

Contents

S.No	Particulars	Page No
1.)	Existing judicial delivery system in India	
	• Historical Overview	1
	• History	1
	• Indian Judicial System	1-2
	• Reforms in legal system for achieving effective and speedy resolution of disputes - Public Interest Litigation	3-5
	• Judicial reforms in India - Need of the hour	5-6
	• Judicial Activism	6-9
2.)	Need of ADR in India	10
3.)	Alternate Dispute Mechanism (ADM)	
	• Concept and its efficacy	11
	• Impact of ADR	12-13
	• Type of ADR System	13-15
4.)	Arbitration and Conciliation Act, 1996	
	• Arbitration	16-17
	• Conciliation	17-19
	• Major provisions relating to Conciliation	20-22
	• Scope of Mediation / Conciliation	22-23
	• Conciliation process	24-26
	• Advantages of Conciliation / Mediation	26
	• Pre-requisites for conciliator	27
	• Neutrality and Control of the process	28
	• Flexibility and Adaptability	29

→ Next Page

5.)	Kinds of Mediation	
	• Types	30-31
	• Conciliation / Mediation Process	31
	• State made by parties	32
	• Facilitative negotiations	33
	• Termination of Mediation	34
	• Costs of Conciliation	35
	• Deposits by Parties and Accounts	36
	• Conciliation under Industrial Disputes Act, 1947	37
6.)	Mediation	37
7.)	Jok Adalats	38

Existing Judicial Delivery System in India

Historical Overview:

"Judicial Reforms" is a theme, which is so much of talked about but too little has been done.

History:

Indian Judicial System has a long history right from pre-British days. In the 18th Century a uniform pattern of judiciary emerged and during the British regime High Courts were established in presidency towns. Thereafter, in 1937, the Federal Court was established to hear the appeals from the High Courts. Because of complexities of personal laws of Muslims and Hindus and various customs and practices, there were initial difficulties in administration of justice. After independence, the government ~~focused~~ focused on to have a systematic judicial system throughout the country and many new subordinate courts were established in various parts of the country.

Today, there is a network of over 14,000 courts all over India and these courts are dealing with approximately 4 crore cases. Out of these 14,000 judges, the working strength would be about 12,500 judges and nearly 4,000 cases are handled per-judge. This is too high as compared to the average load per-judge in other countries.

Indian Judicial System:

The Supreme Court is the apex court in the country. The

Supreme Court's exclusive ~~original~~ original jurisdiction extends to all disputes between the Union and one or more States or between two or more States.

The Constitution of India (hereinafter referred to as "Constitution") gives an extensive original jurisdiction to the Supreme Court to enforce fundamental rights.

The Supreme Court consists of a Chief Justice and 25 other justices, all appointed by the President on the advice of the Prime Minister. The High Court stands at the head of the State's judicial administration. There are 21 High Courts in the Country.

The Chief Justice of a High Court is appointed by the President of India in consultation with the Chief Justice of India and the Governor of the State.

Each State is divided into judicial districts presided over by a District and Sessions Judge, who is the highest judicial authority in a district.

Below him, there are courts of civil jurisdiction, known in different States as munsifs, sub-judges, civil judges and the like. Similarly, ~~criminal~~ criminal judiciary comprises Chief Judicial Magistrate and Judicial Magistrates of 1st and 2nd class.

Also, there are voluntary agencies, Lok Adalats for resolution of disputes through conciliatory method. The Constitution through its articles relating to the judicial system provides a way to question the laws of the government, if the common man

finds the laws as unsuitable for any community in India.

Reforms in the legal system for achieving effective and speedy resolution of Disputes - Public Interest Litigation

Acts introduced for effective and speedy resolution of dispute

There have been many major structural changes (post independence) in the judicial system. The major changes can be categorized as below:

The National Legal Services Authority (NALSA) Act

NALSA has been constituted under the Legal Services Authorities Act, 1987 to monitor and evaluate implementation of legal services available under the Act. It functions in different ways:

The NALSA issues guidelines for the State Legal Services Authorities to implement the Legal Aid Programmes and schemes throughout the country. Primarily, the State Legal Services Authorities, District Legal Services Authorities, Taluka Legal Services Committees etc have been asked to discharge the following two functions on regular basis:

- (i) To provide free legal services to the eligible persons; and
- (ii) To organize Lok Adalats for amicable settlement of disputes

2016-17

Article 39-A of the Constitution which was inserted by the

Constitution (Forty Second) Amendment Act, 1976 casts an obligation on the State to secure that the operation of the legal system promotes justice on a basis of equal opportunity, and in particular, provide free legal aid by suitable legislation or schemes or in any other way, to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Section 304(1) of Cr. P.C., 1973 and order 33 of Civil Procedure Code, 1908 also provides provisions for free legal aid. Besides, the right to free legal aid has now been included as part of Right to Life and Personal Liberty guaranteed under Article 21 of the Constitution.

With a view to accomplish this objective, the Government of India appointed a Committee for implementing the legal aid schemes in 1980. This Committee was headed by Justice P. M. Bhagwati. The Committee prepared a draft legal aid programme which could be applicable throughout India. It is on the basis of the recommendations and the draft outlined by this Committee that the Legal Services Authorities Act, 1987 was passed to establish Statutory Legal Services Authorities. It also contained provisions relating to Lok Adalats.

Object of the Act :- The main object of this Act is to provide free and competent legal services to the poor and weaker sections of the society so as to ensure that they are not denied the ~~opportunities~~ opportunities for securing justice by reason of economic and other disabilities and to organize Lok Adalats to secure that the operation of the legal system promotes justice on the basis of

equal opportunities.

