CHAPTER IV
ALTERNATIVES TO LITIGATION: SOME PROPOSALS

Alternative Dispute Resolution (ADR) refers to any mechanism other than courts for resolving disputes. They include processes like negotiation, mediation, conciliation, arbitration etc. Originally they were conceived mostly as informal mechanisms outside the judicial dispute resolution system established by the State. But slowly, mainly due to the desire to mitigate inordinate delay in dispensation of justice by the judicial system, the judiciary in many jurisdictions absorbed and adopted ADR and more or less formalized it. Among various alternative dispute resolution mechanisms, arbitration is distinctive because in arbitration, there will be a binding award.\(^1\) Arbitration has features more closely common with court-based adjudication than with other forms of ADR.\(^2\) The arbitral award is almost like a judicial verdict. But in other forms of ADR finality can be arrived only with the consent of parties.\(^3\) However, in recent times there are many innovative models in ADR in the nature of hybrid forms like Med-Arb, Arb-Med-Arb etc. in which arbitration plays essential part. ADR is now gaining more importance and now considered by some writers as an Additional Dispute Resolution Mechanism or as an Appropriate Dispute Resolution Mechanism.\(^4\)

4.1. Meaning and Concept

ADR is a mechanism for settling disputes through procedures like arbitration, mediation or mini-trial and unlike litigation, usually less costly and more expeditious. They are increasingly being used in commercial and labour disputes, divorce action, in resolving motor vehicle and medical malpractice tort claims, and in other disputes that would otherwise involve court litigation.

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2 *Ibid.* at 20
3 Rahmath Mohamad, Secretary-General, AALCO on the topic “Alternative Dispute Resolution: Asian-African Perspectives” (at the ALSA National Conference, 2011, UTIM, Malasia, on Sunday, 22 May 2011)
One commentary offers the following definition, Viz. “ADR is a set of practices and techniques that aim (1) to permit legal disputes to be resolved outside the courts for the benefit of all disputants; (2) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; or (3) to prevent legal disputes that would otherwise likely be brought to the courts”. According to *Halsbury’s Laws of England*, ADR is a term for describing the processes of resolving disputes in place of litigation and includes mediation, conciliation, expert determination, and early neutral evaluation. Therefore, ADR refers to a variety of techniques to resolve disputes without adjudication. It includes even the method of negotiation in which two parties through their communication, without the assistance of a third party, themselves resolve the dispute. It may also include processes like conciliation and mediation in which there is the intervention of a neutral third party. Thus it is a system of settlement of conflicts and disputes resorting to amicable ways of resolution privately in a consensual manner between parties themselves with or without the intervention of a neutral third party.

It may be without resorting to litigation in a formal court or may be even during the pendency of litigation. Either way, it covers a wide range of dispute resolution options outside conventional decision-making process carried out by courts established by the State. The system of resolving disputes in a consensual way seems to have existed all over the world for thousands of years. ADR may be considered to be a much refined form of resolving disputes in a similar manner. However, modern ADR is a more scientifically organized way of implementing dispute resolution consensually. Its principles and processes have been expressed in clear terms with an increasing trend on the part of the people to resort to it. In recent years the US scholars have made several innovations and creative contributions in ADR. The founding moment

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for modern ADR movement was the Pound Conference convened by Chief Justice Warren E. Burger in 1976. It derived much attention and acknowledgement, after chief Justice Burger’s speech at the Annual Meeting of the American Bar Association in Minneapolis on August 21, 1985. Chief Justice Burger said that “there is some form of a mass neurosis that leads many people to think that courts were created to solve all the problems of mankind”, and emphasized that ADR must be used to curb the ‘flood’ of the new kinds of conflicts that have purportedly overwhelmed the judicial system”.^8^ Strictly speaking, ADR refers to such devices which are intended to resolve disputes, mainly out of court, or through non-judicial processes. However, in its wider meaning it includes court sponsored dispute settlements also. Some people are even lauding it as the panacea for all of the languishing victims of our overpriced, inefficient and intransigent legal system.

### 4.2. Scope

The scope of ADR does not apply to all law cases. ADR is a process which may be used in addition to or along with or even independent of the judicial system. ADR is not intended to supplant of litigation.\(^9\) It offers alternative options to dispute resolution. There are still a large number of important areas, including constitutional law and criminal law in respect of which there is no substitute for court decisions.\(^10\) Since the techniques used in ADR are not the ones applied in adjudication, ADR is extra-judicial in character.\(^11\) ADR method may be resorted to contentious matters capable of being resolved, under law if parties agree for it. There seems very encouraging results in various categories of disputes, especially civil, commercial, industrial, environmental disputes, sports, social development and community-related issues, crime control and prevention, schooling and

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11. Ibid.
family disputes. These techniques have been seen 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 injury; product liability; professional liability; real estate; and securities. The alternative dispute resolution methods are becoming more popular for resolution of disputes between parties belonging to two different countries. Some writers are of the view that it is more accurate to describe ADR as an appropriate dispute resolution method rather than as an alternative to litigation.\textsuperscript{12} The alternative dispute resolution methods offer distinct advantages over litigation.\textsuperscript{13} Under ADR, a dispute may be settled out of court. However, ADR system generally applies to disputes, which have arisen out of a legal relationship which may or may not be contractual.

4.3. Objectives and Purposes

The main objectives of ADR are resolution of disputes in a speedy manner and at lesser cost. Since it is an amicable way of settling disputes, building better relationship between parties is another objective.\textsuperscript{14} Some of the goals that have been articulated for civil ADR programmes are saving of costs for parties and courts, resolution of disputes in an quick manner, satisfying procedures for dispute resolution, reflection of parties’ interests and values in the outcome, satisfaction of litigants and their compliance with results, ensuring the public access to justice, reducing backlogs and freeing up judicial resources etc.\textsuperscript{15} ADR may be used first, as a threshold point of control to litigation, if parties resort to it as soon as the dispute arises and before approaching court. This will help to achieve the objective of reducing the number of filing before courts. But it does not stop parties approaching court if

\textsuperscript{12} Supra n. 3
\textsuperscript{13} Vinod Agarwal, Alternative Dispute Resolution Methods, www.unitar.org, p.4
\textsuperscript{14} Supra n. 1 at13
the dispute could not be resolved through ADR. Secondly, ADR techniques may be used at any time even when a case is pending before a court. This will enable the parties to reduce the number of contentious issues and may pave the way for early settlement, and helps to achieve the objective of reducing number of pending cases before courts. The ADR process can be terminated at any stage by one of the disputing parties except in the case of binding arbitration, thus permitting a party or parties to continue their litigation if they so wish. Thirdly, in order to find an expeditious resolution of disputes at lesser cost it provides a better option.

ADR helps in keeping the dispute a private affair and promotes creative and realistic business solutions, since the parties are in control of the proceedings. ADR procedures take only a day or a few days to arrive at a settlement. But it depends upon the nature of cases and attitude of the parties. In certain cases it may require several attempts to settle a dispute. Fourthly, ADR programmes are flexible and not afflicted with rigours of rule of procedure thereby helps to achieve the objective of resolution of disputes at ease. Fifthly, the freedom of parties to litigation is not affected by ADR proceedings. Even a failed ADR proceeding is never a waste either in terms of money or time spent on it, since it helps the parties to appreciate each other’s case better. Sixthly, ADR may be used with or without a lawyer and helps a party to directly present her case. A lawyer, however, plays a very useful role in identification of contentious issues, exposition of the strong and weak points in a case, rendering advice during negotiations and over-all presentation of his client’s case, especially when parties are ignorant about legal and technical aspects. Seventhly, ADR procedures help in the reduction of workload of courts and thereby help them to focus attention on cases which ought to be decided by courts. Eighthly, ADR procedures permit parties to choose neutrals who are specialists in the subject-matter of the dispute. This will encourage lawyers, especially budding lawyers to acquire expertise over different subjects other than law relating to varying disputes. The lawyers will
have to adapt their role to ADR requirements in order to play central role in ADR processes. Finally, ADR also helps prevention and control of crimes. Sometimes certain simple conflicts may grow into serious crimes. If conflicts were easily resolved, chance for them to develop into a crime could be avoided.

