

IN SEARCH OF TRUE 'ALTERNATIVE' TO EXISTING JUSTICE DISPENSING SYSTEM IN INDIA

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"I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter men's hearts. I realized that the true function of a lawyer was to unite parties given as under. The lesson was so indelibly burnt unto me that the large part of my time, during the twenty years of my practice as a lawyer, was occupied in bringing about private compromises of hundreds of cases. I lost nothing, thereby not even money, certainly not my soul¹".

-Mahatma Gandhi

1. Introduction

For the efficient functioning of any legal system fundamental requisite is that such system shall be built on the aspirations of the people, law or legal system for that matter will not work in vacuum, for this reason surrounding social condition are the deciding factors for adoption or for bringing any change in the legal system. Unfortunately in a developing country like India it is considered to be normative practice to find the solution for our problems (legal) in western jurisprudential thought and practices (it is true at least in regard to Legal restructuring is concerned). In India with a view to overcome the problems of 'formal legal system' serious attempt were made and continued to be made, as result of which there is adoption of Alternative Dispute Resolution System of Anglo-Saxon style in this country. Thus, post-emergency, the dominant theme of legal reform was translated into sponsoring relatively informal, conciliatory, and alternative institutions alongside the formal judicial mechanism. The early 1980s saw a concerted effort to promote a more indigenous character within the justice dispensing system, and to provide alternatives to the Anglo-Saxon models of adjudication.

In India until now no solemn attempt has been made to identify and to recognize our own system of justice administrations which stood as efficient mechanism of dispute resolution from vedic age. This

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1 Mahatma Gandhi, *The Story of My Experiments With Truth* (Part II, Chapter XIV).

development brought us to such tragedy that, more than 70% cases in rural India even today were solved by traditional Panchayats, in fact these Panchayats were the true aspiration of institutions whereas, foreign made modern ADRs had got statutory recognition even though they were failed to achieve desired results, except Lok Adalats anything decipherable had happened by ADRs in this country.

Today justice dispensing system in India is on twisted road at the one end failure of formal law Courts resulting in backlog of cases, and on the other end ADRs fails to get much need public support, under this circumstance it is essential to rethink on the new ways out for coming generation. Accordingly it is essential in this context to study various forms of ADRs, their development, and mode of working of ADRs so as to assess it pros, cons and applicability to the pluralistic Society of Indian.

2.1. Alternative Dispute Resolution System

The basic yet pre-eminent question surrounding ADR is this: what is it an alternative to? The answer, particularly in India, is that it is the alternative to the often tedious, strictly formal legal proceedings in court that is presided over by a state-appointed judge, with counsel representing the parties, and, in some cases or jurisdictions, the presence of juries was recognized to be an alternative to the judicial system that has been existence in India. In fact 'Alternative' is not Conciliation, Mediation and Arbitration but the British System Justice of Administration, for this reason 'A' is used as 'appropriate' and not as 'alternative'. The problem with this alternative approach is that there are numerous cultures and communities in many parts of India, where litigation is not the norm and is actually the alternative. The norms for these people are their own community dispute resolution procedures. Hence, the word "alternative" in ADR seems to be a misnomer as applied.

In India all forms of LokAdalat, Conciliation, Mediation and Arbitration were prevalent being part of the Legal system from time immemorial. 'Lok' means 'people' and 'Adalat' refers to Court, it is nothing but a 'people's Court', i.e Nayaya Panchayats of those glorious fast of this country. It is approximate 250 year of colonization made our

own system as 'alternative' and it was brought back in more perverted form as ADRs after Independence.

2.2. Concept of Alternate Dispute Resolution in Olden days in India

Before formation of law Courts in India, people were settling the matters of dispute by themselves by mediation. The mediation was normally headed by a person of higher status and respect among the village people and such mediation was called in olden days "Panchayat". The Pancha is the person of integrity, quality and character who will be deemed to be unbiased by people of the locality, called Village headman (sarpanch) and he was assisted by some people of same character or cadre from several castes in the locality. The dispute between individuals and families will be heard by the Panchayat and decision given by the Panchayat will be accepted by the disputants. The main thing that will be considered in such Panchayat will be the welfare of the disputants as also to retain their relationship smooth. Similarly in the case of dispute between two villages, it will be settled by Mediation consists of person acceptable to both villages and people from both the villages and the decision of such mediation will be accepted by both village people. The disputes in olden days seldom reached law Courts. They were even settling the complicated civil disputes, criminal matters, family disputes etc. Such type of dispute resolution maintained the friendly relationship between the disputants even after resolution of their disputes. ADR techniques have also been largely based on co-existential justice. "This form of justice has . . . always been part of African and Asian traditions where conciliatory solutions were seen to be to the advantage of all and often as a *sine qua non* for survival"².