Entitlement to Legal Services $\Rightarrow$ Section 13 of the Legal Services Authorities Act, 1987 provides that persons who satisfy all or any of the criteria specified in Section 12 shall be entitled to avail legal services provided that the concerned Legal Aid Authority is satisfied that such person has a prima facie case to prosecute or to defend. The person concerned is required to file an affidavit stating that he is entitled to legal services under the Act.

Section 12 of the Act enumerates the categories of persons who are entitled to legal services.

Judicial Reforms in India - Need of the Hour

Mr. Veerappa Moily I (the former Law Minister), said that the UPA Government would stress during the next 5 years on judicial reforms and also ensure that rule of law touched every individual including the last man in queue would go a long way to realize "Simple, Speedy, cheap, effective and Substantive" justice.

However, due to change of Government in 2014, the above objectives could not met. The NDA Government also emphasized the need for judicial reforms in India to provide continuity and stability in the policies of the Government regarding the judicial reforms in India.

Recourse to Alternate Dispute Redressal (ADR) mechanism can great

help in reducing pendency of cases through arbitration, negotiations, conciliation and mediation. In countries like USA, ADR as dispute resolution mechanism has been very effective. India already has Arbitration Conciliation Act 1996 and the Code of Civil Procedure has also been amended. However, the measure suffers from grossly inadequate number of trained mediators and conciliators. Both judicial officers and lawyers need to be trained with a view to grow alternate system into the mainstream of justice.

While having a holistic view of all the intricacies and nuances of the justice delivery system, its present pitfalls and fault lines will have to be considered to ensure transparency and accountability of the judicial system.

Judicial Activism

Judicial activism is gaining prominence in the present days. In the form of Public Interest Litigation (PIL), citizens are getting access to justice.

Judiciary has become the centre of controversy, in the recent past, on account of the sudden/serious level of judicial intervention. The area of judicial intervention has been steadily expanding through the device of PIL. The Judiciary has shed its pro-statue quo approach and taken upon itself the duty to enforce the basic rights of the poor and vulnerable sections of the society, by progressive interpretation and positive action.

The Supreme Court has developed new methods of dispensing justice

to the masses through the PIL. Former Chief Justice P.N. Bhagwat, under whose leadership PIL attained a new dimension commented that "the Supreme Court has developed several new commitments". Further, Chief Justice P.N. Bhagwat commented that "It has carried forward participative justice. It has laid just standards of procedure. It has made justice more accessible to citizens".

The term 'Judicial Activism' is intended to refer to, and cover the action of the Court in excess of, and beyond the powers of Judicial Review.

The scope of the term 'Judicial Review' before Indian Courts has evolved in 3 dimensions -:

- Firstly, to ensure fairness in administrative action;
- Secondly, to protect the constitutionally guaranteed fundamental rights of citizens; and
- Thirdly, to rule on questions of legislative competence between the centre and the States.

The power of the Supreme Court of India to enforce these fundamental rights is derived from Article 32 of the Constitution. It gives citizens the right to directly approach the Supreme Court for seeking remedies against the violation of these fundamental rights. This entitlement to constitutional remedies is itself a fundamental right and can be enforced in the form of writs evolved in common law - such as habeas corpus, mandamus, quo warrant, prohibition and certiorari. Besides the Supreme Court, the High Courts located in various States are also designated as Constitutional

Courts and ~~that~~ Article 226 permits citizens to file similar writs before the high Courts. From one angle, it is said to be an act 'in excess of, or without jurisdiction'. The Constitution does not confer any authority or jurisdiction for 'activism' as such on the Court.

With the advent of PIL in recent decades, Article 32 has been creatively interpreted to shape innovative remedies such as a 'continuing mandamus' for ensuring that executive agencies comply with judicial directions. In this category of litigation, judges have also ~~interpreted~~ imported private law remedies such as 'injunctions' and 'stay' orders into what are essentially public law matters. Successful challenges against statutory provisions result in reliefs such as striking down of statutes or even reading down of statutes, the latter implying that Courts reject a particular approach to the interpretation of a statutory provision rather than rejecting the provision in its entirety.

Beginning with the first few instances in the late 1970s, the category of PIL has come to be associated with its own 'people friendly' procedures. The foremost change came in the form of the dilution of the requirement of 'locus standi' for initiating proceedings. Since, the intent was to improve access to justice for those who were otherwise too poor to move the Courts or were unaware of their legal entitlements, the Court allowed actions to be brought on their behalf by social activists and lawyers.

Besides, the above mentioned factors, there are some other situations that lead to 'Judicial Activism', which are -:

(i) When legislature fails to discharge its responsibilities

(ii) In case of a hung parliament where the government is very weak and unstable;

(iii) When the governments fail to protect the basic rights of the citizens or provide an honest, efficient and just system of law and administration;

(iv) When the party in power misuses the Courts of law for ulterior motives as was done during the Emergency period, and

(v) Finally, the Court may on its own try to expand its jurisdiction and confer on themselves more functions and powers.

Need of ADR in India

The system of dispensing justice in India has come under great stress for ~~several~~ several reasons mainly because of the huge pendency of cases in Courts. In India, the number of cases filed in Courts has shown a tremendous increase in recent years resulting in pendency and delays underlining the need for alternative dispute resolution methods. It is in this context that a Resolution was adopted by the Chief Ministers and the Chief Justices of States in a Conference held in New Delhi on 4th December 1993 under the Chairmanship of the then Prime Minister and presided over by the Chief Justice of India.