The ADR seeks to resolve the conflict in a more cost effective and expedite manner, while fostering long term relationships. ADR is, in fact, a means, of settling disputes that need not involve courts. It involves finding other ways apart from regular litigation which may substitute litigation and resolve civil disputes and compoundable criminal cases. Its procedures are widely recommended to reduce number of cases, and provide cheaper form of justice. Therefore, the judiciary in many parts of the world including India has increasingly adopted it and the court-connected ADR has now become the order of the day.16 According to Justice P S Narayana:

My very strong impression is that people have recognized that in addition to making the judicial system more efficient through judicial case management, there is an increasing role for mediation and arbitration. A lot of these cases are exhausting not merely because of what is involved but build up a tension of their own. There is a terrible Chinese curse which goes may you be involved in litigation in which you are in the right. The tension of it gets to you. If you can sit around a table together with somebody who points out that a little bit of give and take actually resolve the dispute reasonably fairly to both sides that is better way of proceeding than going to court and finding one side winning everything and the other losing everything.17

4.4. Basis

The principles of natural justice are the very basis of ADR. The principles and Rule of law are inherently related to each other. It is protection

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from excess of power by authorities or who are in commanding position. It means fairness, equity, equality and reasonableness. The principles do have constitutional foundation. The articles 21 and 14 of Constitution embody the principles of natural justice and rule of law. These articles incorporate substantial and procedural due process.\textsuperscript{18} They are fairness and absence of discrimination and arbitrariness.

In the case of \textit{E.P. Royappa v. Tamilnadu,\textsuperscript{19}} the Supreme Court held that a properly expressed and authenticated order could be challenged on the ground that condition precedent to making of order had not been fulfilled or the principles of natural justice had not been observed. In \textit{Maneka Gandhi v. Union of India,\textsuperscript{20}} the apex court held that

Law which allow any administrative authority to take a decision affecting rights of the people, without assigning reason for such action, could be accepted as a procedure, which was just, fair and reasonable, hence violative of articles 14 and 21. In \textit{Olga Tellis v. Bombay Municipal Corpn,\textsuperscript{21}} the Court held that even if the legislature authorized the administrative action, without any hearing, the law would be violative of the principles of fair hearing and thus violative of articles 14 and 21.

As far as ADR is concerned, its sole basis is founded on two basic principles of natural justice. They are: 1 \textit{Nemo judex in causa sua}, i.e. no one shall be made a judge in his own cause (rule against bias) and 2. \textit{Audi alteram partem}, i.e. hear the other side. These two principles, Rule against bias and \textit{Audi alteram partem} are embodied in procedural laws like Cr.PC and CPC.

4.5. Terminology

Before proceeding towards the analysis of the research problem, understanding the meaning and concepts of ADR terminology is necessary and is discussed below.

\begin{itemize}
\item \textsuperscript{18} \textit{Selvi v. Karnataka} (2010) 7 S.C.C. 263
\item \textsuperscript{19} AIR 1974 SC 555
\item \textsuperscript{20} AIR 1978 SC 597
\item \textsuperscript{21} AIR 1986 SC 180
\end{itemize}
The term ‘alternative’ in ADR emphasizes that it is a way of resolving disputes other than through judicial process. It is not only alternative to regular court system, but also amicable resolution of disputes. One may therefore say that alternative dispute resolution is also an alternative approach to resolution of disputes. Judicial resolution means only final verdict. And that decision itself may be the starting point of another dispute either in the nature of an appeal or a fresh litigation or might even lead to a crime as a consequence. But in ADR, since it is in the nature of consensual procedures there is an actual resolution of the dispute.

The ADR is distinctively different way of settling disputes. First, in ADR decision making process is totally different from the traditional litigation in a court of law. Secondly and most importantly there is a qualitative difference in the end result. As opposed to adjudication, in ADR there is a resolution of a dispute in the sense of obtaining a consensual result. In adjudication the emphasis is not on consensuality but on finality.

4.5.1. ‘Conflicts’ and ‘Dispute’

Before proceeding to analyse the term ‘dispute,’ it is better to have an idea about conflict. Conflict is an integral part of human behavior and occurs everywhere. Even a single individual may be faced with conflict of thoughts when he has to take a decision. When there are more options than one, it creates confusion in the mind of a person and results in conflict of thought. It is therefore, obvious that there will be conflicts in any society where there is interaction between individuals. The term conflict is derived from two Latin words con (together) and fligre (to strike). It is defined as “to come into collision or disagreement”, “to be at variance or in opposition; clash”, “to contend”, “a battle or struggle; strife”, “controversy; quarrel”, “antagonism or opposition between interests or principles; a conflict of ideas”, “a striking together; a collision” or “incompatibility or interference”.

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22 The Random House Dictionary of the English Language.
contained, it may grow into altercation and behavioural disagreements and ultimately to violence in some cases. There could be no movement or change without it.23 The democratic process is founded on the bedrock of normalcy of conflict of ideas and interests.

John Crawley24 defines conflict as “a manifestation of differences working against one another” which have “ingredients” (the differences that inherently exist between the people in conflict such as cultural and value differences, interests, beliefs and patterns of behavior), “combinations and conditions” (their contact with one another and the structures in which they operate) and “the spark” (what happens when their differences clash). These may either lead to a smouldering fuse with an explosion, or if constructively managed, a cooling of the heat, leading to a readjustment and a settling.25

Obviously, conflict has positive and negative aspects. When conflict becomes dysfunctional problems will arise. When the natural mechanisms such as discussion and negotiation become inadequate for managing and resolving the conflict, it may become potentially damaging and other processes may be needed.

4.5.2. Dispute

The differences unresolved, lead to disagreements. Differences cause problems. The unresolved disagreements or conflicts become a dispute. To put it differently, when a conflict manifests itself in to distinct, justiciable issues, it may be viewed as a dispute. The term dispute is defined as “to engage in argument or debate”, “to argue vehemently; wrangle or quarrel”, “to argue against” or to “quarrel or fight about”.26 Disagreement over issues capable of resolution by processes like negotiation, mediation, or adjudication etc. is involved in a dispute. An objective examination of differences inherent in a dispute is usually capable of analysis by a neutral third party, and can take a

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23 Supra n.1 at 1
25 Ibid. at 1
26 The Random House Dictionary of the English Language.
view on the issues to assess the right and wrong of both the sides. When a claim is asserted by one party and opposed by the other side, an actual dispute arises. In Major (Rtd.) Inder Singh Rekhi v. Delhi Development Authority,27 where there was an arbitration agreement and there has been an assertion of claim by appellant and silence as well as refusal the respondent. The Supreme Court held that there could not be a dispute for the parties to invoke arbitration until “a claim is asserted by one party and denied by the other on whatever grounds”. Dispute entails a positive element and assertion in denying, not merely inaction to accede to a claim or a request. In Ellerine Brothers (Pty.) Limited v. Klinger,28 there was a provision for disputes to be referred to arbitration. The defendant failed to account as required under the agreement, but did not assert that a dispute existed until after a writ had been issued seeking an accounting and payment. The Court of Appeal held that silence did not mean consent.

From the above it is clear that difference from a conflict and dispute lies in the development of it to a justiciable issue capable of being decided by a person or persons other than disputants.

**4.5.3. Causes for conflicts**

Several theories seem to explain the causes of conflict. According to Charls Darwin, the principles of struggle for existence and survival of the fittest are main causes of conflict. Primarily it arises from clash of interest within the groups and the society as a whole. The Darwinian ideas for causes of dispute are individual differences, cultural differences, clash of interests and social change.29 Folberg and Taylor30 explain away conflict in terms of the divergent aims, methods or behavior of people. In simple terms conflicts can be viewed as the result of the differences which make individuals unique and

27 AIR 1988 SC 1007
28 [1982] W.L.R. 1375
the different expectations which individuals bring to life.\textsuperscript{31} There may be one or more causes for conflict. The multiple causes may be evident or appear only on close examination. Some conflicts may start with a single cause, but develop into multiple causes as the conflict grows. Christopher Moor\textsuperscript{32} analyses the causes of conflict in detail. He conceptualizes the major causes for conflicts into five. They are Relationship conflict, Value conflicts, Structural conflicts, Interest conflicts, and Data conflicts.

### 4.5.3.1. Relationship conflicts

This type of conflict arises where parties are connected to one another in a context wider than the immediate dispute. It may be family relationship, business relationship, neighbouring or religious groups etc. Such conflicts arouse strong emotions. Attention must be paid to relationship while negotiating these types of conflicts. It is part of the answer, and may be part of the problem. Poor communication, distrust, history of conflict, misperceptions and misunderstandings are characteristics of this type of conflicts. In order to resolve such conflicts, parties will have to clarify perceptions, improve communication, learn from the past, and learn to leave grievances behind and think ahead.

### 4.5.3.2. Value conflicts

Value conflicts arise from differences in ideas, different criteria for evaluating ideas, and different ways of life, religion, culture and ideology. Though it is possible, it is not easy to resolve these types of conflicts. In order to resolve such conflicts, finding shared goals and commonalities is a way. It may not be a value conflict at all in certain cases even if it is labeled as one. On a closer examination there may be other aspects involved.

