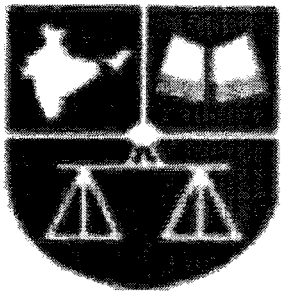


NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

Bangalore

SCOPE FOR ALTERNATE DISPUTE RESOLUTION IN FAMILY DISPUTES: A STUDY WITH SPECIAL REFERENCE TO HINDU FAMILIES IN INDIA

DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF LL.M (BUSINESS LAW)

UNDER THE GUIDANCE OF PROF. T. DEVIDAS

SUBMITTED BY:

SONALI PRITHVIRAJ RAUT

I.D. No. 443

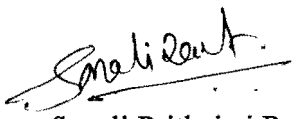
(2012)

DECLARATION

I, the undersigned, hereby declare that the work titled **"Scope for Alternate Dispute Resolution in Family Disputes: A Study with Special Reference to Hindu Families in India"** is the product of the research carried out by me under the guidance and supervision of Prof. T. Devidas at National Law School of India University, Bangalore.

I hereby declare that this work is original, except for such assistance, taken from such sources, as have been referred to or mentioned at the respective places, and for which necessary acknowledgements have been made.

I further declare that this work has not been submitted either in part or in whole for any degree or diploma at any other university.



DATE: 07/06/2012

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LL.M-II (B.L)

CERTIFICATE

This is to certify that this Dissertation, **"Scope for Alternate Dispute Resolution in Family Disputes: A Study with Special Reference to Hindu Families in India"** submitted by Ms. Sonali Prithviraj Raut (I.D.No. 443) in partial fulfillment of the requirements for the degree of Masters of Laws of National Law School of India University, Bangalore is the product of bona-fide research, carried out under my guidance and supervision. This Dissertation or any part thereof has not been submitted elsewhere for any other degree.

DATE: 07/06/2012

PLACE: Bangalore

Prof. T. Devidas

(NLSIU, Bangalore)

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Lastly I offer my regards to all of those who supported me in any respect during the completion of my work.

Errors and omissions, if any, in this work belong solely to me.

Sonali Prithviraj Raut

INTRODUCTORYCONSIDERATION

OBJECTIVES

1. To study the mechanism of family dispute resolution as prevalent in Ancient India.
2. To study the changes those have happened in it over a period of time and to identify its causes and consequences.
3. To evaluate the effectiveness of an adjudication in resolving family disputes.
4. To assess the desirability of using Alternate Dispute Resolution mechanism for family disputes.

LIMITATIONS

This study is limited to family disputes with special focus on Hindu families in India.

RESEARCH QUESTIONS

1. What was the conventional family dispute resolution mechanism among Hindus?
2. Does family dispute in India witness a shift of emphasis from duties to rights?
3. Is the shift influenced by the adversarial method of dispute resolution?
4. Can Alternate Dispute Resolution mechanisms be best suited for settling family disputes in Hindu families?
5. Can the culture of peaceful settlement of disputes earlier prevalent in Hindu Families be restored under Article 29(1) of the Constitution of India?
6. What are the steps to be taken or changes to be made for successful implementation of Alternate Dispute Resolution mechanism for resolving family disputes in Indian Hindu Families?

HYPOTHESIS

1. The culture of peaceful settlement of family disputes among Hindus has been destroyed by the introduction of adversarial method of dispute resolution.
2. The culture of peaceful settlement of disputes earlier prevalent in Hindu Families can be restored under Article 29(1) of the Constitution of India.
3. Mediation and conciliation are the best suitable methods for family disputes resolution.

METHOD

The method of research adopted for the study is essentially doctrinal and factual data are used to strengthen the study.

SOURCE OF DATA

To accomplish the aforesaid objectives I have heavily relied on the secondary data obtained from various books. I also went through numerous articles related to the topic of my research.

METHOD OF CITATION

A uniform mode of citation has been followed throughout the paper. The Harvard Bluebook style of citation has been used by the researcher.

TABLE OF CONTENTS

HISTORICAL BACKDROP

CHAPTER I- A HISTORICAL BACKDROP

This chapter seeks to find out answers for two important questions, as follows

1. What was the conventional family dispute resolution mechanism among Hindus?
2. What were the family dispute resolution mechanisms in other major religious groups in India?

1.1 Methods of dispute resolution among Hindus in India

Understanding the Hindu perspective on Dispute Resolution

Ancient India placed emphasis on *Dharma*. According to philosophy of *dharma* if everyone follows his or her duty there will be fewer chances of frictions resulting into disputes.

In order to understand the Hindu perspective on dispute resolution, *Bhagwat Gita* (a part of Mahabharata) can be referred to. It reveals that there are two levels of any dispute resolution. The first is resolving internal dispute which refers to the dispute between soul and ego of the person. It can be resolved by following teachings of Bhagwat Gita and transcendental knowledge i.e. knowledge beyond experience. The second level involves resolution of external dispute i.e. dispute between two distinct persons. In resolving external dispute one should not sacrifice his or her own interest because doing so is considered to be worse than the death of the person. One should try peaceful means for settlement of dispute and meet his needs. This has to be done without considering the probability of success or failure in achieving the desired results by using such means. However if these efforts failed, then one can take resort to war.[1]

[1]Alok Sikand, ADR Dharma-Seeking a Hindu Perspective on Dispute Resolution from the Holy Scriptures of the Mahabharata and the Bhagvad Gita, 7(2), Pepperdine Dispute Resolution Law Journal, 323, (2007) p. 371.

This guidance provided in *Gita* becomes useful for family dispute resolution because the central dispute in Mahabharata was also a family dispute i.e. right to kingship. Above mentioned teaching of *Gita* reveals that in resolving such dispute interest of both the parties must be served and no party should sacrifice his or her interest. For this, means of amicable settlement like communication can be resorted to. The role played by Lord Krishna in Mahabharata can be equated with the role of present day mediator who tried to find out a solution for the dispute peacefully. Only when the attempt at amicable settlement fails one can take recourse to coercive methods. In the present context the coercive steps can be equated with litigation. It can be concluded that litigation should always be preceded by efforts at an amicable resolution.

a. ANCIENT PERIOD

Ancient period was marked with two types of courts i.e. official courts and popular courts.

Official courts: According to *Dharmasustras* and *Arthashastra*, they include courts as mentioned below in the order of hierarchy,

1. King: According to Dharmasustras and Nitisatras, he was the highest source of justice and highest court of appeal. In practice King used to delegate his functions to the Chief Justice or any other Royal officer due to his busy schedule.
2. City courts: The decisions given by city courts could be appealed in King's court.
3. Village Courts: This was the lowest official court, the decision of which was appealed in City Court.

Other than above mentioned official courts there were popular courts functioning in Ancient India. These courts were entrusted with the function of resolving disputes of lesser importance which include family disputes. In Vedic period probably *sabha* functioned as popular court. In Arthashastra polity number of matters relating to women, old people, children were decided by

Dharmasthas i.e. unofficial jurors, but the nature of these matters, the manner in which *Dharmasthas* were selected and their number is not known. These courts were first time mentioned in *Yajnavalkya Smritis* and reference to them can be found in *Brihaspati* too.

They were mainly of three types

1. ***Kula***: *Mitakshara* defines them as consisting of a group of relations, near or distant. They were joint families. If there was quarrel or any dispute between two members of family an informal body of elders of the same family known as '*Kula'* used to attempt the settlement. *Kula* could be a court taking cognizance of quarrels arising in family units of ten, twenty or forty villages. The *Gopa* was in charge of such units and they might have had an informal court of their own, consisting of elder family members. This mechanism resembles to mediation or conciliation.
2. ***Sreni:*** If the '*Kula*' could not settle the dispute it was referred to the *Sreni* court. Mahabharata makes mention of *Sreni*. They had their own executive committees of four or five members.
3. ***Puga*** court: The people staying in the same village but belonging to different castes and professions formed *Puga*. They were known as *Gota* court in Maharashtra.[2]

   It was a policy of government in ancient India to encourage these popular courts and to enforce their decisions. Thought they are essentially non-officials, they had the royal authority behind them.[3]

Panchayat system

The present institution of Lok Adalats that uses negotiation and conciliation as methods of dispute resolution has its roots in Panchayat system prevalent in ancient India where the elder

[2] Justice S. S. Dhavan, The Indian Judicial System A Historical Survey, *available at* www.allahabadhighcourt.in/event/TheIndianJudicialSystem_SSDhavan.pdf (last visited on May15, 2012)

[3] A.S. Altekar, State and Government in Ancient India, Motilal Banarsidass, New Delhi (2002) pp. 247-254

villagers helped other villagers to resolve their dispute. Those disputes included family disputes like disputes over property, matrimonial disputes etc.

Dispute Resolution by Karta

Role of Karta

The joint family system was a characteristic of ancient India. In Hindu Joint Families, the senior most male member used to act as a *karta*. He had managerial power of family. Being a head of family, he used to advice other members on their duties and obligations. In case of any dispute among family members usually karta was the first person to be consulted. Most of such disputes were resolved by karta. Due to his age and power other members used to respect and obey him. The main reason behind this dispute settlement within four walls was that, the family disputes were considered to be private matters. It was a matter of reputation of a family and connected to its social status. Therefore the emphasis was on settling such disputes privately and secretly.[4]

The Karta represents the family in all matters legal, social and religious. His acts are binding on the family. He has following powers in connection with dispute resolution,

Power to compromise: The Karta has the power to compromise in all disputes relating to the family property or management. His acts are binding on the members of the family; but in case of a minor, it has to be approved by the court under O.32, Rule 7, and C.P.C because the Court is the universal guardian of all minors. The compromise made by the Karta can be challenged in court by any of the coparceners only on the ground of malafide.

Power to refer a dispute to Arbitration: The Karta has the power to refer any dispute with respect to family property or management to an arbitration council and the decision is binding on the family.

[4] This conclusion is drawn from discussions with some elderly people.

Mediation/Arbitration/conciliation

As seen earlier karta had significant role to play in settling family disputes, in practice he used to play the role of arbitrator as decision given by him were binding on family members. However there was no legal force behind his decisions but as discussed earlier they were obeyed due to his seniority and respect.

It shows that Ancient system of dispute resolution made a significant contribution, in reaching the present mediation/conciliation mechanism for resolving family disputes. Village Level Institutions like *Kula* where disputes were resolved by elders in their particular caste or *Puga* and *panchayat* system which was an informal way of mediation played the leading role. In those days disputes hardly reached courts as decisions given by the elderly council were respected by all.[5]

Evidence used in family disputes.

In family disputes like dispute on inheritance, partition the documentary evidence in the form of family registers was used. This system of maintaining family registers is still in existence.

Hardwar's Brahman pandas are professional genealogists. They keep registers recording births, marriages and deaths in their patron's families. These registers also provide information on patron's residence, caste and sectarian status as well as kind of rituals performed while in Hardwar and size of donation paid to the pandas and other ritualists. These records can be used as evidence in legal cases concerning property rights and inheritance. Having such ancestry recorded by pandas in Hardwar and in other pilgrimage places is a source of pride and prestige for Hindus.[6]

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[5] VG Ranganath, *Alternative Dispute Resolution and Family Dispute Resolution* (May 8, 2010) lawyersclubindia, *available at* http://www.lawyersclubindia.com/articles/Alternative-Dispute-Resolution-and-Family-Dispute-Resolution-2857.asp (Last visited on May 24, 2012); Universal's Guide to Judicial Service Examination, Universal Law Publishing Co. Pvt. Ltd., New Delhi, (8th edn., 2011) p. 1203;

[6] Lise McKean, Divine Enterprise: Gurus and the Hindu Nationalist Movement, University of Chicago Press, Chicago (1996), p. 151

b. MUGHAL PERIOD

The Muslim rulers brought a new religion, a new civilization, and a new social system in India with them. India had an efficient system of government in Mughal Empire as a result of which the judicial system took shape. *Qazi* was the unit of judicial administration. This office was borrowed from the Caliphate. Every town and every village large enough to be classed as a *Qasba* had its own *Qazi*. At the head of the judicial administration was the office of Supreme *Qazi* of the empire known as *Qazi-ul-quzat*. The qualification prescribed for *Qazi* was, he had to be "a Muslim scholar of blameless life, thoroughly conversant with the prescriptions of the sacred law."[7]

The popular court however remained a distinct institution even during Mughal rule in India. Until the advent of British rule the popular courts were effectively functioning in India. The disputes in villages and even in cities were settled by popular court of the caste within which the dispute arose. These courts were empowered to adjudicate according to the customs and usages of region, caste or family. They had both civil and criminal jurisdiction. Villagers had to settle their disputes locally and appeal could be made to the Caste Court. Arbitration of an impartial umpire known as *Salis* was also one of the ways to settle private disputes. During Mughal period the lengthy and tedious process of litigation was discouraged. Nearly three fourth of the population was subjected to their own panchayats.[8]

7Encyclopedia of Islam, Vol. II, (B. Lewis et al eds.), (1998) p. 606

8 U.B. Singh, Administrative System in India: Vedic Age to 1947, A.P.H.Publishing Corporation, New Delhi (1998) p. 124

c. BRITISH PERIOD

With the advent of the British regime, the people oriented dispute resolution was started. During initial period Britishers delegated magisterial power to the native people as they were unaware of the local language and local laws. After reorganization of Courts in 1861, justice was administered at higher level by judges trained in Common law. Gradually people's court lost their importance and adjudicatory process became more and more formal. It had two fold effect, first it detached the large number of masses from administration of justice that were traditionally followed and secondly, it created class of people called legal professionals who were experts in the technicalities. However British rulers did realize the disadvantages of this new system to some extent as a result of which they even tried to revive the functioning of the people's court in the early 19th century. The Royal Commission upon decentralization was appointed, that recommended formation of village organizations. It suggested that "It is most desirable to constitute and develop village Panchayats for administration of certain local affairs within the villages. The headman of the village, where one recognized should be ex-officio chairman of the Panchayat, other members should be obtained by the informed system of election by the villagers...The functions of the Panchayat must largely be determined by local circumstances and experience."[9]

On the failure of establishing a Panchayati Raj Gandhi said "*Panchayat is our old and beautiful work, which has got the sweetness of ancient way of life. Its real meaning is that people of villages used to elect five persons for the Panchayat and they used to administer the whole*

[9] Committees and Commissions in Pre-independence India 1836-1947, Vol. IV, (M. Anees Chishti ed.), Mittal Publications, New Delhi (2001), p. 93

dispute for mediation. Here the example of Hazrat Usman can be cited who appointed mediator in family dispute. A matter of Hazrat Aquil (s/o Abu Talib) and his wife Fatma (d/o Utba) came before his court where he appointed Ibn Abbas as mediator from the family of husband and Hazrat Mauia from family of wife. He empowered the arbitrator to decide the dispute.