It said "The Chief Ministers and Chief Justices were of the opinion that Courts were not in a position to bear the entire burden of justice system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, mediation and negotiation. They emphasized the desirability of disputes taking advantage of ADR which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial".

In a developing country like India with major economic reforms under way within the framework of the rule of law, strategies for swifter resolution of disputes for lessening the burden on the Courts and to provide means for expeditious resolution of disputes, there is no better option but to strive to develop alternative modes of dispute resolution (ADR) by establishing facilities for providing settlement of disputes through arbitration, conciliation, mediation and negotiation.

→ Next Page

Alternate Dispute Resolution Mechanism

Concept and its efficacy:

The concept of conflict management through ADR has introduced a new mechanism of dispute resolution that is non-adversarial. A dispute is basically 'between parties' and the justice dispensation system in India has found an alternative to adversarial litigation in the form of ADR mechanism.

New methods of dispute resolution such as ADR facilitate parties to deal with the underlying issues in dispute in a more cost-effective manner and with increased efficacy.

In addition, these processes have the advantage of providing parties with the opportunity to reduce hostility, regain a sense of control, gain acceptance of the outcome, resolve conflict in a peaceful manner, and achieve a greater sense of justice in each individual case. The resolution of disputes takes place usually in private and is more viable, economic and efficient.

ADR is generally classified into at least 4 types, which are -:

- Negotiation;
- ~~Mediation~~ Mediation;
- Collaborative law; and
- Arbitration

CHECKED

Sometimes, a 5th type, conciliation, is included as well, but for present purposes it can be regarded as a form of mediation.

→ Next page

Impact of ADR

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

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

The Arbitration Act, 1940 was not meeting the requirements of either the international or domestic standards of resolving disputes. Enormous delays and court intervention frustrated the very purpose of arbitration as a means for expeditious resolution of disputes. The Supreme Court in several cases repeatedly pointed out the need to change the law. The Public Accounts Committee too deprecated the Arbitration Act of 1940. In the conferences of Chief Justices, Chief Ministers and Law Ministers of all the States, it was decided that since the entire burden of justice system cannot be borne by the courts alone, an ADR system should be adopted. Trade and Industry also demanded drastic changes in the 1940 Act. The Government of India thought it necessary to provide a new forum and procedure for resolving international and domestic disputes quickly.

Thus, "The Arbitration and Conciliation Act, 1996" came into being. The law relating to Arbitration and Conciliation is almost the same as in the advanced countries. Conciliation has been given statutory recognition as a means for settlement of the disputes in terms of this Act. In addition to this, the new Act also guarantees independence and impartiality of the arbitrators irrespective of their nationality. The new Act of 1996 brought in several changes to expedite the process of arbitration.

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

Types of ADR System

- Mini-trial
- Mediation Arbitration
- Fact finding expert
- Early neutral examination
- Court-annexed Arbitration
- Mediation and Hybrid Process
- Judicial Settlement conferences
- Multi-door court house

Each of these ADR systems are explained as under:-

Mini-trial ⇒ A non-binding procedure where the disputing parties present their respective cases before their senior executives

who are competent to take decisions and who are assisted by a neutral 3rd party. Thus, the executives have an objective assessment of the dispute and if possible; they can mutually arrive at an amicable settlement.

Mediation Arbitration $\Rightarrow$ It is a mixture of arbitration and mediation that combines the benefit of these 2 methods. Basically, parties commence with mediation, and if an agreement had not been reached, they move on to arbitration. The same or different third-party neutral may conduct the mediation and the arbitration sessions.

Fact finding expert $\Rightarrow$ Used most often in employment disputes, neutral fact finding is a voluntary and consensual process involving a mediator or other outside neutral third party investigator. This "fact-finder" conducts a due process search for evidence relating to an existing conflict. The fact finder typically interviews the claimant, the defendant and other witnesses and prepares a confidential report for management and in some cases, their counsel. Neutral fact finders are often likely to uncover facts than are stakeholders and their discoveries often provide employers with the information they need to resolve a dispute internally without litigation.

$\nearrow$ (ENE)

Early neutral evaluation $\Rightarrow$ It arises when disputing parties submit their case to a neutral evaluator through a confidential "evaluation session". The neutral evaluator considers each side's position and renders an evaluation of the case. Contracting parties can include an ENE clause in the contract, which represents their agreement to submit to ENE in good faith to resolve any contractual disputes.

Court-annexed arbitration $\Rightarrow$ It requires statutory introduction into the Court system and which, depending upon the model adopted, may be binding or initially non-binding, and may or may not provide for a re-hearing by a judge under certain circumstances. The Code of Civil Procedure (Amendment) Act, 1999 provides for Court-annexed ADR processes.

Mediation and Hybrid process $\Rightarrow$ A hybrid dispute resolution process combines elements of 2 or more traditionally separate processes into one. The most common hybrid process is mediation-arbitration, which uses the same individual or dispute resolution forum, first as mediator and then if necessary, as an arbitrator.

Judicial Settlement Conferences $\Rightarrow$ In this Court based ADR process, the Settlement judge presides over a meeting of the parties in an effort to help them reach a settlement. Judges have played a variety of roles in these conferences, articulating opinions about the merits of the case, facilitating the trading of settlement offers, and sometimes acting as the mediator.