### 4.5.3.3. Structured conflicts

Conflicts that come from hierarchies, from positions of authority and power or from unequal holdings of resources and access to knowledge and


\textsuperscript{32} Moore Christopher, \textit{The Mediation process} (2003), p.607.
wealth are called structured conflicts. Here one party is strong and the other is weak. There will be a power imbalance. The weak may feel that they will not get anything and the strong may feel that they have nothing to lose. Therefore, it is very difficult for negotiation. Therefore, the weak resort to other means like threat of violence and strikes. An example is labour-management conflicts. The negotiators should understand these imbalances and see that they do not result in an unfair agreement. A fair and mutually acceptable decision-making process will have to be established.

4.5.3.4. Interest conflicts

A conflict of interest is a set of circumstances that create a risk that actions regarding a primary interest will be unduly influenced by secondary interest. For example, in the environment of a company, a conflict of interest tends to occur in one of three ways. When an individual has the opportunity to use his or her position for personal financial gain or to benefit company in which the individual has a financial interest. When outside financial or other interests may inappropriately influence the way in which an individual carries out her responsibilities. When an individual’s outside interests otherwise may cause harm to partners’ reputation, staff, or patients. Conflicts of interest are not always obvious. A conflict of interest is any situation that might cause an impartial observer to reasonably question whether one’s actions are influenced by considerations of private interest. ‘Private interest’ may include financial interests, interests related to one’s personal relationships, procedural interests, psychological interests or interests related to his other outside activities. Therefore, a negotiator has to understand the underlying ‘private interest’ for the resolution of the dispute in a fair manner.

4.5.3.5. Data conflicts

Conflicts that arise from lack of information, misinformation, or different interpretations of information are called data conflicts. The lack of means to verify or analyse data is the result. It may the result of an imbalance in access to and possession of data. This needs to be recognized and remedied.
by reasonable disclosure for fruitful negotiations. There shall be agreements as to the availability of important data, its processing and verification.

4.5.4. Types of conflicts or disputes

It is always better to understand the type of disputes for finding the apt way for resolving it. On a broad classification one may say that there are three types of conflicts. One is war or feud. The second is litigation and the third is impersonal. But when it comes to details they may be classified in to personal, family, matrimonial, commercial, contractual, workplace conflict, environmental resources conflict, group conflict, interstate conflict, military conflict, ideological conflict, religion-based conflict and racial conflict.

4.5.5. Resolution

Resolution of disputes includes adjudication by courts, arbitration, negotiation, conciliation, mediation, and many other similar processes. They may broadly be classified in to adjudication processes and consensual processes. Arbitration may also be considered as an adjudication process to a certain extent. In both cases the judge or the arbitrator decides or determines the issues in the dispute to arrive at the outcome. But in processes like negotiation, conciliation and mediation, the parties with and without the assistance of a neutral third party arrive at their own solutions to the problem. These are therefore, called consensual processes. In literal sense of the term, adjudicative or determinative processes are not actually about resolving the problem. These processes are very much structured and tightly controlled by complex rules of procedure, rules of evidence, and precedent developed by higher courts. The established protocol has to be followed. Otherwise, it may result in dismissal of the case. Judges do not resolve the problem that comes before them but they decide the dispute or adjudicate them. The term ‘resolve’ means to fix or settle on by deliberate choice and will. The judge while deciding an issue considers the evidence before him and the law relating to it and takes an independent decision in a detached manner. Therefore, he is

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33 Random House Dictionary.
neither choosing from any alternative options nor exercises his will. On the other hand while parties to a dispute sitting together for an interaction will be able to find alternative options for resolution of the problems. They can exercise their free will for a give and take solution.

Therefore the role of a judge or arbitrator in deciding a case and the role of a mediator in the resolution of a dispute are different. The mindset, attitude and approach of a judge and a conciliator or mediator are distinctive. The mediator’s job is facilitating the parties to come out with a good solution. He is enabling and empowering the parties to come with their own solution. Therefore, ADR is quite the opposite of adjudication. But in adjudication and arbitration, parties have no role in reaching the outcome except providing material evidence and advancing pleadings. Thus in ADR there is an actual resolution of disputes in strict sense of the term.

4.6. History

Resolution of disputes through mediation, conciliation and arbitration has long traditions in several parts of the world. There is a long and old tradition in India of the encouragement of dispute resolution outside the formal legal system. Disputes were decided by the intervention of elders or assemblies of learned men and such other bodies. Administration of justice by peoples’ courts and concomitant people’s participation in India is as old as the village itself.\textsuperscript{34} Even today many village level disputes are settled by such methods by elders of the village. However, with the advent of the British rule these traditional institutions of dispute settlement crumbled down and the formal legal system introduced by the British prevailed on the basis of the concept of omission of rule of law, and the supremacy of law. Informal dispute resolution has a long tradition in many societies of the world such as in China, England and US. The people all over the world used nonjudicial indigenous methods to resolve conflicts. Arbitration has also a

\textsuperscript{34} R.Sahai, \textit{Panchayati Raj in India} (1968), p.95.
place in the teachings of Islam.\textsuperscript{35} During the years of the exodus of the Israelites from Egypt, Moses functioned as judge over the Israel nation and mediated disputes brought before him by anyone who had a problem with his neighbour among the people.\textsuperscript{36} Also, the famous story of King Solomon mediating in the dispute between the two mothers who laid claim to a baby after the other child had been killed in the night gives a veritable example of resolution of disputes between parties.\textsuperscript{37} According to Greek mythology, the royal shepherd, Paris, was called upon to mediate between the Goddesses Juno, Athena and Aphrodite in their conflict about who was the most beautiful.\textsuperscript{38} Apart from these, the Athenian courts became crowded and slow in the years leading to 400 BC and this led to the creation of the position of public arbitrator, which, according to Aristotle, each man was to fill in his 60\textsuperscript{th} year. Thus the well-defined and surprising formal and procedural system of arbitration developed and thrived in Greece.\textsuperscript{39} Before the colonialists came with their adjudicatory system of dispute resolution, African communities had their indigenous judicial systems which explored means other than adjudication for resolution of conflicts. The old African communities thrived on a system where members of the society saw themselves as family and this reflected in their relationships with one

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\textsuperscript{35} Ayah 35 of Surah Al Nisa mentions conciliation along with arbitration:
\begin{quote}
If ye fear a breach
Between them twain,
Appoint (two) arbiters,
One from his family,
And the other from hers;
If they wish for peace,
Allah will cause
Their reconciliation………
\end{quote}
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\textsuperscript{39} \textit{Ibid.}
another.\textsuperscript{40} Under the clan system of Ghana, which was in practice long before the advent of the colonialists, parents refer disputes in the family to the head of family who tried to resolve it. If this effort fails, the clan head is called in to help. The last resort is normally the Chief, who gives a final and binding determination.\textsuperscript{41} Hence, since conflicts and disputes are normal part of everyday existence within a society, methods and systems of resolving them have existed as far back as man began to live in a society and not alone.

4.6.1. Common law

Agreements to arbitrate disputes have been recognized in the common law at least since 17\textsuperscript{th} century.\textsuperscript{42} But the judiciary was hostile towards executory arbitration agreements. Courts in England rejected attempts to gain enforcement of agreements to arbitrate on the ground that such agreements acted to ‘oust the jurisdiction’ of the court. This English common law rule immigrated to the US and continued in to the 20\textsuperscript{th} century. However, with the coming of the New York statute in 1920 and the US Arbitration act of (1925) judicial resistance to arbitration began a pattern of reversal.\textsuperscript{43}

In more recent times, at the end of the late 19\textsuperscript{th} century attempts were made to develop the use of arbitration and mediation in response to the disruptive conflicts between labour and management in the United States. However, it wasn’t until 1898 that Congress followed initiatives by authorizing mediation for collective bargaining disputes.\textsuperscript{44} In the ensuing years, special mediation agencies, such as the Board of Mediation and

\textsuperscript{40} Birgit Brock-Utne, “Indigenous Conflict Resolution in Africa”, (A draft presented to the week-end Seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute for Educational Research 23 – 24 of February 2001), p. 8
\textsuperscript{41} Ibid.
\textsuperscript{43} Ibid.
\textsuperscript{44} History of Alternative Dispute Resolution, 
http://courts.delaware.gov/Courts/Superior%20Court/ADR/ADR/adr_history.html visited on 03.04.214
Conciliation for Railway Labour, (1913) which was renamed the National Mediation Board in 1943, and the Federal Mediation and Conciliation Service (1947) were formed with the responsibility to carry out the mediation of labour disputes. By this time, there was a reasonable amount of faith in the ADR systems of negotiation, mediation and arbitration and these were deemed helpful in resolving labour disputes. This was reflected in The Newlands Act 1913. Mediation was not conceived as an alternative to adjudication. It originally was merely an alternative to strikes and ensuing economic disruption which occurred when unassisted settlement negotiations failed. Shortly thereafter, varied forms of mediation for non-labour matters were introduced in courts.\(^{45}\)

Conciliation in a different form also appeared in domestic relations courts. An outgrowth of concern about rising divorce rates in the post-war 1940's and the 1950's, the primary goal of these programs was to reduce the number of divorces by requiring efforts at reconciliation rather than to facilitate the achievement of divorces. These early conciliation efforts were not widely considered successful in significantly increasing the number of reconciliations and had infrequent use. Still, some have remained in force and have provided the structure for child custody mediation, which emerged much later for other reasons.