Let us take ADRs in its ordinary contextual form and discuss about its origin and development. Alternative Dispute Resolution (ADR, sometimes also called "Appropriate Dispute Resolution") is a general term, used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational way. It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party

2 SAFLII, South African Law Commission – Issue Paper 8 (Project 94): Alternative Dispute Resolution – Chapter 2: The Problem (undated), available at <http://www.saflii.org/za/other/zalc/ip/8/8-CHAPTER-2.html>.

imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies “mediation,” a process by which a third party aids the disputants to reach a mutually agreed solution. The term “alternative dispute resolution” or “ADR” is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. The term 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 within the rubric of ADR. ADR systems may be generally categorized as negotiation, conciliation, mediation, or arbitration systems.

Modern ADRs originated in the USA in a drive to find alternatives to the traditional legal system, felt to be adversarial, costly, unpredictable, rigid, over-professionalized, 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 labor and management. In 1898, Congress followed initiatives that began a few years earlier in Massachusetts and New York and authorized mediation for collective bargaining disputes. In the ensuing years, special mediation agencies, such as the Board of Mediation and Conciliation for Railway Labor, (1913)(renamed the National Mediation Board in 1943), and the Federal Mediation and Conciliation Service (1947) were formed and funded to carry out the mediation of collective bargaining disputes. Additional State Labor Mediation services followed³.

The 1913 New lands Act and later legislation reflected the belief that stable industrial peace could be achieved through the settlement of collective bargaining disputes; settlement in turn could be advanced through conciliation, mediation, and voluntary arbitration⁸⁵. The well organized ADRs movement in the United States was launched in the

3 http://www.courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_history.htm

1970s, beginning as a social movement to resolve community-wide civil rights disputes through mediation, and as a legal movement to address increased delay and expense in litigation arising from an overcrowded court system. Ever since, the legal ADR movement in the United States has grown rapidly, and has evolved from experimentation to institutionalization with the support of the American Bar Association, academics, courts, the U.S. Congress and state governments. For example, in response to the 1990 Civil Justice Reform Act requiring all U.S. federal district courts to develop a plan to reduce cost and delay in civil litigation, most district courts have authorized or established some form of ADR. Innovations in ADR models, expansion of government-mandated, court-based ADR in state and federal systems, and increased interest in ADR by disputants has made the United States the richest source of experience in court connected ADR.

Around 1970's the situation in US was not totally different from other developed and developing countries of the world it had suffered all short of defects for the reason of adopting English system of justice administration. Edward Bennet Williams, as appeared in U.S. News and World Report of September 21, 1970,

“The Legal System isn't working. It is like scarecrow in the field that doesn't scare the Crows anymore because it is too beaten and tattered-and the crows are sitting on the arms and cawing their contemptuous defiance”.

In the same manner Earn Warren in his Speech at Johns Hopkins University as Reported in San

Francisco Examiner and Chronicle of Nov. 15, 1970,

“The greatest weakness of our judicial system is that it has become clogged and does not function in a fluent fashion resulting in prompt determination of guilt or innocence of those charged with crime”.

Considering the delay in resolving the dispute Abraham Lincoln has once said: *“Discourage litigation. Persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time”.*

In the same vein Judge Learned Hand commented, *“I must say that as a litigant, I should dread a law suit beyond almost anything else short of sickness and of death”*. These all the cautions were rightly perused by Judicial and political thinker of US and gave way to their Home made practices of ADRs. As most countries of the world were constantly in lack of efficient justice dispensing system, quickly turn their face towards ADRs, as a result of which within short period ADRs recognized not only at the domestic level but also at the international level. Further more developments in economic field i.e. trade commerce throughout the world is greatly in need of mechanism of speedy disposal of their cases, as matter of inevitability commercial world accepted this new development. ADRs proved efficient and timely in corporate sector as result of developing countries like India get attracted to ADRs.

ADRs today fall 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 disputants⁴.

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 LokAdalat 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.

Mandatory process of ADRs requires 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.

4 <http://www1.worldbank.org/publicsector/legal/ADR%20Workshop.pdf>

Whereas, in voluntary processes, submission of dispute to the ADR process depends entirely on the will of the parties.

2.3. Important mechanisms of Alternative Dispute Resolution System

Most commonly used forms of ADRs are Mediation, Conciliation, Arbitration and Lok Adalats. Let us have eye bird view on these aspects of ADRs.