Multi-door Court house $\Rightarrow$ It helps parties to settle disputes through mediation and other types of appropriate dispute resolution (ADR), including arbitration, case evaluation and conciliation. The name multi-door comes from the multi-door Court house concept, which envisions one courthouse concept with multiple dispute resolution doors or programs. Cases are referred through the appropriate door for resolution. It provides residents with easy access to justice, reduce delay and provide links to related services, making more options available through which disputes can be resolved.

Arbitration and Conciliation Act, 1996

Part I of this Act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.

Arbitration :

The process of arbitration can start only if there exists a valid Arbitration agreement between the parties prior to the emergence of the dispute. As per section 7, such an agreement must be in writing. The contract, regarding which the dispute exists, must either contain an Arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. The existence of an Arbitration agreement can also be inferred by written correspondence such as letters, telex or telegrams which provide a record of the agreement. An exchange of statement of claim and defence in which existence of an arbitration agreement is alleged by one party and not denied by other is also considered as valid written arbitration agreement.

Any party to the dispute can start the process of appointing arbitrator and if the other party not cooperate, the party can approach the office of Chief Justice for appointment of an arbitrator. There are only 2 grounds upon which a party can challenge the appointment of an arbitrator. There are only 2 grounds upon which a party can challenge the appointment of an arbitrator - reasonable doubt in the impartiality of the arbitrator and the lack of proper qualification of the arbitrator as required by the arbitration agreement. A sole arbitrator or panel of arbitrators so appointed constitute the Arbitration Tribunal.

Except for some interim measures, there is very little scope for judicial intervention in the arbitration process. The Arbitration Tribunal has jurisdiction over its own ~~jurisdiction~~ jurisdiction. Thus, if a party wants to challenge the jurisdiction of the Arbitration Tribunal, it can do so only before the Tribunal itself. If the Tribunal rejects the request, there is little the party can do except to approach a Court after the Tribunal makes an award. Section 34 provides certain grounds upon which a party can appeal to the principal Civil Court of original jurisdiction for setting aside the award.

Once the period of filing an appeal for setting aside an award is over, or if such an appeal is rejected, the award is binding on the parties and is considered as a decree of the Court.

Conciliation

Conciliation is a less formal form of arbitration. This process does not require an existence of any prior agreement. Any party can request the other party to appoint a conciliator. One conciliator is preferred but 2 or 3 are also allowed. In case of multiple conciliators all must act jointly. If a party rejects an offer to conciliate, there can be no conciliation.

Parties may submit statements to the conciliator describing the general nature of dispute and the points at issue. Each party sends a copy of the statement to the other. The conciliator may request further details, may ask to meet the parties, or communicate with the parties orally or in writing. Parties may even submit suggestions for the settlement of the dispute to the conciliator.

When it appears to the conciliator that elements of settlement exist, he may draw up the terms of settlement and send it to the parties for their acceptance. If both the parties sign the settlement document, it shall be final and binding on both.

Note that in USA, this process is similar to Mediation. However, in India Mediation is different from Conciliation and is a completely informal type of ADR Mechanism.

The Conciliation under Part III is an independent procedure and distinct from that as provided under Section 30(1) of the Act where the Conciliation may be taken up during arbitration proceedings.

New Section 89 which deals with Settlement of disputes outside the Court provides that where it appears to the Court that there exists element of settlement, which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, judicial settlement including settlement through Lok Adalat or Mediation.

Relevant to note that, the Arbitration and Conciliation Act, 1996 do not contain any provision for reference by Courts to arbitration or conciliation in the absence of the agreement between the parties to that effect.

Under the 1996 Act, the process of arbitration and conciliation are purely consensual and not compulsory. But under the newly added Section 89 of CPC, the Courts can refer the case to

to arbitration, conciliation and mediation etc. The Court can formulate the terms of settlement and give them to the parties for their observation and after receiving the observations; the Court may reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation etc.

At this juncture, the Court is not ascertaining the agreement of the parties but only their observations, because if there is agreement between the parties at the stage of formulation of possible terms of settlement, the Court can as well make it the basis of its judgement and there would be no need for further negotiations under the aegis of arbitration or conciliation. However, once the Court refers the case to arbitration or conciliation, that reference creates a legal fiction that it is deemed to be a reference under the provisions of the Arbitration and Conciliation Act, 1996 and the provisions of that Act would take over from the provisions of the CPC under which the reference was made. Thus, if parties choose to do so, the parties or the conciliator under Section 76 of the 1996 Act can terminate the conciliation proceedings so commenced by Court's ~~ref~~ reference under Section 89 of the CPC.

The major provisions relating to conciliation are explained below:

Commencement of conciliation proceedings ⇒ Section 62 of the Act provides that the conciliation proceedings can be initiated by a party inviting other party to conciliate under the provisions of the Act. Once the other party accepts in writing the invitation to conciliate, the conciliation proceedings shall.

Number of Conciliators $\Rightarrow$ Section 63 of the Act provides that there can be only one conciliator unless parties agree for more than one conciliator. When there is more than one conciliator, they are required to act jointly together.

Appointment of Conciliators $\Rightarrow$ Section 64 of the Act deals with the appointment of conciliator. The section articulates that in case of one conciliator, parties have to agree on the name of the Sole Conciliator. Whereas, in the case of three, each party can appoint one and has to agree on third, who will be the presiding conciliator.

The section further provides that the parties may also request institutions like ICADR to recommend the names of suitable instruments to act as conciliator or the parties may agree that the appointment be made by the institution.