Following privately funded mediation efforts by the American Arbitration Association and others in the late 1960s, the Community Relations Service (CRS) of the United States Department of Justice initiated in 1972 a mediation program for civil rights disputes. In the ensuing years, the US Congress funded a CRS staff that mediated hundreds of prison, school, police-community, and other civil rights conflicts. Settlements promoting civil rights and remedies for those subjected to discrimination, thereby increasing their bargaining power. The legal system's policy for community-wide civil rights disputes became promotion of settlement, not as a means to achieve less

\(^{45}\) Ibid.
expensive dispositions than possible through adjudication, but as a means to reduce discriminatory practices and promote racial harmony.

4.6.2. From law school to court house

In 1976, Chief Justice Warren Burger convened the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, (Pound Conference)\(^\text{46}\) to commemorate the 70th anniversary of Roscoe Pound’s 1906 speech to the American Bar Association in which Pound made a powerful plea for judicial reform. The Pound Conference is considered the founding moment of the modern ADR movement.\(^\text{47}\) In the Keynote Address, Chief Justice Burger discussed the problems with the judicial system, particularly problems of delay, high costs, and unnecessary technicality, stating that “Inefficient courts cause delay and expenses, and diminish the value of the judgment. Small litigants, who cannot manipulate the system, are often exploited... by the litigant ‘with the longest purse.’”\(^\text{48}\) The Chief Justice made several suggestions for reform, including giving a greater role to ADR. The other speakers echoed the Chief Justice’s call for increased use of alternative dispute resolution mechanism to resolve legal disputes. Harvard Law Professor Frank E. A. Sander proposed that courts be transformed into ‘Dispute Resolution Centers’,\(^\text{49}\) in which “the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case.” The Dispute Resolution Centers would have a separate room for screening, mediation, arbitration, fact finding, malpractice, a civil court, and an ombudsman. Sander contended that his proposal for a “multi-door courthouse” would inject greater flexibility, efficiency and fairness into the legal system.

\(^\text{46}\) The papers from the conference, known as the Pound Conference, are reported at 70 F.R.D. 79 (1976).


All this led up to the 1976 Pound Conference in Minnesota, U.S.A., Professor Frank Sander spoke of the “Multi-Door Courthouse” as a place where disputants could go to resolve conflicts and find many alternatives or doors to help them reach amicable solutions. It was a means of decongesting the courts and providing effective alternative methods of resolving disputes in the country’s failing judicial system. This was the birth of contemporary ADR as it is known today. The modern history of ADR movement may trace its roots to the Pound Conference. In 1976, the American Bar Association joined with the conference of Chief justices and the judicial conference of the United States to sponsor a conference inspired by Dean Roscoe Pound. Pound’s address on “the causes of popular dissatisfaction with the administration of justice” was given in 1906. That dissatisfaction apparently persisted. After seventy years the judicial establishment of the US and the largest bar association in the United States, as a result of that 1976 conference concluded that alternative means of settling disputes were desperately needed.

4.6.3. Multi-Door Court House

The creation of Multi-Door Court Houses in the United States is one of the most significant developments arising out of the relationship between ADR procedures and the court system. Professor Sander considered certain criteria to be important for determining the effectiveness of a dispute resolution system, Viz. “cost, speed, accuracy, credibility to the public and the parties, and workability. In some cases, but not in all, predictability may also be important.”

Professor Sander identified two questions as important:

1. What are the significant characteristics of various alternative dispute resolution mechanisms such as adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devices?

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50 The Pound Conference Report, cited as 70 federal rules decisions (FRD79, p.113,n.7)
(2) How can these characteristics be utilized so that, given the variety of disputes that presently arise; one can begin to develop some rational criteria for allocating various types of disputes to different dispute resolution processes?51

According to Professor Sander, decreasing external involvement by a neutral umpire in the process is the critical factor in setting out the range of ADR systems. On a decreasing scale of external involvement he outlined a spectrum of processes. He placed adjudication through the court, by arbitration and through administrative processes at the extreme end of the involvement. Next, in between adjudication and mediation he placed the ombudsman and fact-finding inquiry. Mediation came next, followed by negotiation; and at the minimum involvement end he put “avoidance” He pointed out that while these different systems were distinct in theory, there was in practice often considerable interplay and overlapping between them. Thus, the process of fact-finding might very closely resemble the process of adjudication; and conciliation could also be part of the adjudication process. Professor Sander recommended that,

...a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes (or combinations of processes), according to some of the criteria previously mentioned. Conceivably such allocation might be accomplished for a particular class of cases at the outset by the legislature that in effect is what was done by the Massachusetts legislature for malpractice cases. Alternatively, one might envision by the year 2000 not simply a court house but a dispute resolution centre, where the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case.52

51 Ibid. at 133
52 Ibid. at 130
In several states in the United States, Professor Sander’s theories have been tested in practice and most notably in the District of Columbia. The experience has been favourable and encouraging albeit gradual.\textsuperscript{53} The concept has been tested in experiments in various parts of the U.S. such as New Jersey, Houston and Philadelphia, several federal district courts, such as California Northern also provided litigants with an array of ADR options.

In an analysis of the bench marks of a successful multi-door court house, in the context of a 1998 District of Columbia survey, the following factors were considered relevant: First, to have a viable plan for permanent funding in place from the outset; Secondly, to employ programme staff including experienced administrators with knowledge of court system as well as professionals with proven ADR expertise; Thirdly, to have competent and enthusiastic volunteers to undertake training and operate the service (though for complex civil cases the report indicated that there would need to be provision for properly compensating skilled mediators), Fourthly, to have support from the judiciary and from legal practitioners; And finally, to have a range of ADR techniques and resources but to select them for use with caution and judgment. The multi –door court house concept has been described by the American Bar Association as an exciting and innovative idea. At the 1989 annual meeting of the ABA the National Conference of State Court Judges and the judicial administration division arranged a programme entitled “The Multi door Court House Experience: The Judicial Perspective” which it was said “will serve to stimulate judges and other attenders to explore new concepts for their court systems and provide better service to the citizens of their communities”.\textsuperscript{54}

\textbf{4.6.4. English experience}

In England certain attempts have been made to ensure that the problems of courts, especially regarding delay in justice and uncertainty of

\textsuperscript{53} James podgers, “Main Route:Multi-door Proposal Reflects Growing Role of ADR”, \textit{79A.B.A.J.} (September 1993)

\textsuperscript{54} \textit{ABA’s Dispute Resolution} Issue 25(Spring/summer (1989), p 1.
costs are a thing of the past. This led to the introduction of the Civil Justice Reforms in 1999 which in turn brought about the new Civil Procedure Rules and the Case Management System in which the responsibility of managing cases was shifted from litigants and their counsel to the courts.\(^55\) The system of courts was too slow, uncertain and expensive. In many ways it resembled a ritual dance between opponents who circled each other displaying their claws in a series of interlocutory battles set against a measure of mutual incomprehension about the true nature of the dispute, while judges looked on wringing their hands but unable to intervene as their role was of neutral referees, rather than driving the litigation on to its conclusion.\(^56\)

4.6.5. Indian scenario

In 1984, the Himachal Pradesh High Court faced with the problem of mounting arrears in subordinate courts evolved a project for disposal of pending cases through conciliation. Pre-trial conciliation was insisted upon in fresh cases. Guidance was taken from similar experiments in Michigan and in Canada. The experiment was successful and widely welcomed. The Law Commission of India in their 131\(^{st}\) Report recommended other states to follow the Himachal example.