However the scholars of Islamic law have different opinions about the power of arbitrator or mediator so appointed. *Hanif* School and *Shafi* School Scholars believe that he does not have power to decide the dispute, but can only suggest the agreeable terms for resolution of disputes. It is at the discretion of the parties to accept it or not. However parties can empower the persons so appointed to decide the dispute and in that case the decision given is binding on the parties. The scholars belonging to other Schools believe that arbitrators/ mediators so appointed have power to decide the matter. It shows that there is difference of opinion regarding the role of persons so appointed. According to *Hanif* and *Shafi* School they are only mediators whereas according to other Schools they are arbitrators.[11]

The Islamic law allows a case to refer to an arbitrator who must possess the qualification of *Kazi*. The moment the award is given by arbitrator it becomes binding on the parties; however parties can retract before making of award. The *Qazi* possess the power to declare the award null if he forms contrary opinion. But if he is of the same opinion he may put the award into execution.[12]

It shows that similarly as Hinduism, Islam has a culture of peaceful settlement of family dispute.

B. CHRISTIANS

The Bible is the Holy book of Christians and it contains a plan to resolve family strife. Following are some of the specific guidelines to the people to lead happy life and avoiding disputes.

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[11] *Id,* at 7

[12] Al-Haj Mahomed Ullah, the Administration of Justice in Islam an Introduction to the Muslim Conception of the State, Kitab Bhavan, New Delhi (1986), p79

A. Follow the Bible Instead of Feelings, Human Wisdom, etc.

Proverbs 3:5, 6 states that

5. "Trust in the Lord with all your heart and lean not on your own understanding;

6. In all your ways submit to him, and he will make your paths straight"

It means we should not lean on our own human understanding as trouble couples seek source of guidance outside Bible very often.

John 3: 16 God so loved the world that He gave Himself for it.

1 John 3:14-18 if you see your brother in need and don't give what is needed, you don't have love.

It shows that basic requirement in solving family problem is a willingness to give of ourselves for the good of others. The fundamental thought behind this is we should give up our own desires for the goods of others even when they are not acting in the way we think they should. Even though we are convinced that we are not root cause of a problem, we should ask ourselves honestly what we can do to improve it.

B. Divorce and separation are not options

Romans 7:2, 3 Matthew 5:31, 32: 19:3-9: 1 marriage is a life time commitment. One can spiritually divorce a mate only if it is done because he/she has committed fornication.

C. Discuss the problem

Ephesians 5:25ff- *The husband is the head as Jesus is head of the church. . But God listen to us in prayers* (Phil. 4:6f)

James 1:19- *Every man should be swift to hear, slow to speak, slow to anger.*

1 Peter 3:7- *The husband is to treat his wife with understanding. But since men are not mind-readers, this requires listening to her views.*

Matthew 5:23, 24- One who has been accused of sin must be willing to talk to seek reconciliation. Again it surely applies in home. Both the person has been wronged and one accused of wrong are under obligation to discuss the matter. The resolution of conflict in the home must begin with discussion. Again the timing of such discussion is also important. Discussion should not be made in front of the children or when any one of the parties is extremely angry.[13]

D. Goal of the discussion

People should speak to reconcile and not to hurt.[14] The purpose must be to find Scriptural resolution.[15]

E. Honestly examine the evidence

John 7:24 - "Do *not judge according to appearance, but judge with righteous judgment.*"

Honestly examine your own conduct, motives etc.

It is necessary to consider the possibility of yours being a wrong or of contribution to the problem.

Compromise and overlook differences of view point, where possible.

1 Corinthians 13:4f states that "*Love suffers long and is kind*"

The combined reading of **James 3: 14-18, Matthew 5:9, Romans 12:17-21; 1Peter 3:11** directs to seek sincerely a peaceable resolution to the problem. We must end the conflict even if we have to sacrifice our own desires.

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[13] THE BIBLE, Matt 18:15-17; Prov. 10:17; Gal.6:1
[14] THE BIBLE, Matthew 5:24
[15] THE BIBLE, Lev. 19:18

According to **Luke 17:3, 4** when one has sinned against us and confesses, we must forgive, even seven times a day if necessary.

F. Seek help if necessary

Galatians 6:2- Bear one another's burden. The first source of help should be another Christians.

Matthew 18:15, 16- If your brother sins against you, first discuss it privately with him. But if this does not resolve it, a help from one or two Christians can be taken.

It suggests the mediation by one or two other Christians. In case of failure of this, matter can be taken to the Church.

Matthew 18:17 states that "*And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as a heathen man and a publican.*"

The above text of Bible and its interpretation shows that Bible has suggested following procedure to resolve any dispute which includes family disputes. Even though family disputes are not specifically mentioned they are not even expressly excluded.

1. Discussion and compromise between the disputants
2. Mediation by one or two Christians
3. Resolution by Church[16]

C. SIKHS

The Sikhism has a belief of *Nam Simran* which has all elements of love, respect, purity, pride and scarifies. The traditional format of dispute resolution in Sikhism is the five elder members of Sikh community called as *Punj Piari* hold a meeting and they try to solve the dispute amicably.[17] Guru Nanak referred to five *khands*, i.e. stages in spiritual development and called a spiritually awakened person a *Punj*. The system of *Punj Piari* is equivalent to *Panchayat*.

[16] D. E. Pratte, Solving Marriage Conflict: A Bible Plan to Resolve Family Strife and Alienation available at http://www.gospelway.com/family/marriage_conflict.php (Last visited on April 23, 2012)

[17] http://yogibhajan.tripod.com

Akal Takht is the supreme seat of authority of Sikhs from where the Hukamnamas (edicts or writs) are announced to provide guidance or clarification on any point of Sikh doctrine or practice.

The kinship system of *Sikhs* is based on the *biradaries. Biradari* is a Persian term which means brotherhood. Persons controlling economic sources mainly land used to hold the key positions in *biradari.* They were leaders of biradari and called as Chaudhary. They often exerted social control through biradari panchayat which had a power to pronounce a judgment on wide variety of issues land disputes, matrimonial disagreement and any matter affecting the cohesion and honour of the biradari.[18]

From the above discussion it is evident that, the system of amicable settlement of disputes was present in not only Hindus but also in other religions like Islam, Christianity and Sikhism. Therefore one can say that the peaceful settlement of dispute is the culture of Indian society.

[18] Harjot Oberoi, The Construction of Religious Boundaries Culture, Identity and Diversity in Sikh Tradition, Oxford University Press, New Delhi (1997), pp. 82-85

CODIFICATION OF HINDU LAW

CHAPTER-II CODIFICATION OF HINDU LAW

This chapter seeks to discuss the impact of codification of personal law of Hindus on family disputes. For this inquiry into following questions is necessary

a. Whether the codification has brought any substantial changes in the pattern of rights and duties of family members?
b. Whether dispute resolution practices prevalent in Hindu community earlier have got affected by codification?

A Shift from Duties to Rights

Britishers introduced the system of formal adjudication in India. Although adjudication has its own advantages it has brought a significant change in the very foundation of law i.e. to say in pre British era Hindu law laid emphasis on duties (*dharma*) of individuals whereas, English jurisprudence lays emphasis on rights of the individuals. In fact, the term authority i.e. *adhikar* doesn't occur anywhere in the whole of the *Anushasan Parva*. Indian jurisprudence is founded on theories which emphasises that rights are corollaries of the duties, for example even freedom of speech is recognised as to serve a duty to speak without fear. On the other hand, Western jurisprudence emphasises on rights, natural or legal, though every right must have a corresponding duty. Although in both the systems rights and duties are correlated the difference between the emphases on them affects, to some extent the way of thinking of people, their expectations from the legal system which ultimately affect their social life due to the reciprocity between the law and social change. This can be explained with the example of marriage. In Hindu law marriage is recognised as a duty, a social obligation of the person, which creates a sense of responsibility to perform the duty with best possible efforts. Whereas under English

jurisprudence, a marriage being considered as right each partner tries to get out of it as much as he or she can. The increasing rate of divorce is the result of neglecting the duty aspect of marriage.[19]

Codification process

a. Mughal Period

Mughal Courts had exclusive jurisdiction in the matters considered to be crimes against the rulers and fiscal administration. Most of the family disputes were kept out of the jurisdiction of Muslim officials. It shows that Muslim Rulers recognised the traditional community based system for dispute resolution. They did not try to interfere in the personal laws of Hindus and their practices.

b. Commencement of Codification by Britishers

It was the British era when this community based dispute resolution mechanism started losing its importance. The reason was Britishers came from a society where some aspects of family as well as community affairs came under the jurisdiction of canon law; and they looked for similar authority in India. They were surprised and confused at the huge diversity of India which started the new study of *shastras* to help the Englishmen to develop a set of rules for governing contemporary Indian society. [20]

During the tenure of first Governor-General of India, Warren Hastings disputes regarding inheritance, marriage, caste and religious usages or institutions were to be settled according to the laws of shastras. Britishers assumed that just as the English marriage law was based on Biblical tenets, so must the personal laws of other communities draw their legitimacy from fundamental religious tenets. In England all matters of marriage and divorce and questions of

[19] Supra, Note 3; Art. 12, The European Convention on Human Rights, 1950

[20] Madhu Kishwar, The Hindu Law: Myth and Reality, Vol. 29 (33), Economic and Political Weekly, (1994), p. 2145

testaments and distribution of goods were within the exclusive jurisdiction of the Bishop's court. The error committed by Britishers including Sir William Jones was they considered all Brahmins as Priests. In fact very few of them were priests and there were some priests who were not Brahmins. Not a single or uniform body of Hindu pope was there to legitimize a uniform code for all the diverse communities in India. Another error committed by Britishers was that they took no steps to collect evidence of local or caste customs. This resulted in to wide discrepancies between the opinions of pundits in different courts. East India Company began to train *pundits* for its own service and started patronizing shastric education to arrive at a definitive grasp of Indian legal system.[21]

In 1772 Hasting hired a group of eleven *pundits* for the purpose of creating a digest of Hindu law. He sent this work to London in March 1775. It was printed in London under the title A Code of Gentoo Law or Ordinations of the Pundits. This could be seen as the first serious, though not accurate, attempt of codification of Hindu law by the judges at all levels. It included the topics on debt, inheritance, adulteries, duties of women etc.[22]

British rulers claimed that what they did was only interpretation of the Hindu law and no way had they interfered with the same. However by the very process of setting their law courts for the interpretation of law and adjudication of family disputes, they altered the law. For instance according to *Vijnaneshwara*, in Mitakshara, *stridhan* is explicitly defined as to include wealth acquired by inheritance and partition. But Privy Council discarded this and decided that neither wealth inherited from a female or inherited from male becomes women's property, it revert back to the heirs of a person from whom it is inherited[23]. Another instance is in Bhagwan v. Warubai[24]

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[21] *Id*
[22] *Id*
[23] (1867) 11 MAI 487
[24] (1908) 32 Bombay 300

Bombay High Court rejected the *Balamabhatti* of the Maharashtra School which was favourable to women. It was written by a woman named Lakshmidevi who recognised the rights of women. Over a time the judgments of the law courts became more authoritative than shastras from whom they supposedly derive their authority. In the beginning these judgment affected only parties to the dispute. However slowly they became binding on the entire community due to doctrine of precedents. This court adjudication added the rigidity to the Hindu law which was not present before in traditional system of dispute resolution.

The most undesirable change was destruction of the system of arbitration and settlement. As a result of this change a distant law court functioning in a foreign language following procedures imported from foreign country started the administration of law which had been formerly be understood and decided at the community level. Many times the translation and consequently interpretation of text resulted in to mistranslation and misinterpretation. The power of deciding dispute was completely taken out of people's hand and they were left to the mercy of English educated lawyers.[25]

Hindu Code

The codification of Hindu personal law in post Constitutional era was hailed as the symbol of the Government's commitment to the principle of gender equality and non discrimination in the Constitution of India.

