument is flawed for at least two reasons. One, there will always be influx of some cases in the adjudicatory process, which the system will not be able to adjudicate and therefore there would be requirement for a system to be evolved, which may take care of the cases which can be adjudicated. Two, dispute resolutions in this way have some obvious advantages over the normal adjudicatory process like the cutting down the progression of litigation in the forms of appeals, revisions etc on the one hand and putting an end to prospective litigation between the parties on the other hand.