The CJ and CM Conference, in their resolution of 4\(^{th}\) December, 1993 while commending every State to follow the Himachal example admitted that the courts were not in a position to bear the burden of the backlog of cases. Provision for conciliation and mediation are in-built into certain statutes, e.g. Order XXXII A Rules 3 of the CPC, 1908 (in the context of family matters), and section 12 of Industrial Disputes Act, 1947 (in the context of industrial disputes), and section 23 of the Hindu Marriage Act, 1955 and the Family Courts Act (in the context of family disputes). In the era of fast growing


\(^{56}\) *Ibid.* at 1
industrialization and trade and more so international commercial trade, there is an imminent need of settlement of disputes between parties expeditiously and to adopt the principles of conciliation, mediation and arbitration to settle disputes.

As a mode of dispute resolution ADR has been quite popular with the business community- Due to globalization of economy and competitive market policy; there has been a tremendous increase in trade, commerce and industry, which has resulted in a surge in disputes pertaining to commercial transactions and businesses. Business community and industrial entrepreneurs cannot afford to indulge in protracted litigation and thus prefer to get their disputes settled through ADR. The business world has long recognized the advantages of ADR over litigation in one form or another.

4.7. Salient Features of ADR

ADR encompasses a variety of techniques such as mediation, arbitration, conciliation, judicial settlement, *Lok adalat* and early neutral evaluation, which give an opportunity to settle disputes by mutual consent by parties through more or less informal and flexible process. The salient features of ADR are as follows.

4.7.1. Informal justice

ADR processes are less formal than judicial processes. There is flexibility in the rules of procedure in ADR. Formal pleading, extensive written documentation and rules of evidence etc are not required. This appealing and significant informal nature of ADR paves way for the increasing access to dispute resolution for a great number of people who may be intimidated by or unable to participate in more formal systems. It also leads for reducing the delay and expense of dispute resolution. Most ADR systems operate without formal representation.

4.7.2. Equitable justice

Aristotle in Rhetoric and on poetics said “Arbitration was introduced to give equity its due weight”. Cicero has also said that for a larger assessment of
fairness processual justice many times would march over the substantive justice. He has also advocated the process of arbitration. Blackstone in his famous *Commentaries on the Law of English* has observed about the strict justice and formal rules on process and the requirement of adopting principles of process to deal with equities which matter in the controversy.

ADR programmes are instruments for application of equity rather than the rule of law. Case is decided by a third party, or negotiated between disputants themselves, based on principles and terms that are believed to be equitable in the particular case rather than on uniformly applied legal standards. Establishment of legal precedents and implementation of changes in legal and social norms are not expected from ADR systems. Consistent uniform justice is the price for efficient settlements through ADR systems. But the draw backs are less significant when large number of population do not have even access to formal systems. If the result of informal system is unfair, the disputants can take recourse to formal judicial process.

### 4.7.3. Participatory justice

More direct participation by disputants in the process and in design of settlement, more direct dialogue and opportunity for reconciliation between disputants, potentially higher levels of confidentiality since public records are not typically kept, more flexibility in designing creative settlements, less power to coercive attendance and less direct power of enforcement are some of the characteristics.

The impact of these characteristics is spreading slowly in the Indian scenario owing to various factors such as illiteracy, poverty declined socio-political and cultural climate, backwardness of development etc. However compliance and satisfaction with negotiated and mediated settlements exceed the measures for court ordered decisions.

### 4.8. Various types of ADR

The parties by contract can initiate any form of ADR they wish. But there are certain mechanisms that are well established and used regularly.
These are classified into two as binding and non-binding. Arbitration, when treated as an ADR is binding. In fact arbitration under the new legislation is a hybrid of adjudicatory and consensual. There are four categories of binding ADR — arbitration, rent-a-judge, mini-trial, and binding mediation. It is used when the parties seek finality and certainty for the award entered or is enforceable in court. Nonbinding, ADR such as mediation, is more flexible and reserves to parties the right to go to trial if agreement cannot be reached. The more common formats of nonbinding ADR are (1) negotiation, (2) mediation, (3) summary jury trial, (4) focus study, (5) mock trial, (6) nonbinding arbitration, (7) moderated settlement conference, (8) early neutral evaluation, (9) ADR case controller, and (10) ombudsman.

4.8.1. Arbitration

It is a procedure in which the dispute is submitted to an arbitral tribunal which makes an award that is binding upon the parties. According to some writers arbitration cannot be considered as an ADR.  

4.8.2. Negotiation

It is a non-binding procedure, in which discussion between parties is initiated without the intervention of any third party. It functions with the sole objective of arriving at a negotiated settlement of dispute. It is also a process of conferring with another so as to arrive at a settlement of some matter. The term ‘negotiation’ is, in fact, more used when two parties, both having an intention to enter into a contract among themselves and having only a broad idea of what they will enter into, deliberate or ‘negotiate’, to finalize the terms. Negotiation is thus a discussion between two or more persons who try to work out a solution to the problems. When a dispute arises, persons involved sit together and discuss it with open mind without the intervention of the third party.

57 Supra n.1 at 83
In the context of ADR and as distinct from that relating to the entering into of a contract- the word ‘negotiation’ is used in two senses. One is based on the concept of third party intervention. Negotiation may sometimes (informally) involve a third party for matters like assessment, guidance, second opinion, neutral party opinion or even expertise on a subject that may be part of dispute. In that event, it only imports trappings of conciliation to put differently; an assisted negotiation slowly slides into the realm of conciliation. Strictly speaking, Negotiation does not fall within the realm of ADR because it is a bipartite process and does not involve a third party to facilitate and promote settlement, whereas ADR conceptually involves a third party to facilitate the resolution of disputes by settlement. Negotiation is, therefore, in practical terms, different from, and usually even prior ADR because it enables parties to iron out differences by discussion amongst themselves.

In simple terms, negotiation is a discussion between two or more parties which typically takes place because the parties wish to create something new that neither could do on his own, or resolve problem or dispute between them, or try and work out solution to the problem. When parties negotiate, one usually expects an attitude of give and take. The process of give and take and making concessions is necessary if a settlement is to be reached. Mutual adjustment is one of the key factors that cause changes that occur during negotiations. Both parties know that they can influence the others. The parties have to exchange information and make an effort to influence each other. As negotiation proceeds, each side proposes changes to the other party’s position and makes changes to its own. The effective negotiator (the party himself or an agent on his behalf) attempts to understand how the other will adjust and readjust his positions during negotiations, and based on what the other party is expected to do, and actually does, he changes his own position in increments-both upwards and downwards. The parties must work towards a solution that takes into account each person’s requirements and, hopefully, optimizes the outcome for both.
The most important factor in Negotiation, whether bilateral or assisted, is that parties retain control over the process, the procedures and the outcome. The other advantages of negotiation, in comparison with processes using third parties, are that it is most flexible and informal, provides abundant scope for a party to direct the proceedings so as to best suit his own fact-situation, and also maintains confidentiality. Usually carried out in private, negotiation is the most common mode by which parties resolve disputes without ever coming to the notice of third parties. It protects and preserves personal and business secrets. It is less complicated, involves hardly any expenses and is a speedy method on settling disputes.

An agreement to negotiate, like an agreement to agree, is unenforceable because it lacks certainty. A duty to negotiate in good faith is unworkable in practice as it is inherently inconsistent with the position of the negotiating parties. As a result, law and courts cannot enforce negotiation. The best they can do is to make parties understand the concept and its advantages, and thus persuade them to at least make a serious attempt at it. It is voluntary, non-binding and totally non-structured. However, negotiation is not used often enough, or extensively enough, to avoid litigation. The factors contributing to the reluctance is the lack of understanding of the concept and the lack of confidence in its utility.

Negotiation, for possible settlement, could also result in identification and narrowing down of disputes and preparation of an agreed case or stated case and references to further ADR, or arbitration/litigation. In an agreed case, the parties without instituting a suit submit an agreed statement of the ultimate facts to the court. The court, by drawing appropriate conclusions from the agreed facts, may decide the litigation. An agreed case may also arise when parties, after the litigation has been instituted, submit to court an agreed statement of ultimate facts for being decided by it. Negotiation or other forms of ADR could result in an agreement, and anything regarding law or
application of law, which requires adjudication by a civil court, can then be filed as a special case before civil court, to be heard and decided in a short time. Order XXXVI of the CPC provides for this, arbitration award on agreed terms.

Negotiation is possible only when parties co-operate to meet goals, provide mutual benefits or avoid harms, can identify and agree on issues. When parties know that they have time constraints, any other procedure will not produce desired results and certain external constraints are also present. External constraints may include loss of reputation, excessive cost and possibility of adversarial decision. Negotiation is a mixed motive exchange. The motives of both parties get mixed and propose to be exchanged. The whole success of negotiation depends on how the negotiator uses his cards, adopts relevant strategies and tackles the other party’s interests.

