



Indira Gandhi National Open University
School of Education

MAEE-002
BASICS OF LEGAL
AWARENESS



Regulatory and Dispute Resolution Law

1(A)

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LAW**

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BLOCK 1(A) REGULATORY AND DISPUTE RESOLUTION LAW

Introduction to Block 1(A)

“Unit 4: Implementation of Law” of Block 1 of course MAEE-002 presented an overview of the place and significance of *rule of law* and *principles of natural justice* as essential and effective contrivances in regulating implementation of law in any democratic country. From this, we could clearly understand the significance of ‘Supremacy of Regular Law’ that regulates the actions of all those empowered to govern/rule. In other words, it is not the men who rule but the 'law' that rules. So, the government functionaries who are entrusted with the power to govern/rule are bound by law in all their actions. In furtherance of effective implementation of law, both regulatory law and dispute resolution law also play significant role. Block 1(A) of this course here attempts to focus on these laws. This Block has the following two units.

“Unit 4(A)1: **Regulatory Law**” explains the concept, need and scope of regulatory law with emphasis on the significance of social and distributive justice. It describes the purposes, powers, rights and responsibilities of regulatory authorities. It highlights the typology of regulation -- economic regulation, regulation in the public interest, and environmental regulation – vis-a-vis regulatory law.

“Unit 4(A)2: **Dispute Resolution Law**” presents this law from the point of view of Alternative Dispute Resolution (ADR) law, and as an alternative to the Formal Legal System. It discusses a variety of ADR tools – Negotiation, Mediation, Arbitration, Conciliation, Adjudication and Restorative justice -- as streamlined resolution methods and techniques designed to resolve issues in controversy more efficiently, particularly when the adjudication through judicial system as normal litigation process fails, or more likely to fail to deliver the timely justice. It also highlights the relative advantages and disadvantages of each of these ADR tools, methods or techniques including their specific types, and also in comparison with the normal litigation.

After working through this Block, you will be able to:

- Explain the concept, need, typology and scope of regulatory law;
- Critically analyse the purposes, powers, rights and responsibilities of regulatory authorities;
- acquire the knowledge and skills related to ADR methods, techniques or tools such as Negotiation, Mediation, Arbitration, Conciliation, Adjudication, and Restorative justice;
- discern the principles of diversity of interests, conflicts, disputes, and resolution strategies;
- appreciate the significance of different methods and techniques of settling the disagreement peacefully by way of compromise, negotiation or fair agreements; and
- apply the principle of diplomacy as a win-win situation for both or all the parties involved in ADR.

UNIT-4(A)1 REGULATORY LAW

Structure

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4(A)1.0 INTRODUCTION

In Unit-4 titled “Implementation of Law” under Block-1 (titled “Essentials of Indian Legal System”) you have studied about how rule of law and principles of natural justice act as effective contrivances in regulating the implementation of law not only in India but also in any democratic country. From sub-section 4.2.1.1 of section 4.2.1 of Unit-4, you can recall the words: “It is not the men who rule but the ‘law’ that rules. So, the government functionaries who are entrusted with the power to govern/rule are bound by law in all their actions.” From this you can clearly understand the significance of ‘Supremacy of Regular Law’ that regulates the actions of all those empowered to govern/rule. In Unit-4(A)1 of Block-1(A) here, our focus will be on ‘Regulatory Law’ which is the basis for orderly and effective functioning of the society and the economy.

Regulatory laws are a set of rules and regulations established by governments or regulatory bodies to govern various aspects of society, including business

practices, consumer protection, environmental protection, healthcare, finance, and more. Regulatory laws are essential for creating a framework of rules and standards that promote the common good, protect vulnerable individuals and groups, and ensure the orderly functioning of society and the economy. They form a crucial tool for governments to address market failures, externalities, and other challenges that arise in complex, interconnected societies.