2.3.1. Mediation:

Of all mankind's adventures in search of peace and justice, mediation is among the earliest. Long before law was established or Courts were organized, or judges had formulated principles of law, man had resorted to mediation for resolving disputes⁵. Mediation is a process of dispute resolution in which one or more impartial third parties intervenes in a conflict or dispute with the consent of the participants and assists them in negotiating a consensual and informed agreement. It can also be said as a confidential process of negotiations and discussions in which a 'neutral' third party or mediator assists in resolving a dispute between two or more parties. Mediation' is defined as a facilitative process in which "disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication"⁶. The most essential feature of mediation has been highlighted in the following words "Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge has no power to impose an outcome on disputing parties"⁷. In resolving the dispute or settlement the general role of the mediator is to facilitate communication between the parties, assist them on focusing on the real issues of dispute and to generate options that meet the respective parties' interests or needs in an effort to resolve the dispute. The most important feature of Mediation is that it

5 <http://www.arbitrationindia.com/pdf/mediationtostay.pdf>

6 Henry J. Brown and Arthur L. Mariot, *ADR Principles and Practice*, 127 (Sweet & Maxwell: Lodon, 2nd Ed. (1997) Chapter 7)

7 Stephen B. Goldberg, Frank E.A. Sander and Nancy H. Rogers, *Dispute Resolution, Negotiation, Mediation and other processes*, p. 123 (Gaithersburg and New York Aspine Law & Business, 3rd ed)

provides a solution that both parties can live with, instead of a verdict imposed by a court. Both parties are involved in suggesting possible solutions to the conflict. Mediation is based on the voluntary cooperation and good faith participation of all parties. The mediator cannot force the parties to resolve their differences. But the mediator can help the parties reach a solution agreeable to both of them. If the parties work out all or some of their differences, the resolution – or agreement – is put in writing and signed by both the parties.

Mediation may be able to plow beneath the surface of frequently vexatious litigations by addressing the underlying conflicts. The mediator acts as a bridge to iron the wrinkles of differences affecting the parties⁸. Mediation differs from conciliation on this point that Mediation is not compulsive or legally binding, whereas, conciliation used as a tool of more liberalized or litigant friendly adjudication system where conciliator not only acts as facilitator but draws the binding decision on the basis of submitted fact, and deliberation between the parties. Mediation differs from arbitration, in which the third party (arbitrator) acts much like a judge in an out-of court, less formal setting but does not actively participate in the discussion. Unlike a judge or an arbitrator, a mediator does not decide what is right or wrong or make suggestions about ways to resolve a problem. A mediator seeks to help parties to develop a shared understanding of the conflict and to work toward building a practical and lasting resolution. Mediation serve to identify the disputed issues and to generate options that help disputants reach a mutually satisfactory resolution. It offers relatively flexible processes; and any settlement reached should have the agreement of all parties. This contrasts with litigation, which normally settles the dispute in favour of the party with the strongest argument. Despite the lack of ‘teeth’ (adjudicating) in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impeding (an)agreement, the mediator may attempt to encourage exchange of information, provide new information, help the parties to understand each others’ views, let them know that their concerns are understood; promote a productive level of emotional expression; deal with differences in perceptions and interest between negotiations and constituents (including lawyer and client); help negotiators realistically, assess alternatives to settlement, learn (often in separate sessions with

8 Ibid at p.123

each party) about those interest the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interests of all parties.

Panchayat system of ancient India can be an example, where we can find the efficacy of mediation as tool of dispute resolution but fundamental distinction lies between both is that Panchayat system is backed by popular support of the whole community and is relatively conclusive and widely respected by the people, that sense of popularity not lies with mediation. Ancient Panchayat system were so efficient because they were not worried about convenience of parties to the dispute, it is the 'Dharma' that binds both disputant party and Pancha (mediators). Pancha(s) not only represents the parties to the dispute but they represent whole community in which they live. That they no more oblige to settle individual interest but community interest is of greater importance to them, henceforth their decision gains popular support to which every member of that community feel obliged. For this reason Mediations seems to be toothless and less effective and it is already falling into disused (that has already happened in USA)

2.3.2. Conciliation

Conciliation is "the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator"⁹. Conciliation is an alternative dispute resolution process whereby the parties to a dispute (including future interest disputes) agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award. Conciliation differs from mediation in that the main goal is to conciliate, most of the time by seeking concessions. In mediation, them editor tries to guide the discussion in a way that optimizes parties' needs, takes feelings in to account and reframes representations.

9 definition of 'conciliation' formulated by the ILO (1983) concepts

In common parlance not much distinction lies between conciliation and mediation. However, statute in India had attached different meanings to these two concepts.

(a) In the year 1996, the Arbitration and Conciliation Act, was passed and Sec. 30 of that Act, which is in Part I, provides that an arbitral tribunal may try to have the dispute settled by use of ‘mediation’ or ‘conciliation’. Sub-section (1) of sec. 30 permits the arbitral tribunal to “use mediation, conciliation or other procedures”, for the purpose of reaching settlement.

(b) The Civil Procedure Code (Amendment) Act, 1999 which introduced sec. 89, too speaks of ‘conciliation’ and ‘mediation’ as different concepts. Order 10 Rules 1A, 1B, 1C of the Code also go along with Sec. 89. Thus our Parliament has made a clear distinction between conciliation and mediation. In Part III of the 1996 Act (sections 61 to 81) which deals with ‘Conciliation’ there is no definition of ‘conciliation’. Nor is there any definition of ‘conciliation’ or ‘mediation’ in Sec. 89 of the Code of Civil Procedure, 1908 (as amended in 1999). Sec 89 of Arbitration and Conciliation Act, 1996 provides for reference dispute for conciliation even where parties do not consent, provided the Court thinks that the case is one fit for conciliation. This lays down the stark distinction between mediation and conciliation.