This section specifically provides that the conciliator is not bound by the Code of Civil Procedure, 1908 or Indian Evidence Act, 1872.

Role of Conciliator $\Rightarrow$ Section 67 prescribes the role to be played by the conciliator during the proceedings. The conciliator, as against an arbitrator is only a facilitator and not a judge. His authority is restricted to the extent the parties entrust it to him. The conciliator is required to follow the principles of objectivity, fairness and justice and is required to give due consideration to the usage of trade and business practices. He can make a settlement proposal at any stage of proceedings. The Conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

Settlement Agreement and Status thereof $\Rightarrow$ Sections 73 and 74 deal with the settlement agreement and its status respectively. At any stage of proceedings the Conciliator can propose possible settlement, if he is of the opinion that the settlement is possible. The settlement reached between the parties by consensus with the help of conciliator and signed by the parties, has been treated equally and given same status under the provisions of Act with that of an arbitral award. Section 74 makes the settlement agreement enforceable as a decree of the Court.

Termination of proceedings $\Rightarrow$ Under Section 76 of the Act, the parties have been empowered to terminate conciliation proceedings by giving in writing a declaration to this effect. The declaration shall be addressed to the conciliator. Section 77 makes it clear that the parties cannot initiate any arbitral or judicial ~~proceed~~ proceedings pending conciliation proceedings, unless it is necessary to protect the rights of the parties.

Costs and Deposits $\Rightarrow$ Sections 78 and 79 deal with costs and deposits respectively in relation to conciliation proceedings. Section 78(3) provides that the costs of the conciliation proceedings have to be borne equally by the parties. The conciliator at the end of ~~proceedings~~ proceedings is required to give notice to the parties in writing about the cost. Cost here means reasonable cost.

Section 79 provides that the conciliator before ~~@~~ initiating the proceedings may ask the parties to deposit a particular amount as he thinks fit as cost of proceedings. He may, during the proceedings also ask the parties to deposit additional amounts. This section also empowers conciliator to suspend proceedings, if the amount is not deposited within 30 days. Similarly, conciliator is under obligation to render accounts at the termination of proceedings.

and return the unspent amount to parties.

Role of Conciliator in other proceedings → Section 80 provides that no conciliator can act as arbitrator, representative or counsel in any arbitral or judicial proceeding relating to subject in which he has acted as conciliator. However, the parties by agreement may provide otherwise.

Scope of Mediation / Conciliation

The settlement of disputes through mediation / conciliation covers a wide range of issues. Among others they include commercial and civil disputes and claims for breach of obligations. These may be factual, legal or technical disputes that can range from simple disagreement to complex and substantial technical or commercial disputes. They may arise in relation to virtually any kind of disputes for ~~example~~ example - issues arising under contracts, commercial or corporate disputes, torts and breach of duty including negligence and insurance claims, consumer disputes, disagreements in business or professional relationships such as partnership, principal and agent etc. Industrial and labour disputes, family disputes including issues arising on separation and divorce, community and neighbourhood issues, public policy issues and social conflicts may also be taken up under mediation / conciliation.

There are many other fields in which mediation / conciliation is being used for settlement of disputes for example - mediation in academia, hospitals and health care systems for consumer disputes, to deal with farmer / lender debt ~~issues~~ issues and for many other purposes. Also in UK, Mediation is similarly used, in particular in settlement of international commercial disputes.

Which disputes can be settled by Mediation / Conciliation

Any dispute which has arisen or may arise between the parties in respect of a defined legal relationship, whether contractual or not, can be settled by mediation / conciliation. The parties may agree to seek an amicable settlement of their dispute by conciliation or mediation, except where a particular mode of settlement is prescribed by or under the law.

How can recourse to Conciliation be sought?

Conciliation / Mediation is a procedure mutually agreed to by the parties. Recourse to this procedure can be had:

→ By entering into an agreement for seeking a settlement of the dispute by conciliation. The agreement can be entered into either before a dispute has arisen or after the actual dispute arises. It can be an independent agreement or in the form of a clause in the main contract.

→ even where there is no agreement between the parties to seek settlement of the dispute by conciliation, a party desiring conciliation may send to the other party a written invitation to conciliate. There can be no conciliation if other party rejects the invitation.

Who can seek Conciliation?

Any of the parties, competent to contract can seek an amicable settlement of their dispute through conciliation. The parties may belong to the same or different nationalities.

Teacher Sign.

Conciliation Process:

The conciliator, upon his appointment calls upon the parties to present a written summary of their respective cases together with any relevant documents. After going through the summary of the case filed by each party, the conciliator holds a joint meeting with the parties where each party makes a brief oral presentation of its case.

Thereafter, the conciliator holds private meetings with each party separately to further clarify its case and to discuss the merits of the case, guiding the party in respect of the legal position and the requirements to substantiate the claims. While doing so, he always tries to bring the parties closer to an agreement. Where the parties are so inclined he may even suggest a settlement for acceptance by the parties. If the conciliator receives factual information from the party, he discloses the substance of that information to the other party so that it may have an opportunity to present its explanations, if any. When a party gives any information to the conciliator subject to the condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

There may be several rounds of such separate meetings. If the conciliator is of the view that there is no scope for agreement between the parties or where the parties or any of them indicates its unwillingness to pursue conciliation, the conciliator terminates the proceedings. Where the parties reach an agreement of settlement, the conciliator holds a final joint sitting for drawing up and signing a settlement agreement by the parties. The parties to such an agreement are bound by the settlement.