[25] *Supra*, Note 21 at 2149

Changes brought about in dispute resolution methods by Hindu Code

Hindu Marriage Act, 1955

Hindu Marriage Act, 1955 confers the jurisdiction on District Court to deal with the matters arising under the same.[26] It introduced a notion of adversarial divorce adopted from the Britishers and failed to consider the practices prevalent earlier. It was pointed out by several members of Parliament that framers of Hindu Marriage Act were mistaken in thinking that English notions and practices were more advanced than that of India. Although it is a common belief that divorce is introduced in Hinduism by Hindu Marriage Act, 1955 it is not true. The formal divorce was not unknown to Hindu Community. Even in the higher castes the system of divorce was in existence.[27] Following statements made by various members of Parliament can be considered in order to make this point more clear.

A woman member Kamala Chaudhary said: *"...in eighty per cent of our community I have seen that a panchayat is called and separation is effected within a minute's time... in certain communities even panchayat does not assemble... Males and females are quite free, and leaving each other, they can remarry whomsoever they like... the greatest benefit that we would have of this Bill is that our backward communities which have no cultural background will become cultured and their moral standard will be raised"* [28]

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[26] Sec.19.Court to which petition shall be presented. Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction--
(i)the marriage was solemnized, or
(ii)the respondent, at the time of the presentation of the petition, resides, or
(iii)the parties to the marriage last resided together, or
(iv)the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive.

[27] *Supra*, Note 21

[28] The Constituent Assembly of India (Legislative) Debates, Vol. VI, 1949, Part 11, pp 538-39.

In 1951, Babu Ramnarayan Singh of Bihar said "*In...90per cent of the society, we know that divorce is the daily routine... Two, four or five of them sit together, both the contending parties come and they break some stalk of grass; and their mutual relation is broken-this constituted the 'divorce'. Not a penny was to be incurred on this or any botheration... Now all of them have to go to the district judge for divorce, what a lot of expenditure and botheration will this procedure mean?*"[29]

Some members opposed the notion of adversarial divorce by pointing out the difficulties involved in the formal procedure as follows.

Madras Provincial Backward Classes League, in 1945, in a statement supporting Hindu Code, said: "*Divorce...is also welcome-but the procedure for obtaining divorce should be simplified and made within the easy reach of poor backward classes who constitute nearly sixty five per cent of the Hindu population in this provenance. We are poor and cannot afford... expensive measures of going to the court for obtaining a divorce. I suggest, therefore some government officers should be entrusted with this power in each district for instance, district registrar of assurances, sub registrar or panchayat officers.*" [30]

C D Pande of Uttar Pradesh said "*They do not have enough money even to... try ordinary cases, which are pending for several months together... An ordinary citizen finds it difficult even to get a ration card. Do you think it will be easy to get a divorce certificate in a court of law for a person who is poor and ignorant? You have not got the machinery to deal with the cases... People manage their own affairs in automatic manner... You wish to take upon yourself a responsibility for which you are not prepared.*"[31]

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[29] Parliamentary Debates, Vol. XV, 1951, Part 11, p 3101.

[30] Sri Venkatraya Sarma, Written Statements Submitted to the Hindu Law Committee, Vol II, Madras, (1947) p. 1945.

[31] *Supra*, Note 24 at 3110

It shows that Hindu Marriage Act replaced the informal methods of divorce by the formal adjudication making it more complicated, expensive and time consuming.

In the earlier system the stages like restitution of conjugal rights, judicial separation, as introduced by Hindu Marriage Act, 1955 were not involved on the other hand it was a onetime affair. The Community based decision making authorities, *panchayats* used to settle the matter by way of flexible negotiation. Even in some parts de facto separation was practiced, i.e. living separately without formal separation.

The cases of abandoned women are not uncommon. The economic barriers in addition to other barriers prevent such parties to access the courts. In some of the sections of the society *Biradari* deals with such matters.

Hindu Minority and Guardianship Act, 1956

By introducing the concept of natural guardian this Act created unnecessary sense of grievance not existed earlier in Hindu community. The father and after him mother has been given a status of a natural guardian and other members of family are excluded. The joint family system was one of the features of Hindu family. But the Act failed to take this feature into account and adopted the narrow concept of natural guardianship from western societies having nuclear family setup.

It was argued by the Member of Parliament that "*Under the Hindu law, there is nothing like a natural guardian... As a matter of fact, you have taken away the naturalness of the guardianship. Every person is a good guardian to a minor under the Hindu law...Every de facto guardian is a good guardian. You have thought that India has developed to that extent that there is no relationship except that of the father and the mother. But there is also the grandfather, the*

maternal uncle... and... many others...who bring up the child after the father and mother are dead...[32]

Again it was argued that "*...in a country in which nearly 80 per cent of the people do not know what a will is, and many people are illiterate, do you want to say that in every case in which the father and the mother are not there, the minor's cases must go to court and get a guardian appointed?*"[33]

The right to alienate minor's property without court's permission is taken away by the Act, even from the parents. These changes lead to maximum interference of court in the family matters which was the result of ignorance of customary practices and traditions of Hindu society.

Hindu Adoption and Maintenance Act, 1956

This Act primarily recognises the *dattaka homam* adoption but ignore other prevalent forms of adoption like *krithrima* which was a secular type of adoption in which a widow or wife could adopted to herself a son even without the consent of her husband. This practice of *krithrima* was prevalent in and around the places of Mithila. For this no ceremonies or documents were required.[34]

Tek Chand pointed out: "*Krithrima* adoption of the strict Hindu law is a secular type of adoption whereas the *'datta homam'* adoption of Hindu law is a sacerdotal form of adoption."[35]

But the new Act rendered the other forms of adoption like *illatom* prevalent in some parts of south India in which son-in-law could be adopted, *dwayaya-mushayan* in which simultaneous adoption of one or more son could be done as invalid and no justification was given for the same. As the Act required actual giving and taking of a child as one of the conditions for valid adoption

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[32] Lok Sabha Debates, Vol.VI, 1956, Part 11, p. 158.
[33] *Id*
[34] *Supra*, Note 21 at 2153
[35] Lok Sabha Debates, Vol X, 1956, Part 11, p. 3004.

it ignored the de facto adoption.[36] This has provided one more ground to challenge the adoption that is no ceremony of giving and taking has been performed. This has led to increased litigation.[37]

The income of husband is important factor in determining the maintenance that can be claimed by the wife. However in joint families especially agricultural or business families it is very difficult to identify the separate income of husband, such cases are hard to fight and require high cost and time. It may result into court expenses higher than the value of maintenance. The procedures of civil law are very cumbersome and it is hardly worth fighting such cases.[38]

The above discussion shows that the codification of Hindu law by introducing court adjudication and maximum interference of court has brought to some extent rigidity in the procedures to be followed to enforce the rights making them time consuming, expensive and complicated.

The researcher seeks to look into the possibility of protecting and revising the culture of amicable settlement of dispute of Hindu community under Art. 29 (1) of the Constitution of India.[39]

Article 29 of the Constitution of India gives a right to any section having distinct culture to protect the same. It does not talk about any religion. Even though the term minority is used in the marginal note the language of the same cannot be utilised to restrict the scope of main section.

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[36] Sec.11 Other conditions for valid adoption
(i).....
(ii)....
(iii)....
(i).....
(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family or its both (or in the case of an abandoned child or child whose parentage is not known, from the place or family where it has been brought up) to the family of its adoption.
Provided that the performance of *datta hormam* shall not be essential to the validity of adoption.

[37] *Supra*, Note 35

[38] *Supra*, Note 21 at 2154

[39] 29. Protection of interests of minorities
(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

The same view was taken by the Supreme Court in State of Bombay v. Bombay Education Society and Ors[40]; where it was observed that 'The language of article 29(2) of the Constitution is wide and unqualified and covers all citizens whether they belong to the majority or minority group and the marginal note referring to minorities does not control the plain meaning of the language in which article 29(2) has been couched.' Here even though the Court was referring to the clause (2) of the Article, same view can be applied to clause (1) forming the part of same Article.

In *D.A.V. College v. State of Punjab*[41], it was observed that *"...Art. 29(1) is wider than Art. 30(1), in that while any section of the citizens, including the minorities, can invoke the rights guaranteed under Art. 29(1), the rights guaranteed under Art. 30(1) are only available to minorities based on religion or language....the two articles are not inter-linked nor does it permit of their being always read together."*

The right to conserve its culture to any section of citizens resident in the territory of India is guaranteed by Art. 29(1). It does not speak of any minority, religion or otherwise. In that sense it confers right not only upon the minority as understood in technical sense but also upon the section of citizens resident in the territory of India which may not be minority in technical sense.[42]

It can be seen that the protection of Article 29 is available to the all sections irrespective of the fact whether they belong to minority or majority. Again Article 15 casts a duty on State to not to discriminate on the grounds of religion. In such a case Hindus cannot be discriminated only because they belong to religion forming majority population of the country. They have equal

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[40] 1955 SCR 568

[41] AIR 1971 SC1737

[42] Durga Das Basu, Commentary on Constitution of India, Vol. III, LexisNexis Butterworths Wadhwa Nagpur, New Delhi (Y.V.Chandrachud J. et al eds., 8th edn. 2008), pp. 3562,3563

right to protect their distinct culture of private and amicable settlement of family disputes. Culture is a way of life. The term is of wide magnitude and therefore cannot be confined into some identified elements. The practices, customs, traditions followed by any community can be included within its scope. However by codification of Hindu Law and introduction of adversarial system of adjudication for family disputes, this culture is destroyed by the State. Prof. K.T. Shah said "*Speaking of a culture, I think that is not a single item, either of area, language or script. It is a vast ocean, including all the entirety of heritage of the past of any community in the material as well as spiritual domain. Whether we think of the art, the learning, the sciences, the religion or philosophy, culture includes them all, and much else besides.*"[43]

The practice of using mediation, conciliation methods for resolving family disputes in Hindu families can be revived under Art.29 of the Constitution of India.

[43] Constituent Assembly Debates Official Report, Vol. II, (2009), p 896

ADJUDICATION AS THE METHOD IN RESOLVING FAMILYDISPUTES

CHAPTER III- ADJUDICATION AS THE METHOD OF RESOLVING FAMILY DISPUTES

This chapter seeks to analyse the efficiency of adjudication as a method of resolving family disputes. The efficiency can be judged on the basis of access to justice i.e. to say if the court system provides effective access to justice it can be said to be efficient.

Adjudication is a legal process by which an arbiter or judge reviews evidence and argumentation including legal reasoning set forth by the opposing parties or litigants to come to a decision which determines rights and obligation between the parties involved.[44]

The method of adjudication introduced the adversarial system of dispute resolution in India. Although the system was need of the time, it did not proved to be efficient in India to the full extent due to cultural, social and economical differences of our country. Even after more than sixty years of independence we have not succeeded in adopting and modifying it according to our needs.

Access to Justice

The National Commission to Review the Working of Constitution (NCRWC), constituted in the 50th year of Independence, in its final report suggested for incorporation of right to access to justice as a fundamental right by incorporating Art.30 A, in the Constitution, in following terms,

30 A. Access to Courts and Tribunals and Speedy justice.-

(1) Everyone has a right to have any dispute that can be resolved by the application of law decided in fair public hearing before an independent court, or where appropriate, another independent and impartial tribunal or forum.

[44] Prof. Dr. K. L. Bhatia, Textbook on Legal Language and Legal Writing, Universal Law Publication Co., New Delhi (2010), p 104.

(2). The right to access to courts shall deemed to include the right to reasonably speedy and effective justice in all matters before the courts, tribunal or other for and state shall take all reasonable steps to achieve the said objectives.[45]

Though this has not been done till date and right to access to justice has not been recognised separately as a fundamental right in India, Article 14 and Article 32 are sufficient to bring this right within their ambit. Article 14 imposes a duty on the State to not to deny equality before law and equal protection of laws to anyone within the territory of India.

Article 32 provides for the privilege to every power addressee to move to the highest court for enforcement of fundamental rights.[46]

While describing the significance of Article 32 Dr. Babasaheb Ambedkar said in the Constituent Assembly that *"If I were asked to name the particular article in this Constitution as the most important one, without which this Constitution would be a nullity, I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it..."* [47]

Chief Justice Burgess has noted *"A sense of confidence in courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to the society, that people come to believe that inefficiency and delay will drain even a just judgment of its value, that people who have long been exploited in the smaller transaction of daily life comes to believe that courts cannot vindicate their legal rights from*

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[45] Report of the National Commission to Review the Working of Constitution, Vol. I, para 3.15. 1 (2002).

[46] Art. 32. Remedies for enforcement of rights conferred by this Part
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part
(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

[47] Constituent Assembly Debate, Vol. VII, p 953

fraud and overreaching the people will come to believe the law- in the larger sense cannot fulfill its primary function to protect them and their families in their homes, at their work and on the public streets."[48]

3.1 **Drawbacks of system of adjudication: Access to justice**

Changing theoretical conception of access to justice

According to conception of access to justice in the late eighteenth and nineteenth it was considered as individual's formal right to litigate or defend a claim. The affirmative action by the State for the enforcement of the right was not required. Being a natural right they were considered to be prior to the State. The only role of the State was not to allow their infringement by others. Therefore the role of State remained passive.