Further Sec 67 describes the role of a conciliator. Sub Sec (1) states that he shall assist parties in an independent and impartial manner. Sub Sec (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned, and the circumstances surrounding the dispute, including any previous business practices between the parties. Sub Sec(3) states that he shall take into account “the circumstances of the case, the wishes the parties may express, including a request for oral statements”. Subsection (4) is important and permits the ‘conciliator’ to make proposals for a settlement. It states as follows: “Section 67(4). The conciliator may, at any stage of the conciliation proceeding, make *proposals for a settlement of the dispute*. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore.” Section 69 states that the conciliator may invite parties to meet him. Sec. 70 deals with disclosure by the conciliator of information given to him by one party, to

the other party. Sec. 71 deals with cooperation of parties with the conciliator, sec. 72 deals with suggestions being submitted to the conciliator by each party for the purpose of settlement. Finally, Sec. 73, which is important, states that the conciliator can *formulate terms of a possible settlement* if he feels there exist elements of a settlement. He is also entitled to *'reformulate the terms'* after receiving the observations of the parties. Subsection (1) of sec. 73 reads thus: "Sec. 73(1) settlement agreement. (1) When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, *he shall formulate the terms of a possible settlement* and submit them to the parties for their observations. After receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations."

These all provision signifies that conciliator not only a facilitator for the settlement but he is having statutory authority to,

- (a) to take surrounding facts and existing local usage and customs into consideration,
- (b) make proposals for the settlement,
- (c) formulate terms of a possible settlement,
- (d) reformulates the terms, these all power distinguishes conciliator from mediator but generally unlike arbitrator, conciliator does not have decision making power. The difference lies in the fact that the 'conciliator' can make proposals for settlement, 'formulate' or 'reformulate' the terms of a possible settlement while a 'mediator' would not do so but would merely facilitate a settlement between the parties. However, in India Family Courts Act-1984 confers decision making on the presiding officer of the Court who is called as conciliator.

The process of conciliation is widely used as an alternative mechanism of alternative dispute resolution. For example Sec 4 and 5 of Industrial Dispute Act provides for Conciliation officer and Board of Conciliation. Though conciliation acquired statutory recognition in India, their efficacy in resolving disputes or arriving at the settlement is negligible. Nothing significant has been achieved by giving statutory recognition to this mechanism, rather a waste of State resources and hurdle to the disputant parties in the way of choosing appropriate forum of redressal.

During 1959-66 the percentage of dispute settled by Conciliation Machinery varied from 57% to 83% in the central sphere. During 1988, 10,106 disputes were referred to conciliation out of which the number failure report received was 3,183 in the Central sphere. From period 1990-2000, in 39, 521 labour disputes conciliation proceedings were held out of which only 10,985 were successfully settled. The statistics of the working of the conciliation machinery reveals that it made no remarkable success in India. Number of reference themselves speak efficacy of Conciliation we have Corers of Cases pending but references are in thousands. For the failure of this mechanism there are several reasons,

- (a) Lack of proper personnel, inadequate training and low status enjoyed by conciliation officer and too frequent transfer.
- (b) Undue emphasis on legal and formal requirements.
- (c) Considerable delay in conclusion of conciliation proceedings.
- (d) Lack of adjudicating authority with conciliator.
- (e) Failure of conciliation had much impact as failure leads to reference of dispute to Labour Courts and Tribunals.
- (f) Failure to magnetize people as there are little differences in environ of Courts and Conciliation Board(s).

2.3.3. Arbitration

Arbitration is a quasi-judicial process in which a neutral person sits as a private judge and resolves the dispute of the parties in confidential manner. "Arbitration is a legal technique for there solution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons such as the 'arbitrators', 'arbiters', or 'arbitral tribunal', by whose decision the award they agreed to be bound"¹⁰. Arbitration is a binding method of dispute resolution governed by statute. It is a traditional 'alternative' to court-based litigation. The appointed arbitrator considers the evidence presented by both parties and then issues an award, which is enforceable by the courts – in some countries it is even enforceable without court decision. Procedures used in arbitration can range from informal to rules which essentially mirror court procedures.