4.8.3. Conciliation/Mediation

A non-binding procedure in which an impartial third party, i.e. the conciliator or the mediator, assists parties to a dispute in reaching a mutually satisfactory and agreed settlement of disputes. The definition of, and distinction between, conciliation and mediation has been the subject of debate amongst scholars, reformers and those interested in ADR methods. True, each essentially refers to neutral third-party support or intervention in promoting voluntary settlement of disputes, but it is the extent of the role as also, to a point, the position of this third party which accounts for differences. More important than the distinction is the issue with regard to terminology. This is too because what in some contexts is understood as mediation is in other places (countries/jurisdictions) understood as conciliation and vice versa. This interchangeable use of terminology causes practical problems. Mediation is a process by which disputing parties engage the assistance of a neutral third party to act as a mediator. He acts like a facilitating intermediary who has no authority to make any binding decision, but who uses various procedures,

58 See Chapter 8
techniques and skills to help parties to resolve the dispute by negotiated agreement without adjudication. The mediator is a facilitator who may in some models of mediation also provides a non-binding evaluation of the merits of the dispute, if required, but who cannot make any binding adjudicatory decisions. In areas of general public interests like road building, canal digging, location of a factory, pollution problems etc., which affect public in general, ‘consensus building ‘ method of mediation may be used.

4.8.4. Conciliation

The UNCITRAL adopted a Model Law on 24-06-2002. This provides uniform rules in respect of conciliation process to encourage and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements.

According to Black’s Law Dictionary, conciliation “is the adjustment and settlement of a dispute in a friendly un-antagonistic manner, used in courts with a view to avoiding trial and in labour disputes before arbitration.” According to Wharton’s Law Lexicon, conciliation “means the settling of disputes without litigation.” Conciliation is a process by which decision between parties is arrived at through participation of a conciliator.

The Halsbury’s Laws of England has distinguished the terms ‘arbitration’ and ‘conciliation’, “The term arbitration” is used in several

61 Wharton’s Law Lexicon, (Indian reprint 1993), p227
senses. It may refer either to a judicial process or to a non-judicial process. A judicial process is concerned with ascertainment, declaration and enforcement of rights and liabilities, as they exist, in accordance with some recognized system of law. An industrial arbitration may well have for its function to ascertain and declare, but not to enforce, what in the arbitrator’s opinion ought to be the respective rights and liabilities of the parties, and such a function is non-judicial. Conciliation is a process of persuading parties to reach an agreement, and is plainly not arbitration, nor is the chairman of conciliation board an arbitrator.

Despite the challenges that face the ADR processes today, benefits in the long run that they are capable of generating appear to outweigh the factors that may in the short run deter their enforcement. ADR processes provide bypasses to handle large chunks of disputes leaving the formal legal system to handle the more complex litigation. Even while they do not offer to be a panacea for all the ills of formal legal system ADR processes offer the best hope yet of complementing and helping to fortify the formal legal system.63

There is references to both conciliation and mediation in the Model law, but in practical terms, it reverses (interchanges) the meaning of these two terms as understood in USA. There (in USA) a conciliator is a mere facilitator while a mediator has a more active role. What is referred to as conciliation in US jurisprudence came to be referred to by the UNCITRAL Rules as mediation, and what is known there as mediation is referred to by the UNCITRAL Rules as conciliation. The Arbitration and Conciliation Act (26 of 1996), being itself based on the UNCITRAL model, followed the same pattern, i.e. a reversal from the US understanding of the two terms. Conciliation and mediation have been defined by a Committee appointed by an Order of the SC as follows:

63  S.Murlidhar, “Alternative Dispute Resolution, Conciliation Mediation and Case Management”, (at the International Conference on ADR, Conciliation Mediation and Case Management, organized by the Law Commission of India, New Delhi, 3-4 May 2003), ielrc.org/content/n0301.pdf visited on 16.3.2014.
Settlement by Conciliation means the process by which a conciliator who is appointed by the parties or by the court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act (26 of 1996) in so far as they relate to conciliation, and in particular, in exercise of his powers under sections 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.\(^\text{64}\)

Under Indian law, in the context of section 30 and section 64(1) and section 73(1) of the Arbitration and Conciliation Act, 1996, conciliator has a greater or a pro-active role in making proposals for settlement or formulating and reformulating the terms of settlement. A mediator is a mere facilitator. The meanings of these words are the same in the UNCITRAL and rules in UK and Japan. But, in USA and in regard to certain institutions abroad, the meaning is just the reverse; a ‘conciliator’ is a mere ‘facilitator’ whereas a ‘mediator’ has a greater pro-active role. While examining the rules made in US in regard to ‘mediation’, if one substitutes the word ‘conciliation’ wherever the word ‘mediation’ is used and use the word ‘conciliator’ wherever the word ‘mediator’ is used, one shall be understanding the said rules as one understands them in connection with conciliation in India.\(^\text{65}\)

**4.8.5. Mediation/Arbitration**

A procedure which combines conciliation and mediation at a subsequent stage in instances where the dispute is not settled through either conciliation /mediation within a period of time agreed in advance by the parties to arbitration.

\(^{64}\) *Salem Advocate Bar Association v. Union of India* (2005) 6 SCC 344.

4.8.6. Medola

Medola is a procedure in which, if parties fail to reach an agreement through mediation, a neutral person, who may be the original mediator or an arbitrator will select between the final negotiated offers of parties, such selection being binding on the parties.

4.8.7. Mini trial

Mini trial is a non-binding procedure in which parties are presented with summaries of their cases, so as to enable them to assess strength, weakness and prospects of their case and then an opportunity to settle it.

4.8.8. Fast track arbitration

It is a form of arbitration in which the arbitration procedure is rendered in a particularly short time and that too at a reduced cost.

4.8.9. Lok adalats

Besides the above, Lok adalats are also functioning in India as a mode of alternative dispute resolution system.

4.8.10. Ombudsman

Ombudsman is a person with special powers to investigate cases in certain areas such as health, pensions or in instances where there may be a dispute. Particularly if a government body is involved. An ombudsman can only recommend as to how a dispute may be resolved, however his/her recommendations cannot be enforced. Ombudsman is originated to check mal-administration but now it has also been developed into a form of ADR. There is a high powered quasi judicial body functioning at the state level in Kerala to oversee the functioning of Local Self Government Institutions. Under the present law, only a former judge of High Court can be appointed as Ombudsman. He can conduct investigations and enquiries into instances of mal administration, corruption, favouritism, nepotism, lack of integrity, excessive action, inaction, abuse of position etc. and pass orders.
4.9. Advantages of ADR

4.9.1. Speed

ADR is far quicker than the traditional litigation methods of going to courts, certain types of ADR supply very quick solutions, and ensure that the legal system can operate more quickly.

4.9.2. Economy of cost

ADR proceedings tend to be less formal and inexpensive than traditional litigation, more particularly because, in most cases ADR processes are successful in avoiding expenses incurred for engaging lawyers. Access to justice for poor people are denied owing to exorbitant court fees, advocate fees etc. Many ADR programmes are designed with a goal to reduce cost of resolving disputes both to the disputants and to the dispute resolution system. The primary reason for reduction in cost of ADR systems is the simplicity of the system and lack of need for legal representation. Many ADR programmes seem to be successful in reducing cost of dispute resolution and providing access to justice for the poor. Most programmes operate without any fee, either because they are managed by volunteers or because they are supported by government or donor funds.

4.9.3. Expertise

In ADR experts are frequently engaged, in matters where judges are unlikely to have expertise. Courts are considered to be the expert of all experts. But in particular types of technical or complex disputes it is desirable to have specialized knowledge for easily disciplining the issues involved and for a correct judgment. Thus ADR programmes focused on specialized technical and complex disputes may be more effective and produce better settlements. Commercial, labour, environmental, ethnical, family and many other areas are better to a specialized ADR or Issue specific ADR systems.
4.9.4. Good relations

An ADR system brings both parties to terms, without damaging good relations. It can be instrumental in restoring their relations to a position, as had existed before the dispute.