During that period, like any other commodity justice could be purchased by only those who could afford its cost. But in later period of laissez-fair societies, the concept of human rights began to develop. The societies experienced the shift from individual rights to social rights. To protect these social rights State was casted with the duties and the affirmative action by state became necessary. Right to effective access to justice got attention during welfare State reforms.[49]

Access refers to the means by which rights are made effective. As courts are not the only means of dispute resolution the alternatives to the formal court system also need to be considered. These means have a pronounced effect on how the substantive law operates, how often it is enforced, in whose benefit and with what social impact. In modern societies the right to effective access to justice has been increasingly recognised as social right, but what the term

[48]Burger, What's Wrong With the Courts: The Chief Justice Speaks Out, 69(8), 68, U.S. News & World Report (1970), p 71.

[49] Access to Justice A World Survey, Vol. I, (Mauro Cappelletti and Bryant Garth eds. 1978), pp. 6-9

'effective' signifies is the question to be considered. For this barriers to this effective access, must be identified.[50]

A. Cost of litigation

1. General

Mechanism of formal dispute resolution is expensive. This is due to fees of advocates, court fees etc. 'winner takes all' rule applies in adjudication.

2. Small claims

The claims involving relatively small amount of money suffer most due to this cost barrier. Sometimes the cost of formal resolution is even more than the amount in controversy or if not may still take away so much of it to make the claim futile.

3. Time

The litigants have to wait for longer time not only to get the judicial remedy but also for its enforcement. This results in to increase of the cost of litigation as well as mental dissatisfaction of the litigants.

B. Party capability

This term was utilised by Professor Marc Galanter[51], and based on "the notion that certain parties... enjoys a set of strategic advantages." Following are some of the basic advantages or disadvantages for particular parties.

[50] *Id*

[51] He is a leading American student of the Indian legal system and the author of Competing Equalities: Law and the Backward Classes in India (1984, 1991), and Law and Society in Modern India (1989, 1992). He is an honorary professor of the National Law School of India, served as advisor to the Ford Foundation on legal services and human rights programs in India, and was retained as an expert by the government of India in the litigation arising from the Bhopal disaster. He is engaged in research on access to justice in India.

1. Financial resources

   Parties possessing considerable financial resources have obvious advantages in perusing or defending the claims as they can afford to litigate and can withstand the delays. This becomes the weapons in the hands of the party by which it may outspend the other party.

2. Competence to recognise and pursue a claim or defence

   Personal "legal competence' which relates to the differences in education, background and social status is crucial in determining accessibility. These are the barriers which can be personally overcome before vindication of right thorough legal mechanism. It includes problem of recognition of existence of legally enforceable right. It happens due to lack of basic legal knowledge. Again people may not know how to enforce their right. This relates to the third barrier i.e. psychic willingness of people to restore to legal procedures. Complicated procedures, overbearing judges and lawyers makes the litigant feel lost.

3. One shot litigants v. repeat player litigants

   This distinction is based on the frequency of encounters with judicial system. The repeat players have following advantages a. experience with law unable better planning for litigation b. economies of scale because of more cases c. opportunities to develop informal relations with members of decision making institution d. spreading of risk of litigation over many cases

   These barriers are severer in isolated individuals, small claimants and the poor.[52]

   Employing arbitration, conciliation and out of court settlements is one of the alternatives to reform the justice delivery system.

[52] *Id*, at 10-20

A. Use of arbitration rather than adjudication

This mechanism is characterized by less formal procedure, decision makers with legal or technical knowledge and binding decisions. Given the case delays and expenses of formal adjudication, this method can reduce cost barriers. The award has to go to the court for confirmation. The Arbitration and Conciliation Act, 1996 however requires the arbitrator to decide strictly in accordance with law.

B. Fair settlement by conciliation

These settlements can be more easily enforceable than one sided judicial decrees, as they are founded on the agreements of the parties. This may involve a mutual give and take and may not be strictly in accordance with law.

C. Specialized courts

Establishment of specialized courts can be good solution to overcome the barriers to access to justice. The claims of particular social importance can be diverted to these special courts. Diversion is a method of improving the access of ordinary people. This helps to resolve the conflict more quickly, less expensively and relieve court congestions and delay.[53]

BARRIERS TO ACCESS TO JUSTICE IN THE INDIAN SCENARIO

1. **Physical Access**

India is a large country with huge population and still in the developing stage. A major part of the population resides in villages where the transportation facilities are not available to the extent these should be. Even the lowest courts are located in or near urban areas. In such a situation physical access to the law courts is itself a difficult task. Uneven geographical distribution is one of the main reasons for physical inaccessibility of the court.

[53] *Id*, at 59-67

The barriers to access the law courts are not only physical but may be economical or infrastructural. If the premises of law courts are not accessible how to initiate an action or defend an initiated action is the question.

Centralised court system may be cost saving for governments but it acts as a barrier for individuals not living within proximity of the courts. This is extra hardship for people with lower income and those living in rural area.[54]

2. **Access to Legal Advice**

Sometimes even though premises of law courts are accessible, the legal advice may not be. Without legal advice it may not be possible to take any decision as to enforcement of any legal right through the court proceedings. Sometimes the cost of legal advice is too high to bear. The people in such case remain directionless.

3. **Informational barriers**

Even though ignorance of law is not an excuse, it is never publicised to the grass root level. Hardly few people from rural as well as urban areas may be aware of most of the laws to which they are subjected. This may include unawareness about the free legal aid.

The complicated languages used in Acts, Judgments of the courts add to this more hardship.

4. **Court fees**

For the low income people, paying court fees, stamp fees, other fees like registration fees is very difficult and it makes the litigation additionally costlier to them.

[54] Patricia Moore, Environmental justice and rural communities : studies from India and Nepal, IUCN, Bangkok, (2007), p.10

5. **Advocate fees**

In court of law legal representation through advocates is necessary. But the fees charged by advocates are very high. Many times they are charged per standing. This is why most of the lawyers are interested in delaying the decisions and obtaining more and more adjournments without real necessity.

The reason is failure of Advocates to understand their role in justice delivery. They are given the status of an officer of the court. Their first duty is to protect the interest of client[55]. Most of the times in family dispute the best interest of the client lies in preserving the relationship and reducing the cost, monetary as well as emotional.

6. **Law of Limitation**

In French judicial system the principle of 'justice should be given at all time' is followed. But in India Law of Limitation bars specific suits if action is not initiated within stipulated time. This is also hurdle in accessing the justice. The philosophy behind this law is that it merely bars the legal remedy and not the right of the person. The right still subsists even after elapse of time of limitation. Even though in theory it makes sense, in practice what is the use of such right which cannot be enforced in court of law? The possible answer to this question is extra judicial remedy can be availed for such right. The guarantee of equality before law and equal protection of laws given under Article 14 of the Constitution becomes meaningless in presence of law of limitation.

[55] The Preamble of the Bar Council of India Rules provides that "An advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community...an advocate shall fearlessly uphold the interests of his client..."

In its Note on Access to Justice, published in the year 2004, The United Nations Development Programme has added two more factors namely, long delays in adjudications and excessive number of laws, as additional barriers to access to justice.

7. **Long delays**

As mentioned above advocates are one of the reasons for delayed decisions. Again in India courts are overburdened with cases, as a result of which judicial officers are hardly able to devote sufficient time to the cases, ultimately resulting in to delays.

8. **Excessive Number of Laws**

It may be hardly possible to any one in India to tell the exact number of Acts in force for the time being. Even a legal expert may not answer this question with accuracy. In such case how can one be expected to know all the laws or even most of them. So this barrier is also exists in India.

3.2 Backlog of cases

Overburden Indian judiciary is not a hidden fact now.

In the year 2010

As on 30th September, 2010; about 2.8 crores cases were pending in subordinate courts and 42, 17,903 in the High Courts. Approximately 9 per cent of these cases have been pending for over ten years and a further twenty per cent have been pending for more than five years. The number of cases pending in Supreme Court was 55,000.[56]

[56] Vital Stats Pendency of Cases in Indian Courts, available at http://www.prsindia.org

According to figures revealed by Law and Justice Department on Wednesday, Jun 23, 2010 55,000 couples are waiting for divorce in India. Every year, an average 7,500 cases of divorce are filed in Mumbai, 9,000 in Delhi and 3,000 in Bangalore.[57]

In the year 2011

The government on Monday, Dec 19, 2011 said around 3.2 crores cases was pending in high courts and subordinate courts across the country while 56,383 cases were pending in the Supreme Court.

It also said 74% of the total 3.2 crores cases were less than five years old. Similarly, 20,334 out of the 56,383 pending cases in the apex court were less than one year old.[58]

Pendency in Family Courts

- Family Courts in Ahmedabad

As reported on 23rd March 2012, Family courts in six districts of the Ahmedabad state have 16,781 pending cases. And of these around 13% have been pending for five years or more.

In reply to Jodia MLA Raghavji Patel's question, the government told the House that Vadodara has the maximum pendency in the state.[59]

- Pune Family Courts

As reported on 5th January 2010, about 5,000 cases were pending and another 3,500 new cases were likely to be registered in Pune Family Court. The main issue was shortage of judges.[60]

[57] http://www.dnaindia.com/india/report
[58] http://articles.timesofindia.indiatimes.com
[59] *Id*
[60] http://www.indianexpress.com

➢ Family Courts in Varanasi

Cases registered during 1999-2003

Types of cases	Cases Pending at the Beginning of the Year	Cases added during the year	Total no. of cases for the year	Cases disposed of	**Cases pending**
Dissolution of marriage	1,383	1,272	2,655	1,025	1,630
Conjugal rights	1,053	986	2,039	781	1,258
Custody of child	141	21	162	53	109
Null and void	42	29	71	33	38
Property Rights	40	20	60	16	44
Judicial Separation	28	18	46	16	30
Total	2,687	2,346	5,033	1924	3,109

SCOPE FOR ALTERNATIVE DISPUTE RESOLUTION IN FAMILY DISPUTES

CHAPTER -IV SCOPE FOR ALTERNATE DISPUTE RESOLTION IN FAMILY DISPUTES

This chapter tries to find out as to what extent Alternative Dispute Resolution can be used in family disputes. For this it is necessary to see whether Alternative Dispute Resolution provides for effective access to justice by overcoming the barriers discussed in previous chapter. Again it is to be seen whether these techniques are suitable for family dispute due to their distinct nature.

1.1 Need for justice dispensation through Alternate Dispute Resolution Mechanism

Man is not made for law, but law is made for man. In previous chapter we have seen the problems posed by system of adjudication in accessing the justice. There should be some alternative to overcome these problems and to remove these barriers. Constitution of India has guaranteed justice to all. Citizens of India are entitled to Constitutional as well as other Legal rights. But if no means of enforcement are available then these rights are of no avail.

Scheme of Access to Justice under Indian Constitution

Some of the Articles of the Constitution if read together reveal the scheme for effective access to justice. The intention behind these Articles is to make the justice available to every citizen without any hindrance.

Article 14 of the Constitution guarantees equality before law and equal protection of laws.[61]

To access the justice, first one should access the justice delivering Authority.

Article 39-A of the Indian Constitution imposed a duty on the State to secure that the operation of the legal system promotes justice on a basis of equal opportunity, and ensure

[61] Art.14. Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

that the same is not denied to any citizen by reason of economic or other disabilities.[62] Equal opportunity is the condition precedent for access to justice. But merely guaranteeing equality of law irrespective of prevalent inequalities is not sufficient. The law must function in such a way that all the people have access to justice in spite of economic or social disparities.

Article 256 provides that executive power of state is to exercise as to ensure compliance of laws made by the Parliament and any existing law in the State and the Union executives can direct the states to implement these laws.

Access to Justice has two main objectives

1. to have equally accessible system
2. to have results that are individually and socially just

This concept is broader in scope than the traditional concept of access to justice as understood by common man where it is equated with access to law courts. The reason is simple, even if one access to court of law, the justice cannot be guaranteed due to technicalities and delays. Justice delayed is justice denied. [63]

It is the duty of welfare state to provide judicial and non-judicial dispute resolution mechanisms to which all have equal access irrespective of poverty, ignorance or social inequalities.

Krishna Iyer J terms the jurisprudence of access to justice as "*We should expand the jurisprudence of access to justice as integral part of Social Justice and examine the constitutionalism of court-fee levy as a facet of human rights highlighted in our Nation's*

[62] Art. 39A. Equal justice and free legal aid
The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

[63] 222nd Report of Law Commission of India, Need for Justice-dispensation through ADR etc., 2009

Constitution. If the State itself should travesty this basic principle, in the teeth of Articles 14 and 39A, where an indigent widow is involved, a second look at its policy is overdue. The Court must give the benefit of doubt against levy of a price to enter the temple of justice until one day the whole issue of the validity of profit-making through sale of civil justice, disguised as court-fee is fully reviewed by this Court".[64] The court should have boldly declared court fees as unconstitutional violating Art. 14.

Alternative Dispute Resolution mechanism is one of the approaches that can be adopted in India to eliminate the hindrances in accessing justice.

The Lok Adalats, Nyaya Panchayats, Legal Services Authorities are all part of the campaign to ensure equal access to justice by all. The former Chief Justice of India Dr. A.S. Anand has wished that the next century would not be a century of litigation, but a century of negotiation, conciliation and arbitration.

The lok Adalats may take upon themselves the role of counsellors as well as conciliators. The counseling is very important and effective tool for resolving family disputes as it addresses the psychological state of a person. Mechanism of alternate dispute resolution has proved effective for resolving disputes in spirit of conciliation outside the court of law.