10 Report of Secretary-general, UNCITRAL working Group on Arbitration, 33rd Session at, <http://www.uncitral.org> United Nations Commission on International Trade Law (UNCITRAL)

In India arbitration was originally governed by the provisions of the Indian Arbitration Act, 1940. The Courts were very much concerned over the supervision of Arbitral Tribunals and they were very keen to see whether the arbitrator has exceeded his jurisdiction while deciding the issue, which has been referred to him for arbitration. The scope of interference of the award passed by arbitration was dealt with by the Apex Court in the decision reported in *Food Corporation of India V. Jogindarlal Mohindarpal*¹¹ as follows,

“Arbitration as a model for settlement of disputes between the parties has a tradition in India. It has a social purpose to fulfill today. It has a great urgency today when there has been an explosion of litigation in the Courts of law established by the sovereign power. However in proceedings of arbitration, there must be adherence to justice, equality of law and fair play inaction. The proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure, which will lead to a proper resolution of the dispute and create confidence of the people, for whose benefit these procedures are resorted to. It is therefore, the function of the Court of law to oversee that the arbitrator acts within the norms of Justice. Once they do so and the award is clear, just and fair, the Court should as far as possible give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of corrections by the Court of an award made by the arbitrator. The law of arbitration must be made simple, less technical and more responsible to the actual realities of the situation but must be responsible to the canon of justice and fair play. The arbitrator should be made to adhere to such process and norms which will create confidence not only doing justice between parties but by creating a sense that justice appears to have been done”.

11 1989(2) SCC 347

2.3.3. (a) Species of arbitration

(i) 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.

(ii) 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.

(iii) Labor Arbitration: A growing trend among employers whose employees are not represented by a labor 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 arbitration as an alternative to litigation of employees' statutory claims, e.g., claims of discrimination, and common law claims, e.g., claims of defamation.

(iv) Judicial Arbitration: Some state court systems have promulgate 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.

2.3.4 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.

2.3.5. Statutory recognition to Arbitration in India: The Arbitration and Conciliation Act 1996 before this The Arbitration Act 1940 was in existence. Some of the important provisions of 1996 Act are as follows,

- (1) When there is an arbitration agreement, the Court is required to direct the parties to resort to arbitration as per the agreement (Sec.8).
- (2) The ground on which the award can be challenged now minimized on the basis of invalidity of agreement, want of jurisdiction on the part of arbitrator or want of proper notice to a party of the appointment of arbitrator or of arbitral proceedings or a party being unable to present his case. At the

same time an award can be set aside if it is in conflict with “the public policy in India, a ground which covers inter alia fraud and corruption”.

- (3) The power of the arbitrator himself have been amplified by inserting specific provision on several matters such as law to be applied by him, power to determine the venue of arbitration, failing agreement, power to appoint experts, power to act on the report of a party, power to apply to the Court for assistance in taking evidence, power to award interest and so on.
- (4) Provision to adopt obstructive method by parties to agreement are thwarted by providing express provision to that regard.
- (5) Role of arbitral institution in promoting arbitration has been recognized for the first time in law.
- (6) Provision has been made for appointment of arbitrator by Chief Justice Scheme which takes the act of selecting arbitrator by Court outside the litigation process and makes it an administrative act. Parties are given the liberty to select the arbitrator and only in cases when the parties failed to nominate their arbitrator, the Court’s intervention need be sought.
- (7) Time limit for conducting the arbitration proceedings has been deleted which is a drastic change in the new Act compared to old Act where the time will have to be extended only by Court when there is time limit is provided.
- (8) Formal written agreement to arbitration as provided under the old Act has been now relaxed.
- (9) Though the parties to the agreement held the arbitration in India, the parties to the contract are free to designate the law applicable to the substance of the disputes.
- (10) The Arbitrator has been clothed with power to grant interim relief.
- (11) Arbitrator has been given the power to decide his own jurisdiction to decide the dispute.
- (12) The Act provides for various other saving measures such as requiring an arbitrator to disclose any possible bias at the threshold itself (Sec.12)
- (13) Even if an arbitrator is replaced, the proceedings conducted by him are saved. This reduces the delay.
- (14) The arbitrators are directed to give reason for their conclusion unless it has otherwise provided in the agreement. Further there is no necessity for the party to arbitration to get the award made

a rule of Court as required under the old Act and the award passed by the arbitrator will have the force of a decree.

Further provision has been made to deal with international arbitration, which was not provided, in the old Act. A further matter disclosed to arbitrator has been protected from disclosure unless otherwise required by law to do so. This gives the parties to the arbitration to disclose their views freely. Even though all procedural innovation is made adversarial character of this mechanism cannot be undermine arbitrator is adjudicator unlike Mediator and Conciliator. For several reasons arbitration fail to gain much efficacy in Indian Legal system, this system is widely in use at international level¹².

2.3.6. Important International Arbitral Institutions

2.3.6. (a) Permanent Court of Arbitration (PCA): The Permanent Court of Arbitration (PCA), also known as The Hague Tribunal is an international organization based in The Hague in the Netherlands. It was established in 1899 as one of the acts of the first Hague Peace Conference, which makes it the oldest institution for international dispute resolution. In 2002, 96 countries were party to the treaty. The court deal in cases submitted to it by the consent of the parties involved and handles cases between countries and between countries and private parties.