Once the Settlement agreement is signed, it is final and binding on the parties. Where Settlement is reached during the pendency of arbitral proceedings involving the same dispute and the law so provides, the Settlement agreement can be enforced in the same manner as an arbitral award on agreed terms.

The conciliator and the parties keep all matters relating to conciliation proceedings confidential. The only exception is - where its disclosure is necessary for the purposes of implementation and enforcement.

As a principle inherent in conciliation process, the conciliator and the parties are bound by certain discipline. Unless all the parties otherwise agree, the conciliator is estopped from acting as an arbitrator or as a representative of a party in any arbitral, judicial or other proceedings in which he acts as conciliator. The conciliator cannot also be presented by a party as witness in any such proceedings. Similarly, the parties are estopped from relying on or introducing as evidence in arbitral, judicial or other proceedings -

- a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- b) Admissions made by other party in the course of the conciliation proceedings;
- c) Proposals made by the conciliator;
- d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Where the confidentiality and discipline referred to above are not protected by the law, the parties may enter into contractual arrangement for that purpose.

The parties may initiate ~~conciliation~~ conciliation even during the pendency of any court or arbitration proceeding concerning the same dispute, without prejudice to their respective stand in those proceedings. If such conciliation succeeds, they report to the court or the arbitral Tribunal, as the case may be, which may pass decree / arbitral award in terms of such settlement.

Advantages of Conciliation / Mediation

- It offers a more flexible alternative, for a wide variety of disputes, small as well as large;
- It obviates the parties from seeking recourse to the Court system;
- It reserves the freedom of the parties to withdraw from the proceedings without prejudice to their legal position inter se at any stage of the proceedings;
- It is cost-effective and produces quicker resolution of dispute
- It facilitates the maintenance of continued relationship between the parties even after the settlement or at least during the period the settlement is attempted at - This feature is of particular significance to the parties who are required to continue their relationship despite the dispute.

→ It is committed to maintain confidentiality throughout the proceedings and thereafter of the dispute, the information exchanged, the offers and counter offers of solutions made and the settlement arrived at.

Pre-requisites for Conciliator

A conciliator is employed by the disputing parties to act as catalyst for better communication and problem solving. The conciliator is a person permitted by the parties to assist and empower them to reach their own lasting settlement. Therefore, the position of a conciliator requires fundamental abilities to act as such.

Building Trust

The building of an atmosphere of mutual respect and trust in the conciliation process, conciliator and between parties, is the key to successful conciliation. The openness and honesty of the parties enhance the chances of the success of conciliation. Since, the openness requires trust, the building of trust depends upon the conciliator's ability, competence, consistency, integrity and neutrality at every stage of conciliation process.

Impartiality

The conciliator must ensure that he has no interest in the ultimate outcome of the conciliation, because he is never a biased person. And it is required of him that he reinforced ~~the~~ impartiality by his ~~behaviour~~ behaviour at every stage of the process.

Neutrality

It refers to conciliator's behaviour and attitude during the whole process and the relationship between him and the parties. The indication of any relationship between conciliator and any of the parties disqualifies him from accepting the role of conciliator. The neutrality during the process requires conciliator to ensure that equal treatment is always accorded to the parties.

Hence, an impartial attitude and the ability to be neutral denotes that the conciliator is able to separate his personal views about the dispute and its outcome from the viewpoints of each of the parties and is able to concentrate exclusively upon assisting the parties towards settlement without overtly favouring one over the other. In this context it may be said that the consistent display of neutrality goes a long way in encouraging parties to move towards an agreement, as it helps create an environment of mutual trust, clarity and non-defensiveness.

Control of the process :-

Conciliator must have ability to exercise control of the process at every stage. The control requires conciliator to strike a balance and allow parties the freedom to fully express their case, associated feelings and preserving conducive atmosphere for negotiations. Although it is required of the conciliator not to jump in to stop aggressive interactions between the parties, particularly at the initial stages, yet there may be situations when parties are displaying such hostile behaviours that prevent them from moving any further towards settlement, in such situations

the conciliator is required to act very tactfully by bringing the parties back on the settlement track.

Flexibility and Adaptability

Acting as conciliator is not at all an easy task and to accomplish this task, he has to be adaptable and flexible. The adaptability in relation to conciliation process requires conciliator to adapt appropriately to changing events and act suitably. There is no straight jacket formula to be followed in conciliation and here lies the advantage of conciliation process as it can be customized by the conciliator to fit the needs of the participants.

Kinds of Mediation

Voluntary and Mandatory Mediation

The process of mediation is consensual in nature and depends upon the willingness of the parties concerned. Mediation is generally entered into by the parties voluntarily. However, in some situations parties may find themselves compelled to enter into this process of dispute resolution.

In some countries like USA, there are Court rules which provide for mediation to take place as an integral part of court proceeding. There are situations where some commercial contracts stipulate that the parties should initially try to resolve any dispute by mediation before arbitration or litigation is undertaken. ~~All~~ All that mandatory stipulation for mediation can achieve, whether in the family or commercial field, is to get the parties to a negotiating table but of course, it cannot compel them to negotiate. Whether the mediation is mandatory or voluntary, the parties reserve their right to have the matter resolved by adjudication if it not settled by agreement.

Facilitative / Evaluative Mediation

Mediation may be facilitative in which the parties are assisted and helped to explore options and enhance their mutual interests. It may also be evaluative where the mediator makes or obtains an assessment and expresses a view on the respective merits of the issues or any matter under discussion between parties. The evaluation is not binding but may influence the parties to reassess their respective positions with a view to their agreeing a resolution broadly in line with what they perceive as reflecting their respective rights and prospects.