4.9.5. Devoid of corruption

ADR system is bereft of corruption, which is on and off found and of whose existence there is always a likely apprehension in any of the traditional justice systems. In some countries ADR programmes were developed to by-pass corrupt, biased or otherwise discredited court system that could not provide reasonable justice for at least certain sections of the population such as backwards, poor, and women. Some ADR programmes function as primary institutions for resolving civil disputes, and have effectively replaced or pre-empted courts. Taiwan and China have the best examples of broadly institutionalised, community based ADR. In both countries local government officials and well-respected citizens act as conciliators, mediators, and arbitrators for the vast majority of local disputes. In the United States, Judge Warren E. Burger, said:

All of the information available and specifically the official records… demonstrate that the judicial system and its machinery are not doing the job the public has a right to expect. They need re-examination and re-appraisal. When it takes five, four, three, or even two years to get a civil case on for trial, judges and lawyers cannot escape the charge that a system which functions so slowly has defeated one of its primary objectives at the very threshold of the judicial process.66

Apart from problems of efficiency on the part of the judges, there is also the issue of delayed judgments and excessive judgments, Most times after cases have been brought before a court and heard over a long period of time, one would have thought that the ruling or judgment of the matter would be

66 Warren E. Burger, Delivery of Justice – Proposals for Changes to Improve the Administration of Justice, (1990), p.4
delivered expeditiously by judges, but one often finds that the case is further adjourned for the sole purpose of the delivery of the judgment. This especially happens at the superior courts and causes further delays. In the USA, judges (or the jury where it is a trial by jury) adjourn for only a few hours after concluding hearings and deliver judgments or sentence on the same day.

Where the length of judgments is concerned, judges cannot be excused in the matter. It appears that the higher the court, the greater the urge on the part of judges to produce scholarly judgments which are mostly didactic and excessively lengthy in nature. Sometimes judgments of superior courts run into several pages, especially where there are dissenting opinions, and these have to be read through in the course of delivering the judgment. This takes not only the time of the appellants, but that of the counsel, the judges and the courts. Time thus wasted could be put to good alternative use of hearing other appeals or doing some other ‘judicial’ activity.

4.9.6. Sans prejudice

Since both parties to ADR come to terms on mutually agreeable terms, and that too out of free will, without having any fear of consequences of winning or losing, the system is quite free from prejudice.

4.9.7. Confidentiality

ADR process maintains confidentiality and is not open to public at large. And thus saves parties from fear of any adverse publicity.

4.9.8. Option of withdrawing from some kinds of ADR is always open

ADR reserves the freedom of parties to withdraw from conciliation without prejudice to their legal position, at any time during the continuance of such proceedings.

4.9.9. Flexible and independent

ADR is a very flexible and independent system of dispute resolution, which is free of any statutory or custom ridden procedural law.

67 Ibid.
4.9.10. Choice of decision maker

The choice of selecting the mediator and the arbitrator lies with the parties and they are free to appoint any mutually agreeable expert to adjudicate over any issue in dispute.

4.10. Disadvantages

ADR programmes can play an important role in many development efforts. But they are ineffective, and perhaps even counterproductive in serving some goals related to rule of law initiatives. Though ADR has many benefits, yet it is pertinent to disclose its disadvantages, not with the aim of criticizing the system, but rather with a positive mission of further betterment of this popular dispute resolution system: The following are main drawbacks.

4.10.1. Parties cannot be compelled to opt for ADR

Parties to a dispute cannot be compelled to go for ADR, unless they sign an agreement to solve dispute by ADR.

4.10.2. Lack the force of precedent

In ADR precedent has no value, and consequently under ADR, precedents are not given much importance. As discussed earlier, ADR programmes are tools of equity rather than that of law. They seek to resolve individual disputes on a case-by-case basis, and may resolve similar cases differently. Furthermore, ADR results are private and rarely published. As long as some other judicial mechanism exists to define, codify and protect reasonable standards of justice, ADR programmes can function well to resolve relatively minor, routine, and local disputes for which equity is a large measure of justice, and for which local and cultural norms may be more appropriate than national legal standards. These types of dispute may include family disputes, neighbour disputes, and small claims, etc. In disputes for which no clear legal or normative standard has been established, ADR may not be able to overcome power imbalances or fundamental disagreements over norms among disputants. On the other hand, in situations
where there is no established legal process for dispute resolution, ADR may be the best possible alternative to violence.

4.10.3. Outcome of ADR may not be similar in similar circumstances

Outcome of ADR can vary even under similar circumstances. As a general observation outcome of ADR depends on several external factors such as discretion, priority and considerations of mediator or arbitrator, thus consequently decision of an arbitrator or a mediator may not be same in similar circumstances.

4.10.4. An Incompetent mediator

Appointment of a poor arbitrator or mediator results in unsuccessful resolution and can defeat the very purpose of encouraging ADR.

4.10.5. Unenforceability of some forms of ADR

In some forms of ADR, the outcome is not enforceable. In some issues related to arbitration of employment disputes, particularly in regard to an employee’s waiver of the right to sue in an arbitration agreement. Such arbitration agreements are unenforceable, and the employees in these cases will be allowed to sue their employer.

4.10.6. Extra cost where ADR is unsuccessful

If ADR does not work then court action is required, this is often followed by extra costs that all such process entail.

4.11. Rule of Law Objectives and ADR

Equity rather than Rule of Law is applied in ADR programmes. They are designed to meet a wide variety of different goals such as improving administration of justice and settlement of disputes, Economic development, management of tensions and conflicts in society etc, but they also serve to meet the objectives of Rule of Law in various ways.\(^6\) ADR systems can(a) support and complement court reform (b) By-pass ineffective and discredited

courts (c) increase peoples satisfaction with dispute resolution(d) Increase access to justice for underprivileged groups(e) reduce delay in resolution of disputes and (f) reduce the cost of resolving disputes. These points are discussed below:-

4.11.1. Support in clearing bottle necks in litigation and complement court reform

ADR mechanism is quite instrumental in clearing bottlenecks within domestic judicial system. ADR programmes can reform the formal court system in various ways. In order to manage the existing case loads, either associated with courts or separated from courts, ADR systems can be created as an option within the judicial system. Judiciary can also use it to test and demonstrate new procedures that might later be extended to or integrated with existing court procedures. ADR programmes may also be designed to deal with cases before they enter into the formal court system more effectively and perhaps with greater satisfaction through ADR procedures. This way it can complement court reform by reducing dockets. They may also complement court reform by increasing access to dispute resolution services for underprivileged groups. Even those privileged groups do hesitate to approach courts in order to keep off the labyrinth of court proceedings and inordinate delays more over lack of confidence in expecting justice from the formal system for which courts may or may not be responsible. There is lack of awareness among the educated well-to-do people also regarding various rights and efficacious remedies available under the formal court system. Laziness and fatalistic attitude of the people along with procedural hurdles and delays in delivery of justice create an inhibition to approach these fora. People find out easier and cheaper adopting unfair means to tackle problems in a quick manner rather than preferring a law suit. They find culprits go scot free and good samaritans suffer a lot. This helpless situation prompts people to lead a life peacefully suffering all injustice around them. Thus access to justice is not only a problem of the
less privileged. Therefore ADR programmes can increase access to justice for all people irrespective of their education, status and wealth by providing legal advice on whether and how to use the court system, and or dealing with specialized cases that the courts are not well equipped to handle.

4.11.2. Satisfaction of disputants

ADR is capable of achieving results that meet the needs of all the parties involved, at least in some measure. As a result of creativity of outcomes, the impact of it on the ongoing business or personal relationships, and disputant confidence that the system is responsive to their needs. On all these components of disputant satisfaction, ADR programmes can have a positive influence. This is apart from the other factors such as cost, access and delay.

4.11.3. Access to justice

Accesses to justice for poor people are denied due to court fees, and initial advocate fees necessary to enter the formal system. Many ADR programmes are designed with a goal of reducing cost of resolving disputes both to disputants and to dispute resolution system. The primary reason for reduction in cost of ADR systems is the simplicity of the system and lack of need for legal representation compared with extreme complexity of the formal court system and the requirement of expensive representation. Many ADR programmes seem to be successful in reducing cost of dispute resolution and providing access to justice for poor.

In large number of disputes relating to specific performance in property transactions, money transactions especially private loans, appeal in land acquisition matters etc. poor people hesitate to approach courts because they cannot afford the court free. It is despite the fact that only one tenth of the court fee in courts of first instance and one third of court fee in appeals needed to be paid initially.
4.11.4. Less formality

The formality of court systems intimidates and discourages its recourse. The requirement of legal representation is costly and intimidating to people. But in many new statutes this requirement is now dispensed with and procedure also simplified. This has resulted in an increased access for poor people. Examples are Consumer Dispute Redressel Forums, Family Courts etc. But even in these forums inordinate delay and Rule or Law requirements of precedent come in the way for common people especially for poor illiterates. In such cases disputants have no other way but to seek for legal representation. This goes to show that less formal ADR systems are more user-friendly.