2.3.6.(b) World Trade Organization (WTO): The World Trade Organization is an international organization which oversees a large number of agreements defining the “rules of trade” between its member states. The WTO is the successor to the General Agreement on Tariffs and Trade, and operates with the broad goal of reducing or abolishing international trade barriers. The WTO has two basic functions: as a negotiating forum for discussions of new and existing trade rules, and as a trade dispute settlement body. The function of WTO as a trade dispute settlement body is important in this context. The WTO has significant power to enforce its decisions, through the Dispute Settlement Body, an international trade court with the power to authorize sanctions against states which do not comply with its rulings. The WTO mainly resolves disputes through the process of “consensus” and “arbitration” which are essentially mechanisms of ADR.

12 <http://www.spea.indiana.edu/icri/terms.htm#ENE>

2.3.6.(c). International Chamber of Commerce (ICC): The International Chamber of Commerce is an international organization that works to promote and support global trade and globalization. It serves as an advocate of world business in the global economy, in the interests of economic growth, job creation, and prosperity. As a global business organization, made up of member states, it helps the development of global outlooks on business matters. ICC has direct access to national governments worldwide through its national committees. ICC activities include Arbitration and Dispute resolution which are the most prominent activities that it performs.

2.3.6.(d) Court of Arbitration for Sport (CAS): The Court of Arbitration for Sport (CAS) (Tribunal Arbitral du Sport or TAS in French) is an arbitration body set up to settle disputes related to sports. Its headquarters are in Lausanne; there are additional courts located in New York City and Sydney, with ad-hoc courts created in Olympics host cities as required. The CAS underwent reforms to make itself more independent of the International Olympic Committee (IOC), organizationally and financially. Generally speaking, a dispute may be submitted to the CAS only if there is an arbitration agreement between the parties which specifies recourse to the CAS. Currently, all Olympic International Federations but one, and many National Olympic Committees have recognized the jurisdiction of the CAS and included in their statutes an arbitration clause referring disputes to it. Its arbitrators are all high level jurists and it is generally held in high regard in the international sports community.

2.3.6.(e). United Nations Commission on International Trade Law (UNCITRAL): The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body within the United Nations system in the field of international trade law. UNCITRAL was tasked by the General Assembly to further the progressive harmonization and unification of the law of international trade. As at the international up to now it was not made possible to establish and constitute a Adjudicator body having compulsory jurisdiction and abidingness independent of consent state parties it is inevitable to the international community to adopt these Arbitral and other ADRs Mechanisms.

2.3.4. Lok Adalat

Lok Adalat is the concept having its roots in Indian glorious past which mean 'people's Court', it is the system of "nyayapanch" is conceptualized and institutionalized as LokAdalat. It involves people who are directly or indirectly affected by dispute resolution. The main reason for bring this system is also to lessen the burdens of Court and provide speedy justice with people's participation in decision making. This concept is, now, again very popular and is gaining historical momentum. Experience has shown that it is one of the very efficient and important ADRs and most suited to the Indian environment, culture and societal interests. The finest hour of justice is the hour of compromise when parties after burying their hatchet reunite by a reasonable and just compromise. This Indian-institutionalized, indigenized and now, legalized concept for settlement of dispute promotes the goals of our Constitution. Equal justice and free legal aid are hand in glove. It is, rightly said, since the Second World War, the greatest revolution in the law has been the mechanism of evolution of system of legal aid which includes an ADRM. The statutory mechanism of legal services includes concept of Lok Adalat in the Legal Services Authorities Act. The legal aid, in fact, is a fundamental human right. The concept of Lok-Adalat was pushed back into oblivion in last few centuries before independence and particularly during the British regime. Now, this concept has, once again, been rejuvenated. It has, once again, become very popular and familiar amongst litigants. The Legal Services Authorities Act, 1987, pursuant to the constitutional mandate in Article 39-A of the Constitution of India, contains various provisions for settlement of disputes through LokAdalat. Thus, the ancient concept of Lok Adalat has, now, statutory basis. This is the system which has deep roots in Indian legal history and its close allegiance to the culture and perception of justice in Indian ethos.

LokAdalat is the dispute resolution system presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the LokAdalat. The procedural laws and the Evidence Act are not strictly followed while assessing the merits of the claim by the LokAdalat.

The Legal Service Authority Act, 1987 provided for constitution of Lok-Adalat, jurisdiction and other special provisions. Under this Act a Lokadalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of:

(i) any case pending before; or

(ii) any matter which is falling within the jurisdiction of, and is not brought before, any court for which the LokAdalat is organised. The LokAdalat can compromise and settle even criminal cases, which are compoundable under the relevant laws. So this Act provides that a case which has not brought before Court can be dealt in LokAdalat and it can be settled there.

This Act provides for the constitution of The State Authority and District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee and Taluk Legal Services Committee (mentioned in Section 19 of the Act) can organize Lok Adalats at such intervals and places as may be deemed fit.- Every Lok Adalat so organized shall consist of:

(a) Serving or retired judicial officers, (b) other persons, as may be specified¹³. National Service Authority is also constituted to exercise its powers and functions at the national level under this Act.