Sole Mediation or Co-mediation

Generally, a sole mediator is preferred in comparison to two or three mediators. If there are 2 or 3 mediators they act jointly. Similarly the mediation of commercial, civil or any other kinds of issues are undertaken by a sole mediator. However, co-mediation can also be used for commercial and civil disputes in appropriate cases, particularly where a combination of different kinds of expertise is required. The use of co-mediation can be advantageous only in certain circumstances, particularly where a multidisciplinary approach is required. However, it is more expensive than sole mediation, involving 2 neutrals instead of one, though in some cases the use of co-mediators may be more effective covering more grounds. Sole mediation is more cost-effective.

Conciliation / Mediation Process

The parties before meeting the mediator / conciliator may require to have some preliminary communications with the conciliator or with the institution arranging the conciliation. Once the conciliator has explained the process and has dealt with any queries or reservations which the parties may have, it will easier to spend time meeting separately with each party. However, pre-meeting communications should be limited to procedural matters, venue, timetable for the conciliation, documents, information required, formulation of a preliminary programme for obtaining summaries of the parties in respective cases and contentions. At this stage of the conciliation process, the conciliator should ensure that all necessary parties attend the conciliation. Where corporate or institutional parties are involved, their representatives need to have authority to negotiate and reach agreement.

Meeting with the Parties

The initial joint meeting generally involves the conciliator making an opening address to the parties, and explaining the principles, procedures and ground

Rules of the Conciliation.

The mediator / conciliator may also consult the parties about the preparation of an agreed agenda or the agenda may be formulated by the mediator personally, as working guidelines.

Presentation / Statements by the Parties

The parties, at this stage of the process, present their case before the conciliator. The manner of presentation depends upon various factors, including ~~factors~~ whether it is the party or the representative or agent doing so; individual personality, style, skills and strategy; the nature and complexity of the issues; and the emotional factors involved. Most ~~ideally~~ ideally, the presentation should be clear and well ~~reasoned~~ reasoned and explain their claims or grievances and impart the facts and any technical issues precisely.

Section 65 of the Act contains provisions regarding the submission of statements describing nature of dispute and points at issue. The mediator should exercise his authority and judgement to ensure that discussions do not degenerate into hostile exchanges which might make the process more difficult.

Relevant information

Submission of information relevant to the dispute is an important part of the process. Information that is required for the purpose may include non-contentious facts about the parties and the background to the dispute may be obtained ~~by the~~ from an ~~initial~~ initial referral form or from statements of facts furnished by the parties. Relevant documents, including copy of pleadings or affidavits where adversarial proceedings are under way, may be obtained by the mediator from the parties. The conciliator may also request parties to submit statements comprising identification of issues and respective

statements of the parties and technical information, which may include expert opinion, legal opinions, valuations etc.

Facilitating Negotiations

This is substantive phase of the process where the conciliator/mediator helps the parties to communicate with one another, either directly or in joint session, or indirectly through separate meetings, and facilitates their ~~negotiate~~ negotiating with one another with a view to narrowing their differences and eventually resolving their disputes. During the negotiations the mediator/conciliator can encourage and help the parties to generate and consider their options, and develop them into viable course of action. In most cases the parties themselves should suggest options, but the mediator can often add to these suggested options. The development of options is an intrinsic part of the problem solving ~~approach~~ approach which characterises mediation. Section 72 of the Act provides that each party may submit to conciliator suggestion for settlement.

The conciliator/mediator is required to use various skills at all levels of the proceedings but especially during negotiating process. The skill of the mediator is an important ingredient in the mediation process. A mediator should, in addition to the usual facilitative role, also adopt some element of evaluation of the issues. The object of any evaluation is not to sit in judgement in the matter but to facilitate realistic negotiations by helping the parties to reassess their respective positions and prospects of success in the event of adjudication, particularly where there is dead lock. The mediation may continue for consecutive days if necessary until the parties reach an agreement or decide to adjourn or abandon the mediation. In some ~~new~~ cases, the mediation may be conducted at agreed intervals, for example: weekly or fortnightly with agreed action being taken between meetings.

Deadlock / Impasse Strategies

Deadlock is a situation where the parties find themselves unable to extricate. When negotiations come to a halt due to specific differences which seem irreconcilable and the mediation seems set to terminate, the mediator should try some appropriate strategies to help the parties back onto the negotiable table. Mediators need to devise strategies specific to the deadlock. Where there is any blocking issue, it may help to suggest that the parties refer it to an expert for a non-binding opinion while the mediation is pending. In this context, the Act contains reference to expert advice under section 78. The expert could, in a suitable case be asked to attend a mediation meeting to answer questions and to help the parties through their difficulty. The mediator can help parties by identifying and normalizing differences of perception. If the parties cannot find a long-term solution to their differences, they can be suggested to formulate short term agreements and to review the position after a particular period of time. Where the parties remain stuck, adjudication may be necessary and appropriate.

Termination of Mediation / Conciliation

Mediation can be terminated where all the issues have been totally resolved or the parties may have resolved some issues and decide to take the others into a different ADR forum or process. The parties or any of them can also terminate the mediation even though some or all of the issues are unresolved. The mediator himself may consider the continuance of mediation in a appropriate case and may decide to terminate it.