The Family Court Act, 1984 promotes the conciliation in and secures speedy settlement of disputes relating marriage and family affairs. This shows that Alternative Dispute Resolution Mechanism has got recognition in family dispute settlement. As it is the need of hour to render the Justice in all its facets-social, economical and political, what will be better way than Alternative Dispute Resolution techniques which are less expensive, less time consuming, and free from technicalities.[65]

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[64] State of Haryana v. Darshana Devi, AIR 1979 SC 855

[65] *Supra,* note 57

The Privy Council affirmed the decision of the Panchayat in a family dispute in Sitanna v. Marivada Viranna in 1934 where Sir John Wallis J stated the law in following words,

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

1.2 Advantages of Alternate Dispute Resolutions in Family Disputes

Nature of family disputes

The very nature of family disputes differentiates them from other legal dispute.

Private nature

Firstly, they are personal in nature. Even though family is social unit family disputes fall within private affairs of the family. Therefore the resolution of them should also be done privately. In Indian Hindu families the reputation and social status has paramount significance. Involving into litigation for some family dispute is considered to be a stigma or matter of disgrace. The formal adjudication is public in nature which does not suit family disputes.

Complex of emotions

As oppose to other legal disputes family disputes are complex of emotions. Very often emotions are the very cause of existence of such disputes. Therefore while dealing with them emotions underlying them need to be addressed.

Litigation may not and in fact does not always lead to a satisfactory result. The reason is winning for one party is loss for other, both the parties cannot win at the same time. Adversarial nature of

formal adjudication does not change the mindset of the parties and therefore ends up in bitterness. Alternative dispute resolution systems preserve the relationship between the parties by encouraging communication and collaboration.

Maintenance of peace and harmony is the paramount consideration in resolving the family disputes.

As seen earlier family disputes were resolved by the elders of the family who acted as conciliators or mediators. Even today, such role is played by elders of the family and in villages, the elder persons of the village. The philosophy behind this informal mechanism is amicable dispute resolution and mediation and conciliation provides a space to the parties to sit down and focus on what they really want, rather than think what they need to seek or what the law will let them fight for.

Due to peculiar nature of family disputes and its distinctiveness from other legal disputes, the mechanism of Alternative Dispute Resolution is best suited for the same. Following are some of the significant advantages of using Alternative Dispute Resolution techniques in family disputes.

Less Expensive

As seen earlier the dispute resolution through Courts is expensive due to factors like court fees, advocate fees, stamp duties etc. In Alternative Dispute Resolution these expenses are not involved, this makes it less expensive. Family dispute includes disputes between husband and wife, property disputes, child custody matters, partition disputes etc. Many of these do not have any underlying property i.e. to say no economic rights or benefits are involved in them. Even in cases of partition value of property may not be very high. The main reason behind these claims is psychological in nature. Sometimes only out of ego and pride these cases are fought. In such circumstances the total cost of litigation may go higher than the value of property. Again the

parties fighting may not be always financially sound. This is why less expensive techniques of ADR are best suited in order to protect the litigants from undue financial loss.

Less time consuming

Many of the family disputes are personal in nature, not involving property matters which can be inherited by next generation. The final decision of this mainly affects or helps the parties to the dispute. If such disputes are not resolved quickly, the justice can hardly be done with the parties as the fruits of decision may not be enjoyed by them due to limited time span of human life. Consider the cases of divorce. Unless the divorce is obtained a Hindu cannot remarry. There are some instances where these cases are pending for five, six years. Imagine the life of the disputants in such cases, on the one hand they are not getting divorce and on the other hand they cannot start their life newly. ADR techniques being less time consuming can address these issues effectively.

Participatory in nature

The processes of Alternative Dispute Resolution is participatory in nature. The best part is, parties can communicate with each other and express their views directly. This may help to address the issue or point of conflict directly. As no legal representation is mandatory other elements like interest of lawyers in delaying the case are not involved.

Parties can even participate in solution finding process. This may help the parties in honouring the solution with commitment. In family disputes there is always scope for understanding, sacrifices and innovative solutions like compromise. The rigid remedies provided in codified law may not be always suitable for family disputes.

Lesser harm to relationships

The adjudicatory process always results in win-loss situation, but this is not the case in mediation or conciliation. There is always scope for restoration of present relationships and even though it may not be achieved, the harm that may be caused to future relations can be avoided. These techniques help in ending the ill will between the parties as they not only address the dispute but also the emotions underlying the same. This feature makes Alternative Dispute Resolution mechanism more suitable to family disputes as the blood or marital relations cannot be separated from emotions or feelings.

Problem specific solutions

In this mechanism of dispute resolution no precedents are followed like adjudicatory system. It makes it more flexible and problem specific solutions can be found out. It adds creativity to the resolution mechanism. As the nature and behavior of individual are subjective, the solutions for the problems must be circumstantial in nature, particularly in family disputes. The factors like family structure, social standing, reputation, and status of relationship of parties, their maturity level, willingness and scope for compromise, and most significantly possibilities of betterment of relationships and adjustments play key role in finding solutions for the problem. These factors may not always be taken in to consideration in adjudication. They make Alternative Dispute Resolution mechanism problem specific.

Private Resolution

It is a private resolution mechanism. The confidentiality extends to the agreement arrived at by the parties. Even in family courts the proceedings are in camera unless otherwise provided.[66]

[66] S.B. Sinha, J., ADR and Access to Justice: Issues and Perspectives available at http://www.hcmadras.tn.nic.in/jacademy/articles/ADR-%20Justice%20SB%20Sinha.pdf (last visited on April 31, 2012)

1.3 Negotiation, Conciliation, Mediation and Arbitration as an alternative to litigation

The four basic techniques of Alternative Dispute Resolution are as follows

Negotiation

Mediation

Conciliation and

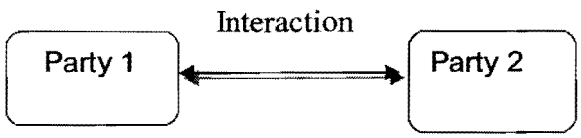
Arbitration

Each of them has their own characteristics and need to be discussed separately.

NEGOTIATION

This is the most basic and simplest form of Alternative Dispute Resolution.

In negotiation parties to dispute come together and discuss the problem. No third party intervention is allowed in negotiation. It is completely private in nature. The parties try to find out solution for their problem at their own. This is the cheapest technique as no third party is involved. However as no neutral third party is involved, it may be very difficult to arrive at a settlement. It is a basis of Mediation, Conciliation and Arbitration i.e. to say in every other technique it is used.



Types of Negotiation

Negotiation can be broadly classified as competitive negotiation and co-operative negotiation.

1. Competitive negotiation

The name itself suggests the nature of this negotiation strategy. The party adopting this strategy tries to get maximum benefit for itself. In every negotiation every party tries to do the same. However competitive negotiator forces other party to do maximum concessions while he/she is not ready to do the same. In this, main focus is on the outcome of the negotiation. Here the psychology of the other negotiator is targeted in order to out-think him in the negotiation.

The important point is that these competitive negotiators are not always aggressive; sometimes they create a facade of being cooperative trying to get the confidence of other side but continuously thinking of how to take other's advantage. Negotiators use the pressure techniques and they take extreme positions. It is generally used when there is an imbalance of power. The advantage of this strategy is negotiator may get good results. And as it is more focused, it may save time.

However this type of negotiation is least suitable for resolving family disputes because of following,

1. In a case if, the other negotiator is also competitive, an unnecessary deadlock may result.
2. It may harm the present as well as future relationship irreparably.
3. Here as the negotiator is involved in getting the best deal for him, he may miss the opportunity of finding new creative solution for the problem.
4. It may sometimes even prolong the negotiation process as more time may be spending on arguing rather than solving the problem.

5. It ends up in win-lose situation.[67]

2. Collaborative or Problem solving negotiation

Here the importance is given to the relationship of the parties. The success of the negotiation is judged on two criteria

1. Whether the agreement between the parties has been reached?

2. Whether both the parties are satisfied with the process and the agreement?

The parties generally worked together if both are cooperative for solving the dispute. They explore many possible solutions and select the one which is best suitable for their interests. Here they use persuasion along with reasoning.

This strategy can be successfully used for resolving family disputes due to following advantages

1. It maintains the good relationship between the parties.

2. The degree of the creativity is high as new solutions can be found out to overcome the obstacles.

3. Here as the negotiator himself is ready to make concessions the other party feels comfortable and it cause the other party to make concessions on its own.

4. Mostly it ends in win-win situation.

However it suffers from the disadvantage like, the cooperative negotiator may not get good results for him if the other party is competitive in nature.[68]

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[67] Allan J Stitt, Mediation: a Practical Guide, Cavendish Publishing Limited, London (2004) pp. 25-35

[68] *Id*

1. Principled Negotiation: The solution

Having being discussed the advantages and disadvantages of both the types of negotiation we must think of the other way to negotiate in order to overcome the difficulties and combine the benefits of these two above mentioned types of negotiation.

The principled negotiation is introduced in the famous book "Getting to Yes."[69] It provides the framework for negotiation that can maximize the likelihood of getting good results and maintain the good relations. It also provides for the structure, that the mediator could use to shift the competitive or cooperative negotiation into one that is more likely to result in a durable settlement.

It has seven elements

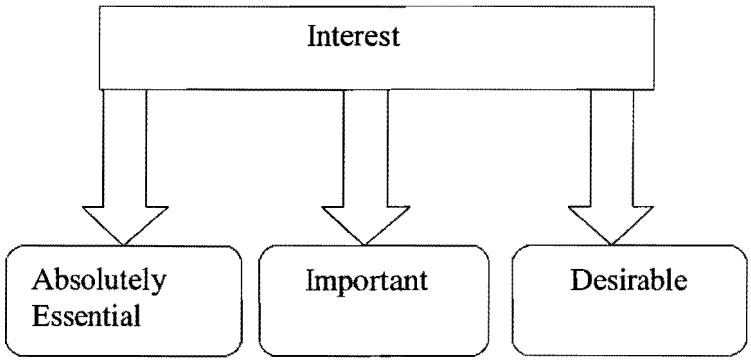
1. **Alternatives:**

It means, if in case the negotiation fails, what other ways you have to solve the problem. If, ways better than negotiation are available it is not at all needed to go for negotiation.

2. **Interest**:

It can be described as the need or desire of the negotiator. They are different from the positions. Position is the stand taken by the party i.e. what the party wants and interest means why party wants the same.

[69]Roger Fisher and William L Ury, Getting to Yes Negotiating Agreement Without Giving In, Houghton Mifflin Harcourt, New York (2nd edn., 1991)



Interests can be divided into three classes, absolutely important, important and desirable. First target of negotiation shall be absolutely essential interests and then important interests. Desirable interests can be and often are compromised.

3. **Options:**

These are the ways to satisfy the interest. They are possible solutions to the problem.

4. **Legitimacy:**

Proposals and counter proposals are involved in the negotiation. They are to be properly supported. In that case parties will be on firm footing.

5. **Communication:**

Negotiation mainly takes place through communication. So not only the verbal communications but the body language, skills of listening is important.

6. **Relationship**:

Negotiation has two issues substance and relationship. Many times the ongoing relationship is more important than reaching a solution to the substance.

7. **Commitment:**

It is needed from both the sides. So it is important to ensure that the other party also has the commitment to honour the settlement.

However very often due to presence of ego, self pride, anger, or other emotional factors, parties may not be able to negotiate effectively. In such a case the requirement of third neutral party intervention is felt. For that mediation and conciliation techniques can be used.[70]

MEDIATION

It is a process of negotiation in which neutral third party assists the parties in resolving their dispute. Mediator can use special techniques of negotiation and communication in helping the parties to arrive at a settlement. Appointment of mediator can be made with the mutual agreement or in case of pending litigation the court can appoint a mediator. The unique feature of mediation is that, mediator is not the deciding authority on the other hand the parties to the dispute decides for themselves. The job of the mediator is to act as a catalyst in bringing the parties together by defining issues and removing or limiting obstacles to communication and settlement. Parties can take assistance of lawyers however it is not mandatory.

Importance of Mediation

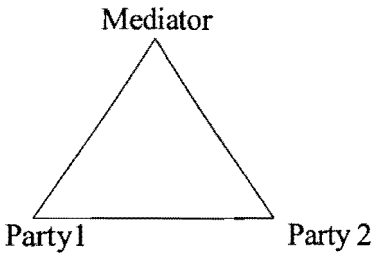
As we can solve the problem and find out the solution by negotiation, why do we need mediation at all? In negotiation the parties may take extreme positions that may hamper the process of negotiation. This may happen due to the emotions, perception, and other differences of the parties. Even though parties are represented by their respective representatives, they are under the control of the parties and cannot act against the interest or wish of the parties. The parties

[70] *Supra,* Note 61

have ego, so there must be someone to absorb the same. The parties may take subjective approach because of which the negotiation may fail. Therefore we need mediation.[71]

Meaning of Mediation

It is simply understood as facilitated negotiation. It can be described with following diagram. However some are against this diagrammatic presentation, as according to them it makes the process of mediator very formal and rigid which is in fact not. So mediator can be at any point of the triangle. But again there is opposition to this view also as according to them in that case mediator becomes closer to one of the parties which is against the neutrality principle.