4.11.5. Location

Access may be impaired because the courts are located far from the homes of those who need them. Example is family courts. There are no family courts even in every district in India. One advantage of ADR programmes is the ability to set them with relatively little cost to local communities.

4.11.6. Reducing delay

Delay is common in most court systems throughout the world and affects a number of development objectives. In some cases, delays are so extreme that they effectively deny justice, particularly to disadvantaged groups. Delays in resolution of commercial disputes impair economic development and undermine the efficiency of economy. ADR offers simplified procedures for dispute resolution can significantly reduce delay and indirectly reduce court back long by redirecting cases that would otherwise go to court.

4.12. ADR and Other Development Objectives

Apart from meeting Rule of Law objectives as discussed above, ADR programmes can also help accomplish other development objectives.
4.12.1. Increased civic engagement in economic development and social change

Facilitation and mediation skills developed by extensive use of ADR programmes can play a vital role in development of leadership skills, entrepreneurship skills, increased civic engagement etc. The impact of ADR programmes on social change is felt through the increased skills and abilities of local leaders. ADR programmes can help develop and train community leaders. Programmes aimed at providing dispute resolution and problem-solving skills, negotiation skills will empower people. Like most capacity building initiatives, ADR programmes require substantial amount of time to have a significant impact on leadership skills, ethics of civic engagement, and public problem-solving processes.

4.12.2. Reducing tension and conflict

Along with the resolution of individual disputes if the ADR Programme is designed to focus on social problems it will have an impact on the level of social tension and thereby reduce conflict in community. It will be somewhat different from programmes normally designed for Rule of Law projects. The efforts for preventing conflicts generally focus more on public conflicts rather than private disputes. For example, the peace initiatives by forming all party peace committees in various places in Kerala after riots or violence is very much helpful in reducing tension and thereby avoiding or at least controlling the escalation of violence. They may also focus public education, early intervention in potentially explosive conflict, and outside intervention by third parties.

4.12.3. Managing conflicts that may adversely affect development initiatives

The specifically designed ADR programmes may be helpful for solving issue-specific disputes that may impair the development and progress. This is true for conflicts involving multiple or polarized stakeholders with vested interest, for example, water resources dispute which is
source of international and intra-national tension. Kaveri water dispute involving south Indian states, Mullaperiyar dispute involving Kerala and Tamilnadu and similar other disputes manifest this aspect. The economic success of the common law countries has resulted in their taking initiatives in the legal field. Following this trend, in the area of ADR, various solutions have been developed with an intention to meet market needs and attractively presented; among them are various formulas for meeting and discussions between the parties, aiming to lead them to a better understanding of each other’s position and thereby bringing about a settlement of the dispute.

4.13. Court Annexed ADR

The Parliament enacted The Legal Services Authorities Act, 1987 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 duties to perform, inter alia, the following functions:

(1) To encourage the settlement of disputes by way of negotiations, arbitration and conciliation;
(2) To lay down policies and principles for making legal services available in the conduct of any case before the court, any authority or tribunal;
(3) To frame most effective and economical schemes for the purpose;
(4) To utilize funds at its disposal and allocate them to the State and District Authorities appointed under the Act;
(5) To undertake research in the field of legal services;
(6) To recommend to the Government grant-in-aid for specific schemes to voluntary institutions for implementation of legal services schemes;
(7) To develop legal training and educational programmes with the Bar Councils and establish legal services clinics in Universities, Law Colleges and other institutions; and
(8) To act in coordination with governmental and non-governmental agencies engaged in the work of promoting the cause of legal services.
The Arbitration and Conciliation Act, 1996 has made elaborate provisions for conciliation of disputes arising out of legal relationship whether contractual or not and to all proceedings relating thereto. It provides for commencement of conciliation proceedings, appointment of conciliators and the assistance of suitable institution for the purpose of recommending the name of the conciliator or even appointment of conciliator by such an institution and submission of statements to the conciliator. It also provides that conciliator is not bound by the Code of Civil Procedure or the Evidence Act. It defines the role of the conciliator in assisting the parties in negotiating settlement of disputes.

Finally, the introduction of ADR mechanisms in the Code of Civil Procedure, 1908 is one more important step taken in recent times by Parliament by enacting section 89 and Order X Rules 1A, 1B and 1C providing for ADR machinery even in cases pending before the civil courts and has further authorized the High Courts to frame rules for the purpose. Thus, elaborate provisions exist in law to facilitate introduction of court annexed mediation.

4.13.1. Advantages of Court annexed ADR

In court annexed ADR, the services are freely provided by the court as an integral part of the judicial system in court referred matters. The advantage of court annexed ADR is that the judge, lawyers and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors in justice delivery system. When a judge refers a case to the court annexed mediation service, keeping overall supervision on the process, no one would feel that the system parts with the case. The Judge would feel that he refers the case to a member within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the Lok adalats or mediation centers within the same set-up. The litigants feel that they are given an opportunity to play their own participatory role in the resolution of disputes. This will also bring in larger public
acceptance for the process as the same time tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provides an additional service. The court is the parental institution for resolution of disputes and if ADR models are directed under court’s supervision, at least in those cases which are referred through courts, the effort of dispensing justice can become more coordinated. ADR services under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complementary and not competitive with the court system. The system will get a positive and willing support from the judge who will accept mediator as an integral part of the system. If reference to mediation is made by judge to mediation, the process will become more expeditious and harmonized. It will also facilitate movement of the case between court and mediator faster and purposeful. Again, it will facilitate reference of some issues to mediation leaving others for trial. Court annexed mediation will give a feeling that court’s own interest in reducing caseload to manageable level is furthered by mediation. Court annexed mediation will thus provide additional tool by the same system providing continuity to the process, and above all, court will remain central institution in the system. This will also establish a public-private partnership between court and community. A popular feeling that court works hand-in-hand with mediation facility will produce satisfactory and faster settlements.

4.14. Some Proposals

It has come to notice that there are circumstances in which some judges refer cases for mediation or to Adalat even before the defendant files written statement. It was also reported that on some rare occasions even after completion of evidence and arguments by both the parties and while waiting for the judgements, cases are sent to Lok Adalat for settlement. The recommendations of the law Commission in its 238th report, suggests for reference of cases at the stage of framing of issues i.e. before framing of issues
or at the first hearing of the suit. Therefore, the abovementioned eventualities may not occur once the amendment is made as per the recommendations.

Since various laws on ADR like the Arbitration and Conciliation Act, 1996 and the Legal Services Authorities Act, 1987 etc. permit the parties to report settlement arrived at outside the Adalat or Mediation Centre and as it will get the status of a decree in due course, there is enough chance for the intervention of extra-legal agencies to secure a settlement by compulsion. The lack of chance for a legal scrutiny in such settlement reports may lead to injustice and violation of human rights. This may be a major setback for ADR initiatives and it may become counterproductive. Therefore it is desirable that every settlement reported shall be brought under the scrutiny of a statutory authority or statutorily recognised forum.

At present the Lok Adalat settlement or resolution of disputes at the court-annexed mediation centres are free of cost to rich and poor alike. At this initial stage of development of mediation in the country and state, it is desirable that the state providing it free of cost. But at the same time it is time to think about limiting the free delivery of service only to the poor litigants deserving legal aid under the provisions of the Legal Services Authorities Act, 1987. Those litigants with own financial support need not be given the benefit of free service. The fee collected should be utilised for the development of mediation and other ADR processes.

Court fee must be collected from Banks, financial institutions, and also from financially sound litigants. the then Chief Justice of India K.G.Balakrishnan has said that ten percent of the expenditure needed for the establishment of courts could be collected from commercial cases and corporate clients would not mind paying the additional fee if it was passed on to them. Justice S.H Kapadia said there was no rationale for charging the same court fee for a normal case and a patent case involving Rs.50 crore or a

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69 The Hindu Daily (26.10.2009)
batch of income tax appeals involving over Rs. 5000 crores. Poor people must be exempted from payment of court fees. Court fee refund shall not be given for all litigants. Only those deserving litigants must be given this refund. The amount collected by way of court fees should be utilised for the development of judicial administration and ADR.

4.15. Conclusion

Lord Devlin, a great Law Lord with profound common sense had said sometime on the courts of Great Briton “if our business methods are as antiquated as our legal system, we would have become a bankrupt nation long back”. In this fast changing world everybody is busy with their schedules. No one will be interested to conduct litigations ad nauseam. People need quick remedy to their solutions. In such circumstances, in order to provide speedy remedy to the litigant public, promotion of Alternative Dispute Resolution methods like mediation, conciliation etc. may be one of the appropriate remedies available to people.

70 Ibid.