2.3.4.(a) Cognizance of cases by Lok Adalat: there were two mode of taking cognizance were recognized under the Act, (i) On Application: When all the parties to the case agree for referring the case to Lok Adalat, or When one of the party to the case makes an application to court, praying to refer the case to Lok Adalat and the court is prima facie satisfied that there are chances for settlement. (ii) *Suo Moto*: Where the court is satisfied that the matter is an appropriate one to be taken cognizance of, by the Lok Adalat. Then, the court shall refer the case to the Lok Adalat, after giving a reasonable opportunity for hearing to all the parties¹⁴.

4.6.2.(b) Mode of Determination of cases: the Authority or Committee organizing Lok Adalat may, on application from any party to a dispute,

¹³ Sec 9 of Legal Service Authority Act, 1987

¹⁴ Sec 20

refer the said dispute to Lok Adalat, after giving a reasonable opportunity for hearing to all the parties. Lok Adalat shall proceed to dispose of a case referred to it expeditiously.

- Shall be guided by principles of law, justice, equity and fair play.
- Shall yearn to reach a settlement or compromise between parties.
- When no compromise or settlement is accomplished, the case is to be returned to the court which referred it. Then the case will proceed in the court from the stage immediately before the reference.

2.3.4.(c) Finality of Settlement arrived before Lok Adalat: Sec 21 of the Act declares that every award of (a) Lok Adalat shall be deemed to be decree of Civil Court, (b) Every Order made by the Lok Adalat shall be final and binding on the all the parties, (b) no appeal shall lie form the order of Lok Adalat.

2.3.4.(d) Establishment of Permanent Lok-Adalat under the Act: Chapter VI A was newly added by Amendment Act, 2002, introducing the concept of Permanent Lok Adalat¹⁵. The Central or State Authorities may establish by notification, Permanent Lok Adalats at any place, for determining issues in connection to Public Utility Services.

Public Utility Services include:

- (1) Transport service,
- (2) Postal, telegraph or telephone services,
- (3) Supply of power, light and water to public,
- (4) System of public conservancy or sanitation,
- (5) Insurance services and such other services.

Lok Adalat proved to be one of the efficient machinery of dispute resolution, we can substantiate this by analyzing its performance, in every respect the scheme of Lok Adalat is a boon to the litigant public, where they can get their disputes settled fast and free of cost. They get faster and inexpensive remedy with legal status. Success of Lok Adalats in India can be judged from the number of cases settled by the Lok dalats in all the States. The difference between the work done by Lok Adalats and the regular courts becomes much more marked if one takes into account the number of cases settled at various Lok Adalats and compares them to the corresponding figures for those decided by regular courts. The table below shows the number of Lok Adalats held in all the States

15 Section 22A to 22E of Legal Service Authority Act- 1987

till 30th November 2011 from its inception, number of MACT (Motor Accidents Claims Tribunal) cases settled, number of total cases settled and compensation awarded in MACT cases:

State/Union Territory	No. of Lok Adalats held	No. of MACT Cases Settled	No. of Cases Settled (including MACT Cases)	Compensation awarded in MACT Cases (in Rs.)
Andhra Pradesh	159110	112169	1431481	993710136
Arunachal Pradesh	481	549	4925	30137176
Assam	3976	22869	247406	126758885
Bihar	20550	120135	825871	938946619
Chhattisgarh	9365	8329	81072	759240532
Goa	658	5206	8004	306091648
Gujarat	113239	182344	6864186	10739579473
Haryana	13954	34868	1165674	3289016583
Himachal Pradesh	5614	5414	93014	422908879
Jammu & Kashmir	3365	8527	119594	1609457800
Jharkhand	18166	3487	147598	489116740
Karnataka	76463	132589	1298306	6250538966
Kerala	23722	121157	285533	5064256058
Madhya Pradesh	33645	121096	3022786	9227305797
Maharashtra	32375	82614	1173676	9615545572
Manipur	43	1170	1185	57221500
Meghalaya	109	926	6157	161072918
Mizoram	1268	240	1272	6094080
Nagaland	99	1049	1648	109098322
Orissa	12099	44128	4067482	3002792997
Punjab	18964	16889	999956	1472283274
Rajasthan	112633	598919	2365331	5373836690
Sikkim	1068	160	4008	9101000
Tamil Nadu	244675	154380	547320	14513720409
Tripura	568	3103	23756	67753578
Uttar Pradesh	37934	72431	8223824	5742022194
Uttarakhand	1209	4121	241993	442574460
West Bengal	17873	34271	193645	2454330542
And. & Nico. Islands	158	24	1789	3736468
U.T. Chandigarh	6145	17842	192396	1221173175
D & Nagar Haveli	12	119	1781	12007699
Daman & Diu	8	61	135	3099000
Delhi	10937	19287	589464	3048379536
Lakshadweep	73	11	131	435000
Puducherry	854	7967	28958	284499244
SCLSC	6	44	179	--
Total	981418	1938495	34261536	97881720428*