Role of Mediator

For good and successful mediation the role of the mediator is of supreme importance. Mediator is also called as traffic cop particularly in directing the communication. It indicates that he does the job of facilitation and regulation as the traffic cop does. He himself does not perform any activity same as traffic cop does not drive the vehicle himself in order to regulate the traffic. He can play different roles such as clarifier, supervisor, and teacher. He acts as catalyst moving the parties in direction of the solution.

One thing he always has to bear in mind that he is a neutral intervener.

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[71] *Id*

1. **Communication between the parties**

Mediator brings the parties together and makes them speak. Without communication no negotiation is possible.

2. **To negotiate**

He helps the people to negotiate more effectively and efficiently than they could on their own.

3. **Helping the parties in finding solution**

He helps the parties to find out the solution of the problem but suggesting the solution is not his task. His main work is to make the parties search the creative but realistic solution for their dispute.

4. **Ego absorber/ Face saving**

As we discussed earlier, ego of parties may act as main barrier in settlement. When the mediator intervenes in the negotiation he acts as an ego absorber.

Procedure and Techniques to be used

The mediator is in the control of the process of Mediation, whereas parties are responsible for the outcome. There are no rigid rules as to the techniques to be used by the mediator. It depends on the circumstances of each case e.g. if no party is ready to start the communication, mediator can suggest the claimant to start first if it is a court directed mediation. If it is not court directed, then he can use simple techniques like tossing a coin. The advantage of using such technique is that here his own discretion is not involved, so he can maintain his neutrality and no party can doubt the same.

Duties of the Mediator

1. **Confidentiality:**

This is the main duty of the Mediator. He is a neutral intervener, if he breaches the confidentiality, his neutrality may get hampered. Sometimes in order to collect some extra information it is necessary for him to have private meetings. He should not communicate the other party the discussion of the private meeting without due authorization from that party.

If the mediator breaches the confidentiality, and parties come to know about the same after settlement, they can set aside the settlement arrived at. The remedy under criminal law i.e. criminal breach of trust is also available, even though it is very difficult to prove the same in the court of law.

2. **Neutrality:**

We have already seen that mediator act as a neutral intervener. If he does not, the other party may lose the trust in him and may walk out of the negotiation. There are two schools of thought on this issue. According to one, mediator must be neutral and according to other Mediator has the responsibility to do justice. Accordingly we can view two types of Mediator i.e. Active Mediator and Passive Mediator

1. **Passive Mediator**

His job is only to facilities the process of negotiation. He maintains his neutrality throughout the negotiation. This is what is expected from him, at least according to theory.

2. **Pro Active Mediator**

He takes the responsibility of doing justice with the party. He believes in what is fair. But real difficulty arises here only. Fair according to whom? The answer is, 'according to parties'. So it is

not expected on the part of Mediator to decide what is fair. The rational being he is Mediator and not Judicial officer. Again let's assume that we accept that it is mediator's job to do what is fair, but here again the problem will arise in determining the parameters of this "FAIR". But as we say even though theoretically it's desirable to have passive Mediator, sometimes to meet the practical situation he has to become somewhat active. If he thinks that the parties are not equally strong, what can he do? Here at the most he can suggest the parties to engage some person for representation. But he should not go beyond this; otherwise he may lose his neutrality.

CONCILIATION

Conciliation is similar to that of mediation, but one significant difference between them is the role they play. As discussed earlier in Mediation the job of Mediator is to facilitate the process of negotiation. He cannot suggest the solutions. Parties themselves have to find solutions for their problem. But in Conciliation the case is different as the Conciliator can suggest the ways to settle the dispute and can draft the settlement agreement also which if consented by the parties is binding on them.[72]

According to one twenty ninth report of Law Commission of India, litigations involving family disputes such as divorce, judicial separation, restitution of conjugal rights, custody of children and alimony are on the increase. The resolution of these disputes can be speedily achieved by setting up conciliatory courts. The near relatives can be easily persuaded to take just and rational attitude. The Commission recommended for the establishment of conciliation courts and compulsory reference to them of certain disputes including family disputes. The conciliator plays more active role than that of the mediator in resolving the dispute.

[72] Justice M. Jagannadha Rao, Concepts of Conciliation and Mediation and their Differences, *available at* http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf (last visited on May 1, 2012)

ARBITRATION

It is the most formal method of dispute resolution. However it is more privatized than adjudication. The law relating to arbitration in India is governed by Arbitration and Conciliation Act, 1996. Section 7(3) of the Act requires that "an arbitration agreement shall be in writing". However in arbitration, even in the absence of a prior written agreement, if the parties appoint the arbitrator and proceed with the submission of written claim and defense and continue with the proceedings till they culminate in the award, the requirement of S. 7(2) under 4 (c) should be taken as complied with.[73]

Section 30 of the Act, 1996 permits the parties to engage in conciliation process even while the arbitral proceedings are on. Parties can do so on their own and settle the dispute through conciliation or authorize the arbitrator himself to use mediation or conciliation and settle the dispute. The arbitrator would record the settlement in the form of an arbitral award.[74]

Duty of Arbitrator

Section 28 (1) (a) of the Act provides that where the place of arbitration is situate in India, in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide

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[73] Sec.7, the Arbitration and Conciliation Act, 1996. Arbitration agreement
(1)...
(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(3) An arbitration agreement shall be in writing.
(4) An arbitration agreement is in writing if it is contained in-
(a) a document signed by the parties;
(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

[74] Sec. 30. Settlement. –
(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties; the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during, arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.[75]

It shows that even though procedural law is not applicable to the Arbitration, the substantive rights and duties of the parties are not compromised in Arbitration.

In the matters like child custody, property disputes parties can resort to arbitration. But the cost involved in the arbitration may be very high due to fees of arbitrators.

According to section 35 the award of arbitral tribunal is final and binding on the parties as well as on those claiming under them.

However the award can be challenged and an application to set aside the same can be made to the court of law on following grounds

a. Incapacity of the parties
b. Invalidity of the Arbitration agreement
c. No proper notice of the appointment of an arbitrator or of the arbitral proceedings or
d. inability to present his case; or
e. subject matter not covered by arbitration agreement
f. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties[76]

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[75] Sec. 28. Rules applicable to substance of dispute.
(1) Where the place of arbitration is situate in India,-
(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India

[76] 34. Application for setting aside arbitral award.
(2) An arbitral award may be set aside by the court only if-
(a) The party making the application furnishes proof that-
(i) A party was under some incapacity, or
(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to

On analysing the above mentioned techniques of Alternative dispute Resolution, it can be said that Arbitration is the least suitable technique for resolving family dispute as the arbitral award has to go back to the court for its enforcement.[77] It means that the procedure given under Order XXI of Civil Procedure Code has to be followed. This order is the lengthiest order containing 106 rules. This defeats the very purpose of Alternative Dispute Resolution as the recourse to the court has to be taken and the barriers to access to justice cannot be avoided.

Negotiation cannot be used in isolation as a separate strategy as no intervention by third neutral party is involved.

The further question comes is whether the techniques of Mediation and Conciliation can be used effectively to resolve the family disputes. The answer to this question can be obtained by studying these techniques with specific reference to matrimonial dispute, child custody dispute and property disputes.

a. <u>Mediation/ conciliation in Matrimonial Dispute</u>

The basic principle of Mediation/conciliation is to maintain harmony in the social fabric. In the matrimonial dispute the mediators often assumes the role of counsellors and conciliators. Except the difference that mediator cannot suggest solution and conciliator can, the process and

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arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) The court finds that-

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) The arbitral award is in conflict with the public policy of India.

Explanation -Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

[77] Sec. 36. Enforcement.—Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

strategies followed in both the methods are same. Keeping this in mind the terms mediation and conciliation are interchangeably used in following discussion.

Peculiarity of matrimonial mediation/conciliation

Due to distinct nature of family disputes from other disputes the form in which it is to be used in resolving family disputes is also different. The factors like motivation, sentiments, social compulsions, personal liabilities and responsibilities of the parties, the views of the two parties regarding life in general and to the institution of marriage in particular, the security for the future life, so on and so forth are not present in other disputes than family disputes. In mediation the parties are at liberty to find out their own solution, however in this solution finding, not only rational but also irrational and emotional factors play role. This is the reason why, in matrimonial disputes the mediator cannot merely concentrate on the monetary aspects and overlook the emotional aspect. In fact he is concerned with happiness of the parties which is more a matter of sentiment than of reason. To lead the parties towards amicable settlement mediator may have to act as a counsellor. The proposal for the solution may come from either of the parties or the mediator. The main job of the mediator is to continuously bridge the gaps in the proposals to arrive at consensus. The process of mediation is voluntary and following are the reasons for its attractiveness,

(1) It promotes the interest of the entire family including those of the children

(2) It reduces economic as well as emotional cost associated with the resolution of the family disputes.

As it is a voluntary process sometimes one of the two parties or may even both parties show unwillingness or reluctance to approach a mediator. Such a situation can be handled by mediator by making the parties understand the advantages of mediation. It is a common experience of

family court judges and others who mediate or counsel the disputing couple that even though the parties formally express their willingness to accept a mediator or counsellor, in fact, they keep their reservations. The mediator can motivate such parties to opt the mediation and for this he must have a skill and ability to motivate. In one case Justice Manju Goel, (High Court of Delhi) as a family court judge invited the parties for an effort for reconciliation as directed by Section 23 of the Hindu Marriage Act 1955, she was faced with an open retaliation by the husband. He said that he would be a fool if he participated in any process intended to send the wife back to his house by obliterating all sins committed by her in the last many years. She could tell him that this was a requirement of the law and that she could not bypass the same. Under her command the husband participated in the process. Finally to her great satisfaction the couple ended up reconciling with each other after six years of separation.[78]

One of the important qualifications required for mediator of matrimonial dispute is the knowledge of social customs, religious sentiments. He must also have an insight into the psychology of the people, the rights and liabilities of the parties in the socio–economic context, so on and on forth. There should be balance of knowledge as well as sensitivity.

The adjudicating officer may not have all these skills required for handling matrimonial disputes. Again, the mediator may himself or herself be required to visit the parties to the disputes as such a visit to the house of a party and meeting the members of the family in their house may give a clearer picture of the socio–economic conditions of the parties. It may help the mediator to get to know the equations between different members of the family. This is necessary because very often, the dispute and the solution lays not so much in the relationship between the husband and the wife as in the relationship between the couple and the other members of the family. An

[78] Manju Goel J., Successful Mediation in Matrimonial Disputes Approaches, Resources, Strategies & Management, available at http://www.delhimediationcentre.gov.in/articles.htm#partI, (last visited on May15, 2012)

adjudicating officer cannot do so. He is made to focus on right or wrong doing of the party where as the Mediator has to restore the equilibrium and be non judgmental through whole process.[79]

Strategies and Management

The matrimonial counselling may yields better results if attempted before litigation. The reason is in pre–litigation stage polarization has yet not taken place. Very often the allegations against each other are vague at this stage and parties are more likely to forgive and forget. They are perhaps more hopeful of a solution and, therefore, ready for more sacrifices and adjustments. In litigation to make the allegations more convincing false stories are woven into the pleadings giving rise to more hatred. The exchange of pleadings very often takes the parties to the point of no return. Therefore every effort of mediation should be made before the litigation actually commences. At all the entry points a check has to be exercised to prevent more litigation. The common signs of matrimonial dispute are litigations for maintenance and complaints to the police. The police have to handle the subject with sensitivity, wisdom and patience.

The following can be important stages in mediation

i. Probing of facts;

ii. Identifying the real cause of dispute;

iii. Exploration of possibilities of reconciliation or divorce;

iv. . Bring the parties to an agreed solution; and

v. Shaping the solution in the legal formats.

The first two stages of probing of facts and identification of the real cause of dispute in a matrimonial dispute call for enormous patience. It is natural that the pleadings or the first narration of the parties will conceal more than they reveal. Very often the parties themselves are

[79] *Id*

not able to decipher what really is the cause of disharmony. It is only after some active listening by counsellor for long sessions that the real problems actually surface. [80]

There may be various reasons for a matrimonial discord. In some cases third parties may be involved. The dispute may arise out of too little money or too little accommodation, so on and so forth. Once the counsellor identifies the real issue, i.e. what ails the relationship, he has to proceed to examine the possible solutions. The first possibility to be checked is 'whether a reconciliation possible?' For this the counsellor has to see if the cause of dispute can be removed. For example if the discord is because of violent nature of the husband or the wife, the counsellor has to examine whether and how the behaviour of the violent person can be modified. Or if it is due to the third party like, mother–in–law can she be made to see her role in correcting the situation. The possibility of the reconciliation has to be fully explored. Sometimes the suggestions for improvement even need to be put to trial by actual practice.

If there is no possibility of reconciliation the counsellor has to explore the possibility of a peaceful separation. Even in separating the couple, counselling has a significant role to play. In such a case, the parties have to be prepared for accepting the fate of divorce which is not always easy. Very often the parties are looking more on punishing the other side than seeking the relief for them. Here the counsellor must see the real issues and make parties understand that only solution to the problem is peaceful parting. Here one instance can be cited, where counsellor after failing to reconcile the parties settled the matter in favour of divorce. Later on accidentally one day he met the parties walking together as if nothing had happened to their relationship. When asked ''Have you turned to be friends?'' the woman smiled and the man replied ''we are

[80] Marian Roberts, Mediation in Family Disputes Principles of Practice, Ashgate Publishing Limited, Hampshire (3rd edn.2008) pp 123-157; *Supra*, Note 72

always friends''. This is the success of mediation, that is, divorce with minimum or no emotional break down or damage.