Recording of Settlement Agreement

At the conclusion of the mediation / conciliation proceedings, the mediator /

Conciliator has to consider as to whether a written record of the outcome is needed. If the mediation ends without any of the issues being resolved, there may be no need to record anything in writing, though in some cases the parties may nevertheless wish to have an informal written summary of the mediation, providing information which might be useful to them in subsequently trying to narrow down issues and in facilitating any future bilateral negotiations.

Where there is complete or partial resolution of issues a written document is required to record matters resolved. Section 73 also supports this view. If requested by parties the conciliator may draw up, assist, the parties in drawing up the settlement agreement. After signing of the agreement by parties, the conciliator authenticates the agreement and furnishes a copy to each of the parties. The agreement signed by the parties and authenticated by a conciliator is binding on the parties and shall have status and effect of an arbitral award and shall be enforceable as decree of Court.

The document signed by the parties at the conclusion of the mediation/ Conciliation may either record the principles of their agreement and/or the key points. As a general rule, it is usually appropriate and important that the document be precise, simple and clear to avoid subsequent misunderstanding and disagreement.

Costs of Conciliation

After termination of Conciliation proceedings the Conciliator fixes the cost of proceedings and gives written notice to the parties. Section 78(2) of the Act specifically defines the 'costs' as reasonable cost relating to fee and expenses of conciliator and witness and expert advice requested by the institution for appointing conciliator or

Arranging administrative assistance to facilitate the conduct of the Conciliation proceeding in accordance with Section 64/68 of the Act.

Deposits by the Parties

The conciliator, at the initiation of the proceedings may direct the parties to deposit an equal amount as an advance for the costs which may be incurred. Even during the proceedings he may direct each party to deposit supplementary amount. In this context Section 79 of the Act empowers the conciliator to suspend the proceedings or declare in writing the termination of Conciliation proceedings, if the deposits as directed by the conciliator, have not been paid in full by both the parties within a period of 30 days.

Accounts

Under Section 79(4) of the Act the conciliator is under obligation, upon the termination of proceedings, to render accounts to parties about the deposits he had received during the proceedings and also return the unexpended balance, if any to the parties.

Conciliation Court System

In respect of suits involving disputes as to inheritance, succession, partition, maintenance and those concerning wills, which are generally blood relations, the Law Commission recommended the Conciliation Court System must be made compulsory by an effective amendment to the Code of Civil Procedure on the lines of Rule 5B, Order XXVII, Rule 5B of Order XXVII of the CPC makes it obligatory for the Court in a suit against the Government or public officer, to assist in

arriving at a settlement in the first instance. In respect of all other kinds of suits, it was recommended that an attempt should be made at the pre-trial stage by the lawyers of respective parties for a reasonable settlement of the dispute through negotiations and that in case the dispute is not resolved, litigation may be resorted to but in that case the matter should be referred to Conciliation Court and if such Court finds that its persuasion to the parties to go in for a amicable settlement has failed, the party who was recalcitrant and unjust in approach be fined with heavy costs.

Conciliation under the Industrial Disputes Act, 1947

While it also ~~also~~ addressed strikes in public utility services and general strikes affecting the community as a whole, its main purpose was to create a conciliation machinery to facilitate the peaceful resolution of industrial disputes. ~~Just~~ Initially, the law made provision for only ad hoc Conciliation Boards and Courts of enquiry. However, in the year 1938, an amendment authorized the Central and Provincial Governments to appoint Conciliation officers for mediating in or promoting the settlement of industrial disputes. The Supreme Court in the case of RS Sharma's case summed up the role of a Conciliation officer as "Even though a Conciliation officer is incompetent to adjudicate upon the dispute between the management and its workman, he is expected to assist them in arriving a fair and ~~Mediation~~ just settlement."

Mediation

Mediation a form of ADR aims to assist 2 or more disputants in reaching an agreement. The parties themselves determine the conditions of any settlements reached - rather than accepting something imposed by a third party. The disputes may involve states, organizations, ~~communities~~ communities or other representatives with a vested interest in the outcome.

Normally, all parties must view the mediator as impartial. Mediation can be used in variety of disputes such as commercial, legal, community, work place etc.

Negotiation

Negotiation is a dialogue intended to resolve disputes, to produce an agreement upon courses of action, to bargain for individual or collective advantage or to craft outcomes to satisfy various interests. It occurs in business, NPOs, legal proceedings, government branches etc. Those who work in negotiations ~~personally~~ professionally are called negotiators.

Jok Adalat

While Arbitration and Conciliation Act, 1996 is fairly standard approach towards ADR, the Jok Adalat system under National Legal Services Authority Act, 1987 is uniquely an Indian approach.

It roughly means "People's Court". India has had a long history of resolving disputes through the mediation of village elders. The system of Jok Adalat is based on Gandhian principles. This is a non-adversarial system, where by mock courts (Jok Adalats) are held by State Authority, District Authority, Supreme Court / High Court Legal Services Committee periodically for exercising ~~the~~ ^{such} jurisdiction as they think fit. It does not ^{have} ~~have~~ jurisdiction on matters related to non-compoundable offences.

These are usually presided ~~over~~ by retired judge, social activists or members of legal profession. There is no court fee and no rigid procedural requirements. Cases that are pending in regular courts can be transferred to Jok Adalats if both the parties agree. The focus in Jok Adalat is compromise. If no compromise is reached, matter goes back of the court. However, if compromise is reached, an award is made and is binding on the parties. It is enforced as a decree of civil court. Jok Adalats are deemed as Civil Courts. The first Jok Adalat was held in Chennai in 1986. It is very effective in settlement of money claims. It is boon to the litigant public, where they can