* http://www.ijmra.us/project%20doc/IJPSS_MAY2012/IJMRA-PSS1101.pdf

This is the expeditious method to settle large number of MACT claims. It has become a Dispute Management Institution. It is an informal system of dispute resolution. This has resulted in settlement of a large number of cases long pending before the Motor Accident Claims Tribunals, which would have otherwise taken years for adjudication. Undue delay in settlement of Motor Accident Compensation claims in most of the cases defeats the very core of the purpose. It is in this area that Lok Adalat is rendering very useful service to the needy. It is not merely the question of payment, the time and expense factor and saving the victim families from harassment involved in execution and appeal proceedings are of considerable importance.

However fact is that people in India are now not interested in Lok Adalat though large number of cases have been solved through Lok Adalat. In the beginning there was great flow of cases towards Lok Adalat, this is not wholly because of its efficiency, because there is no alternative left with the people to redress their dispute other than Lok Adalats. Presently it is evident that Lok adalat is not safety value against the drawbacks of Ordinary Courts, as people were also felt dissatisfied with the working of Lok Adalats, to common man Lok Adalat is no different than Court except some procedural relaxation, in fact when the case is long pending Lok Adalat will be last resort at least to weak party(economically) to get relief (form being litigant).

Litigant is mere spectator here though there is absence of Procedural Law, it is still not open to him, opinion of Lawyer and the Judges consider being monolith he feels it uneasy to say actually what he want. The study points out that in Lok Adalats, justice has fallen victim to the desire for the speedy resolution. Instead of trying genuine compromise, in some cases Lok Adalats try to force an adjudicatory decision upon unwilling litigants. The right to fair hearing, which is one of the basic principles of natural justice, is denied to the people. Many sitting and retired judges while participating in Lok Adalats as members, tend to conduct the Lok Adalats like courts, by hearing parties and by imposing their views as to what is just and equitable on the parties. Sometimes they get carried away and proceed to pass order on merits even though there is no consensus or settlement¹⁶. The presiding officers should resist from the practice of making adjudicatory decisions in the

16 <http://pib.nic.in/welcome.html>

Lok adalats. Such acts instead of fostering alternative dispute resolution through Lok Adalats will drive the litigants away from the Lok Adalats. The study stresses that the people in India should take resort to the Lok Adalats to get their disputes settled in an indigenous way.

3. Conclusion

Justice delayed is justice denied to overcome this problem, presently in India it is appropriate to give greater encouragement and legislative sanctions in more appropriate way to strengthen our Sanathanic Panchayat system, instead of giving undue importance to ADRs. In this research paper author tried to establish and author firmly believe that ADRs will not be true alternative to the problems posed by administration of Justice by British modeled Courts. Every Legal System must be built upon its own '*theory*' i.e. *Legal theory* we can loosely call it as Jurisprudence, construction or adoption of Indian Legal System completely based on Anglo-Saxon Jurisprudence is in itself blunder. Just because British ruled us for more than three hundred years Indian Society was not completely westernized. Especially the notion of Justice and injustice, truth and false etc were still in India based on our pre-colonial experiences/perceptions. A matter or dispute in India cannot be satisfactorily decided by a judge sitting impartially, because in fact justice in India is not just settlement of individual interest, whole community had its vested interest in outcome of such dispute or settlement, this is the reason why in India (pre-colonial period) there were five adjudicators (Pancha) who were representative of community and being upholders of Dharma uses to decide the matters.

Accordingly we should not forget that justice delivery system should be in consonance with aspiration of people: today we are but quite busily involved in finding out alternative mechanism of dispute resolution system to ordinary courts of law, but fundamental question is to what extent this foreign made ADR system acceptable and adoptable to the Indian circumstance? In India more than 70% of disputes were resolved by village Panchayats, comprising selected (by disputants) members of village. It means the role of Ordinary Law Courts in India is that of a small tip of ice berg. The reason behind raising this issue here is that ADRS were brought to force for the reasons inter alia to improvise the administration of justice (of ordinary Courts) by speedy redressal of dispute. Well the reason is quite genuine but the problem with ordinary

courts of justice is that they covering only 30% disputes that were existed in society, ADRS on the other hand intended to overcome the difficulties or short comings of ordinary courts of Justice but what about other 70% disputes, we are not thinking about it, instead we are glorifying this foreign made ADRS, suppressing or by neglecting our own indigenous system of dispute resolution. In India court system including ADRS was not able to be a main stream of dispute resolution because they are not backed by aspirations of people. Well we already given statutory status to ADRs but we are far from achieving satisfactory outcome from this ADRs. Accordingly it is not the Arbitration, Conciliation and Mediation of American type is 'Alternative' to existing legal system but our own Indigenous Panchayat system is the 'Appropriate' if adequate step to strengthen it is undertaken at the earliest.