All legal options open shall be informed to the parties by the mediator. He must tell the rights and obligations of the parties towards each other. For example if the husband is seeking a divorce he should be educated about his responsibility to maintain his wife and the child. Similarly wife can be informed as to how much she can expect by way of maintenance and that even if she retains the custody of the child the husband may have rights of visitation. This education may not be possible in litigation due to limitation of time.

The mediator must train the parties to focus on reasonableness. The purpose is to see that the parties remain as comfortable as possible in their future life. He must give reasonable time to allow the parties to give proper thought on the terms of separation. During this period parties may consult their well wishers to finalise the terms. This is the job of a legal counsel to put the terms in legal format to obtain the legal seal.

It must be noted that in matrimonial disputes the Mediation has to be preferred not only because it offers a faster solution but also because it may produce a qualitatively superior solution – a wholesome one when a solution in law is not available.

Proper diagnosis of a problem is an important job of Mediator. For this he should understand the psychology of parties. Only being a person qualified in law may not be sufficient in resolving such disputes. Mediation proves to be better than adjudication as in the adjudication the emphasis is on behavioural pattern of the parties and evidences for the same rather than reasons behind such behaviour. This can be explained with simple example, very often which is looked upon as an act of cruelty may be a perception of an egoist person. When the ego is hurt, different people may react differently. The reaction may take the form of physical violence or of criticism

or looking for faults where none exists. In such a situation it is to be ascertain that whether the real questions is actually a greed for more dowry, a critical behaviour of a man or woman, or a reaction to the ego or pride of a person being hurt. But this can be done only after few numbers of sittings and good communication with the parties. It is needless to say that it requires good amount of time and personal attention to the parties. This can be hardly done by the courts due to load of work. Again it may not be proper to categorise the parties as victimizer & victimized which is generally done in adjudication.

Certain psychological problems like suspicious nature, a desire to protect or guide in smallest of situations or in minutest details may be at the root of conflict. Some people may have the tendency of correcting the partner all the time; it gives rise to constant frictions. Sometimes suspicion may be genuine but sometimes it may be pathological which do not have rational basis but the suspecter presents the stories in such a manner that it becomes difficult to disbelieve. Such cases can be referred to specialists as it may be a symptom of paranoia/paranoid schizophrenia.[81]

In some cases the behaviour of parties may be situational which gives rise to conflict. It may be financial situation where the needs far exceed income. Often with the limited means the one of the parties is trying to maintain a person outside the marriage which causes resentment to the other partner. The problems can arise on account of severe shortage of accommodation, which in the present day cities is a very scarce commodity. This creates lack of privacy as well as lack of freedom which may get translated into reaction which may look like a cruel behaviour or other behavioural abnormality. There are some situations where sacrifice and adjustment demanded of the other partner is higher than in normal circumstances. For example, one party may have to

[81] It is a sub type of a schizophrenia in which patient has false belief that someone is plotting against him or his family.

Mediation/conciliation in Property Disputes

Property dispute is one of the main components of family disputes in India. If the property is self acquired such disputes may not arise, but as the joint family system is a characteristic feature of Indian Hindu Families, these disputes are arising on joint family property mainly at the time of partition. This is happening not only in middleclass families but in big business houses also. Sometimes these disputes take violent forms, the instance of a murder of a couple and their four children of age 6, 4, 3, and 2 years, out of family property dispute can be mentioned here. In this case the man and his family were killed by his own brother and sister. The more shocking fact is that the accused, the brother of victim admitted that he and his dead brother together murdered their mother in 2007 only because she refused to transfer two *bigha* lands in their name[85].

Family settlement is the best option to resolve such disputes. It can not only be in relation to the title of the property but also for the possession for the same. The main object of such settlement is to establish and ensure amity and goodwill amongst the relations. As per Halsbury's Laws of England, " A Family Arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family, either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour. The agreement may be implied from a long course of dealing. But it is more useful to embody or to effectuate the agreement in a deed to which the term family agreement is applied."

Such amicable settlement shields the family from long drawn litigation and perpetual strives that mark the unity and solidarity of the family and create hatred between the various members of the family. Family arrangement is the understanding for division of family property by way of

[85] http://www.indianexpress.com

compromise. There may not be solution to control the human greed but certainly there are ways to reduce heart wrenching and pocket emptying litigation. In family property dispute the mediation either by elder of the family or by supervision of the court can be tried. Many times the property in question may be very small in terms of economic considerations, but due to high pride and ego, members of the family fight the cases for years together. This not only results in to economic loss but also enhances the bitterness which passes by one generation to another. Mediation addresses this ego problem and can prevent the enmities among family members. Again in litigation lawyers are generally more interested in continuing the conflict as their billing depends on the same.[86]

4.4 legislative changes reinforcing Alternate Dispute Resolution Methods

A. FAMILY DISPUTES

Family courts

The very significant step taken by the State to overcome the drawbacks of formal resolution mechanism through courts is the enactment of Family Courts Act, 1984. As seen earlier diversion of cases of particular nature by establishing special courts is one of the approaches of effective Access to Justice. State Government is directed to establish Family Courts for every city or town whose population exceeds one million. Again State Government may establish family courts for such other areas in the State as it may deem necessary.

[86] Anish Dayal, *The "great" big Indian (litigating) family*(March28, 2012), live mint THE WALL STREET JOURNAL *available at* http://blog.livemint.com/2012/03/28/the-great-big-indian-litigating-family/ (Last visited on May5, 2012)

A suit or proceedings that can be dealt with by Family Courts [87]

A suit or proceeding,

a. between the parties to a marriage for decree of a nullity marriage or restitution of conjugal rights or judicial separation or dissolution of marriage;

b. for a declaration as to the validity of a marriage or as to the matrimonial status of any person

c. between the parties to a marriage with respect to the property of the parties or of either of them;

d. for an order or injunction in circumstances arising out of a marital relationship;

e. for a declaration as to the legitimacy of any person;

f. for maintenance;

g. in relation to the guardianship of the person or the custody of, or access to, any minor.

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[87] Sec.7. Jurisdiction.-
(1) Subject to the other provision of this Act, a Family Court shall--
(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and
(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends. Explanation.-- The suits and proceedings referred to in this sub- section are suits and proceedings of the following nature, namely:--
(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;
(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;
(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;
(e) a suit or proceeding for a declaration as to the legitimacy of any person;
(f) a suit or proceeding for maintenance;
(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

In respect to above suits and proceedings the jurisdiction of District Court or any other subordinate court is barred by virtue of section 8 of the Act.

These courts can have one or more judges, and a person to be appointed as a judge should have

a. for at least seven years held a Judicial office in India or the office of a member of a tribunal or any post under the Union or a State requiring special knowledge of law; or

b. for at least seven years been an advocate of a High Court or of two or more such Courts in succession; or

c. possesses such other qualification as the Central Government may with the concurrence of the Chief Justice of India, prescribe.[88]

This Act was enacted with an intend to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. Keeping this in view an additional qualification provided for the person to be appointed as judge is that he must be a person committed to the need to protect and preserve institution of marriage and to promote the welfare of children and qualified by reason of his experience and expertise to promote the settlement of disputes by conciliation and counseling.[89]

The family courts are structured on the twin pillars of counselling and conciliation. The counsellors are required to provide counselling and to bring about reconciliation and mutual

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[88] Sec. 4 (3) A person shall not be qualified for appointment as a Judge unless he--
(a) has for at least seven years held a judicial office in India or the office of a Member of a Tribunal or any post under the Union or a State requiring special knowledge of law; or
(b) has for at least seven years been an advocate of a High Court or of two or more such Courts in succession; or
(c) possesses such other qualifications as the Central Government may, with the concurrence of the Chief Justice of India, prescribe.

[89] Sec. 4 (4) In selecting persons for appointment as Judges,-
(a) every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected; and
(b) preference shall be given to women.

settlement whenever possible. Section 9 (1) of the Act provides that "In every suit or proceeding, endeavour shall be made by Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit." While Section 9(2) empowers the family court to adjourn the proceedings if it appears that there is a reasonable possibility of settlement between the parties for such period as it thinks is necessary for taking the required measures for bringing about the settlement.

By keeping in view the private nature of family disputes Act provides for in camera proceedings.[90]

To make the proceedings more informal and participatory, the Act provides that 'no party to a suit or proceeding before a Family Court shall be entitled, as of right to be represented by a legal practitioner:

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as amicus curiae'[91]

The scheme of the act makes it clear that there is a shift from formal adjudication of disputes based on rights to conciliation of disputes based on the needs of the individuals concerned as well as those of the society.

However the Act suffers from certain shortcomings.

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[90] Sec. 11 Proceedings to be held in camera.- In every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires.

[91] Sec.13 Right to legal representation. - Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner: Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as amicus curiae.

The Act doesn't leave the choice of a conciliator or mediator in the hands of the parties. The process of Conciliation is a more personal than adjudication. It is not impersonal and distanced like the formal judicial process. Being so it is necessary that both the parties to the dispute feel comfortable in the presence of the conciliation officer. However in this formalised conciliation process there is no scope for such considerations. It is in the hands of Conciliation officers to wield a significant degree of power over parties to dispute. One of the main threats is when the judge plays the dual role of conciliator and judge as contemplated in the Act.

When a judge who is in a position of power and, following the guidelines in the Act, has been chosen as a person committed to the cause of preserving the institution of marriage, there can be a strong temptation to settle as many cases as possible. This may result in compromising the interests of the parties and more so that of women.

The Family Courts Act, though it provides for the intervention of counsellors, it casts a duty on the judge to conciliate and settle matters. When the conciliation officer is also the adjudicating officer there are enhanced chances of bias or prejudice.

This dual role tends to confuse issues and there is the constant danger that judges in the name of conciliation may forget to give effect even to substantive rights of parties.

It should be noted that the flawed working of the formal justice system should not by itself be a justification for the existence of the family courts unless they actually provide a better alternative.[92]

[92] D. Nagasaila , Family Courts: A Critique, 27(33), Economic and Political Weekly, 1735, (1992) pp 1735-1737

B. CHILD RIGHTS DISPUTES

The matters relating to child custody are to be dealt with by the Family Courts.

However to specifically deal with child rights and complaints relating to the same the Commission for Protection of Child Rights Act, 2005 was enacted. The object of the Act is to constitute National Commission and State Commissions for Protection of Child Rights and Children's Courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto.

One of the important functions of the Commission is to inquire into violation of child rights and to recommend the initiation of proceedings.

The Commission is empowered to inquire into and take suo motu action of matters relating to,-

(i) deprivation and violation of child rights;

(ii) non-implementation of laws providing for protection and development of children;

(iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children[93]

[93] Sec. 13 Functions of Commission.-(1) The Commission shall perform all or any of the following functions, namely:-
(j) inquire into complaints and take suo motu notice of matters relating to,-
(i) deprivation and violation of child rights;
(ii) non-implementation of laws providing for protection and development of children;
(iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with appropriate authorities;

Children's court

section 25 of the Act provides that "For the purpose of providing speedy trial of offences against children or of violation of child rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify at least a court in the State or specify, for each district, a Court of Session to be a Children's Court to try the said offences:

Provided that nothing in this section shall apply if -

(a) a Court of Session is already specified as a special court; or

(b) a special court is already constituted, for such offences under any other law for the time being in force."

Property Disputes

In resolving property disputes family arrangements, compromise, mediation, and conciliation are effectively used. Section 89 of Code of Civil Procedure provides for settlement of dispute outside the court. It is mandatory for the courts to identify cases where an amicable settlement is possible, formulate the terms of such settlement and invite the observations thereon of the parties to the dispute. Where the court comes to the conclusion that mediation is an appropriate way of settlement, it may itself act as a mediator and shall affect the compromise between the parties. The language used in the section is mandatory in nature and makes the mediation compulsory.

LEGAL SERVICES AUTHORITIES ACT, 1986

This Act was enacted to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society and to ensure that opportunities of justice are not denied to any citizen due to economic or other disabilities.

Another important object of the Act was to revive the system of Panchayats in the form of Lok Adalats and to promote justice on the basis of equal opportunity. The first Lok Adalat was organized at Una in Junagarh district of Gujarat on 14th March, 1984.

The Act obligates every State to constitute a body called as State Legal Services Authority one of the functions of which is to organise Lok Adalats including Lok Adalats for High Court cases. State Authority may constitute Taluka Legal Services Committee to organise Lok Adalats within Taluka. It also directs every State to constitute District Legal Services Authority for every District to organise Lok Adalats within the district.

Time and place of organization and the jurisdiction of Lok Adalat so organised shall be determined by the Authority organizing the same.

Lok Adalats have jurisdiction to determine and arrive at a settlement or compromise between the parties to a dispute in respect of

a. Any case pending before or
b. Any matter falling within the jurisdiction of, and is not brought before any court for which the Lok Adalat is so organised.

Cognizance of cases by Lok Adalats- (1) where in any case is pending before the court

(i)(a) the parties thereof agree; or

(b) one of the parties thereof makes an application to the court for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement; or

(ii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat; the court should refer the case to the Lok Adalat[94]

[94] Sec. 25, the Legal Services Authorities Act, 1987.

Award of Lok Adalat shall deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at by a Lok Adalat the court-fee paid in such case shall be refunded in the manner provided under the Court-fees Act, 1870. Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.

The below mentioned comparison between the procedure of Court of Law and of Lok Adalat explains, why can the Lok Adalat be a good alternative to the litigation.

Sr. No	**Feature**	**Civil Court**	**Lok Adalat**
1.	Institution of case	At discretion of party	Case may be taken up On application of party or By reference by Court in which case is pending
2.	Nature of case	Litigation commences in Court	Pre-litigation and post-litigation
3.	Procedure	Rules of Civil Procedure Code	Power to specify its own procedure for the determination of any dispute coming before it
4.	Guidance by the principles of justice, equity and fair play	Has to follow	Has to follow

5.	Decision/Award		Required to act with utmost expedition in arriving at a compromise or settlement
6.	Mandate	To decide the matter	To determine and arrive at a compromise/settlement
7.	Law to be followed	Both substantive and procedural	No rigid procedures Rights can be compromised

ROLE OF ADMINISTRATOR IN LEGAL ORDERING

CHAPTER V- ROLE OF ADMINISTRATOR IN LEGAL ORDERING

Powers and Duties of President

Article 14 of the Indian Constitution promises the equality before law and equal protection of laws. In other terms it promises the equal access to justice. The administrative mechanism for delivering justice as promised by Article 14 is provided in Article 256 of the Constitution of India. Article 256 imposes an obligation on the State to implement all the laws. The intention behind implementation of laws is to provide an effective access to justice to all. The enforcement of these laws is vested with judiciary. The executive power of the Union is vested in the President and he may exercise it directly or through subordinate officers similarly the executive powers of the State are vested in the Governor and he may exercise it directly or through subordinate officers[95]. The subordinate officers of President include the Governors of the States. The President is responsible for the supervision of administrative mechanism and to see that every law enacted is implemented. It is the duty of the Union to ensure the working of the State government according to the Constitution in case of failure of State to administer the laws and deliver the justice as promised and mandated by Constitution of India.[96] If the President believes that the government of the State is not carried on according to the provisions of the Constitution he can exercise his power under Article 256 by invoking Article 356. Article 356 empowers the President to issue a proclamation and to assume to himself all or any of the functions of the

[95] Article 154(1) of the Constitution state as "The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution".

[96] Article 355 of the Constitution states as "It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution"

Government of the State and all or any of the powers vested in or exercisable by the Governor or any authority or body in the State other than the Legislature of the State.

This is not only power but duty of the President because Under Article 60 he takes the oath to preserve, protect and defend the Constitution and the law. Therefore the combined reading of Article 60 and Article 256 obligates the President to ensure compliance of all the laws. Thus it can be seen that the power structure arranged in Articles 14, 256, 257(1), 356(1) read with Article 365 is in such a manner that it imposed a duty on the State to work *suo motu* and ensure the delivery of justice. Accordingly State intervention is expected for protection of rights of individual irrespective of his/her wish. The role to be played by the State is active protector. The affirmative action on the part of State also demands delivery of justice.

Inquisitorial Mechanism

The scheme of Articles 14, 256, 356, 60 reveals that administrative adjudication designed in the Constitution of India is essentially inquisitorial. According to which it is the duty of the State to find out using its administrative set ups the instances of gross injustice to its subjects and to provide redressal for the same.

In the present context, this duty of the State becomes relevant

Consequences of failure

If the Executive officers or subordinate officers fail to perform their obligation, the recourse to section 166 of I.P.C may be taken. This section provides that "Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

The term injury has been defined as 'any harm whatever illegally caused to any person, in body, mind, reputation or property'[97]

It talks about the personal liability of the public servant if he acts in derogation of his duty. However Section 197 Criminal Procedure Code stands as a bar to Section 166 Indian Penal Code as it requires prior sanction of the government before prosecuting any government servant. This section may be repealed to give full effect to section 166 of Indian Penal Code. The Rule of Law is enunciated in Article 14 according to which no body is above law and every one irrespective of his rank or conditions, is subject to the jurisdiction of ordinary court.

Requiring such special sanction by the government is against the principle of equality.

PRESENT SYSTEM OF DELIVERY OF JUSTICE

Unfortunately Article 256 has remained a dead letter. Supreme Court in *Ram Jawaya v. State of Punjab*[98] and *Samsher v. State of Punjab*[99] while interpreting Article 74 and 75 of the Indian Constitution stated that Indian Constitution is based on Parliamentary form of government and the President was bound by the advice of the Council of Ministers. According to this interpretation of Article 74 President cannot act on his own discretion in exercising his powers. By this interpretation the power structure as provided by the Constitution has been disturbed. It is true that Article 74 directs the President to act on the aid and advice of the Council of Ministers headed by the Prime Minister. However the aid and advice is limited only to the exercise of functions by the President. There is remarkable difference between "Power" and Function. Power refers to the ability to affect others and "function" refers to the things to be done or actions to be taken. In exercising the powers conferred by the Constitution itself President cannot be subjected to the aid and advice given by the council. He is only bound by the mandates of the

[97] Section 44 of Indian Penal Code, 1860
[98] (1955) 2 S.C.R. 225.
[99] AIR 1974 S.C 2192.

Constitution. Again no advice of the Council shall be binding on the President which is unconstitutional. Separation of power is one of the salient and basic features of Indian Constitution. Article 75(5) of the Constitution provides that if a minister is not a member of either house of the Parliament he shall cease to hold his office after the expiration of six months. But it does not mean that the Ministers who become members of the Parliament are at par with the legislators in the Parliament and entitled to enjoy legislative powers. According to convention in India only the political party or coalition of parties who have two third majorities can form the council. Thus the council has been enjoying legislative powers by the virtue of their election or nomination to the Parliament. It has resulted in to illegal transitions of the executive powers and legislative powers from the President and the Parliament respectively to the Political Parties. Again Parliament shall act as a whole body. The Constitution nowhere indicates polarization or division of the body into government and opposition. And each individual legislator is to act individually and not under party wipe and should effectively take part in the legislative proceedings. In the present scenario in India the whole power structure has been disturbed and taken over by the political parties.

Role of Administrator in Legal Ordering

A great part of legal ordering is the private ordering arising from the will of the parties. In the legal order administration has a central role.

A judge while delivering his judgment has to give speaking order the reason is, it is required to reveal the basis of the decision. This would encourage self-examination, which may check his sub conscious bias, by pre testing his findings and modes of reaching them against the standards of persuasion which he shares with other judges and with the community in general. This should be the norm to be followed in administrative adjudication also. An administrator while

adjudicating should look at the powers conferred on the authority, the purpose for such power, the nature of power i.e. whether it is limited or unlimited and what are the constitutional checks or limitations and whether the action of the authority has transgressed the limits of the powers conferred on it. Private power is always subordinate to public power. In ordering of facts public power shall prevails. It is the duty of the decision making authority to take all reasonable steps to ascertain the material facts. He has to ascertain the facts, apply all the relevant laws and then arrive at a decision. The administrator in delivery of justice should take judicial notice of all laws. All persons who will be materially affected by such decision have to be informed within reasonable time of its intention to make decision and shall be given reasonable opportunity of making representation to the authority with respect thereto. If the illegal exercise of power is brought or come to the notice of the administrator he should cease such order.

CONCLUSION

CHAPTER- VI CONCLUSION

The amicable settlement of family disputes is a characteristic feature of Indian society. Not only Hinduism but other major religions in India like Islam, Christianity, and Sikhism believe in peaceful settlement of family disputes. The various techniques like mediation, conciliation and arbitration were extensively used in all these religious communities for resolving family disputes.

In Hindu community the culture of Alternative Dispute Resolution has been followed from the ancient period, which continued under Mughal as well as British Rule. The efforts for peaceful settlement used to be attempted by popular courts, *panchayats* and *karta* [100]

Codification of Hindu law has brought some drastic changes in the perceptions about and practices relating to marriage, divorce, adoption, and inheritance in the Hindu community. It has resulted in a shift from emphasis on duties to emphasis on rights. This shift, to some extent has resulted into the increase sense of grievance contributing to the increased disputes within the families. Everyone has become more interested in claiming his or her right rather than performing his or her duty. This has resulted into increased litigation. There was a strong opposition to the Hindu Code Bill; however it was not challenged under Article 29(1) of the Constitution of India. Still there is a scope for such challenge to reinforce the system of family dispute resolution in Hindu families under the term 'culture' as the Article grants protection to 'any section of society'.[101]

[100] Chapter I, pp.1-13
[101] Chapter II, pp. 22-24

Again the system of amicable settlement of disputes has been greatly replaced by the system of adjudication. However adjudication has proved to be less suitable for the family disputes due to its cumbersome, rigid, time consuming, and adversarial nature. This system has proved to be less efficient in providing effective access to justice. The long delays in deciding the cases have resulted into huge pendency of cases.[102]

To undo undesirable changes that have happened due to the destruction of system of peaceful settlement of the family disputes, efforts to reinforce the same have been initiated. In furtherance of which some legislative changes have been introduced in the form of Arbitration and Conciliation Act, 1996; the Legal Services Authorities Act, 1987, section 89 of the Code of Civil Procedure Code, 1908.

On analysing the four basic techniques of Alternative Dispute Resolution namely Negotiation, Mediation, Conciliation and Arbitration it may be concluded that Mediation and Conciliation are the best suitable techniques to resolve family disputes. The reason being Arbitration is more formal and expensive compare to these two methods. The Arbitrator can depart from the procedural law but he cannot ignore the substantive law applicable to the parties and has to decide the case strictly according to the same. This requirement minimises the chances of creative and situation specific solutions for the parties. In negotiation there is no neutral third party intervention and again the advocates (in out of court settlement) may make the situation worse by bargaining on behalf of the parties and polarizing them.[103]

[102] Chapter III, pp. 33-35
[103] Chapter IV, p.55

The Constitution of India provides for the inquisitorial mechanism for administrative adjudication. It is the duty of the State to find out the instances of gross injustice to its subjects and remedy the same.[104]

SUGGESTIONS

In order to achieve positive results from the efforts to reinforce the Alternative Dispute Resolution Mechanism some significant steps have to be taken. They can be as follows,

Qualification for Mediator/Conciliator:

As far as possible, the opportunity to mediate or conciliate has to be given to the person, desirably an elder of the same family. Or the mediator/ conciliator can at least be provided with the assistance of such person. However if it's not possible, in order to get the quality results from the mediation or conciliation, the person acting as mediator or conciliator may be required to have certain minimum qualifications, he should be person qualified in law as well as psychology. He must be aware of the culture, views, practices, preferences of different sections, classes of the society.[105]

Change in the approach of Judges:

Under the Family Courts Act, 1984, the judge is empowered to act as a mediator or conciliator. This may lead to conflict. The mindset of a judge is entirely different from that of a mediator or conciliator. He is accustomed to decide what is right and what is wrong and is interested in doing justice. The mediator/ conciliator on the other hand is interested in amicable settlement of dispute with minimum harm to the relationship. At the first place, this provision of judge acting as mediator/conciliator is not very appropriate. And even if the judge has to act as

[104] Chapter V, p.76
[105] *Supra*, Note 103 at 57

mediator/conciliator, he must change his approach towards dispute resolution and try to resolve it to the satisfaction of both the parties rather than finding the fault with either of them.[106]

Role of lawyers:

At the first instance lawyers need to understand their responsibility and duty towards their client. They should not always think in terms of monetary considerations. Most of the times in family dispute the best interest of the client lies in preserving the relationship and reducing the cost, monetary as well as emotional. As far as possible the role of lawyers in resolving such disputes need to be minimised. This necessity has arisen due to their adversarial mentality. Even though they can play some role in negotiation i.e. out of court settlement for the parties, there is always a danger of their bargain at arm's length. They become more active by denying an opportunity to the parties for participation and try to create win-lose situation by thinking of what could be the result in the court.[107]

Compulsory Mediation:

Currently the mediation is voluntary process under the Family Courts Act, 1984. It should be made compulsory, and if any party is not willing for such compulsory mediation, the reasons for the same shall be recorded in writing.

National Commission for Protection of Child Rights:

The chairperson of National Commission for Protection of Child Rights should be a person having experience in child psychology. The Commission has a power to inquire in to complaints and to take suo motu notice of matters relating to child rights violation.[108] The decisions of the Commission are taken by majority principle and Chairman has a casting vote in case of equality of votes (as the Commission is consists of six members) his understanding of the gravity of the

[106] Supra, Note 103 at 69
[107] *Supra*, Note 102 at 32
[108] *Supra*, Note 103 at 70

matter in issue gains immense importance. Similarly Chairperson of National Commission for Women which is empowered to take up the cases of violation of constitutional provisions and other laws relating to women shall be person bearing qualification in psychology.

Affirmative action by State

The officials of the departments of women and child development/welfare need to change their attitude. They should play more proactive role. As discussed in chapter VI, it is the duty of the State to take affirmative action for legal ordering. The cases of matrimonial or child rights disputes can be dealt with by these officials.

Prevention than cure

Prevention is always better than cure. All possible efforts have to be made to prevent the family disputes, especially matrimonial disputes. Because once the dispute occurs and even if it is resolved subsequently it may only be patch work. For this at the time of arrangement of marriage the compatibility of two persons must be checked. In addition to genetic compatibility the temporal compatibility has to be seen. This may help in avoiding future dispute.

Finally it can be concluded that there is a huge scope for Alternative Dispute Resolution Mechanism in family disputes. This mechanism will not only lower the burden of the judiciary but also provide means for effective access to justice by removing the economical and other barriers. This will help in the fulfillment of promise given by Article 14 and Article 256 of the Constitution.

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