Across several sectors, regulatory authorities play important roles, from drafting rules and regulations to enabling compliance and adjudicating disputes. Today, independent regulators govern large sectors of the Indian economy, from financial markets and airports to telecom and electricity utility companies. Consequently, independent regulators constitute an increasingly important institution of governance in India, and their effectiveness has important consequences for India's political economy.

Regulatory compliance essentially helps the Government to keep a check on organizations and their functions, but an organization has diverse functions that attract different areas and aspects. Therefore, all the regulations requiring compliance cannot be consolidated into a single legislature. These regulations are hence placed under specific areas they govern and it will help maintain transparency of organizations. For example The Telecom Regulatory Authority (TRAI) is established only to regulate telecommunications. Similarly, there are multiple areas in which the Government demands compliance. Some of the prominent areas of regulatory laws in India are as follows:

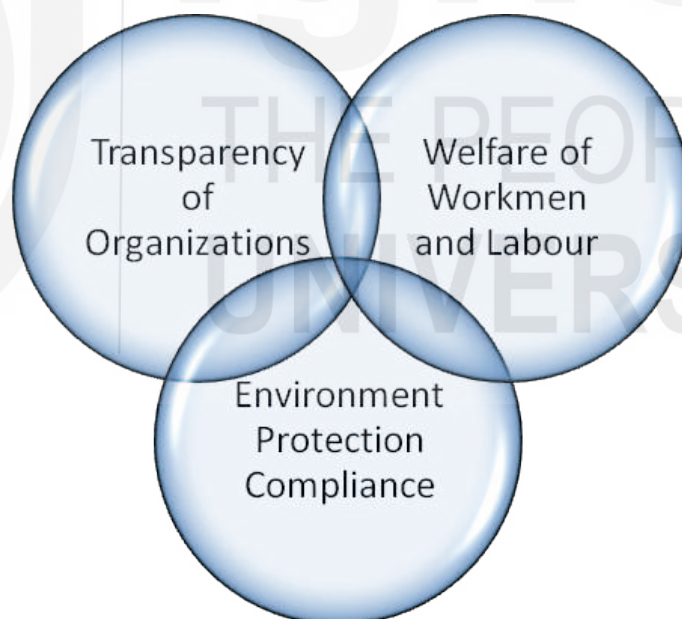


Figure 4(A)1.1: Prominent areas of regulatory laws in India

A. Transparency of Organizations

Accounts, records, and data of a company represent its working and involvement as a corporate personality. In India, the Companies Act, 2013 regulates all these for the companies that are incorporated. The corporate governance practices of Indian listed companies are driven by a combination of mandatory requirements, voluntary guidelines, and market forces. Some of the important regulations for corporate governance include mandatory requirements for board evaluation,

rotation of auditors, corporate social responsibility (CSR) spending, one female director and one-third of independent directors (IDs), and disclosure of dividend policy by the top 1,000 companies. Further, regulation of transactions involving a "promoter" and "related party" is spotlighted to drive distinct governance considerations for Indian listed companies.

At the core, the Companies Act is the governing legislation and the nodal authority under the Companies Act, the Ministry of Corporate Affairs (MCA), issues rules, circulars, and guidelines. Notably, the MCA in 2019, released the National Guidelines for Responsible Business Conduct (NGRBC), which is aimed at nudging businesses to contribute towards wider development goals while seeking to maximize their profits.

Additionally, listed companies in India are regulated by the Securities and Exchange Board of India (SEBI) and are subject to the regulations, rules, and circulars issued by it. Specifically, for corporate governance the primary regulations are the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR Regulations), which impose a range of substantive requirements on listed companies, including compliance with the principles governing disclosures and obligations of listed companies, the rights of shareholders including special rights of minority shareholders and the responsibilities of the Board.

B. Environment Protection Compliance

Organizations are, in some way or another, one of the major contributors to the degrading environment, and, the environment being one of the major concerns currently, it requires attention through control and adopting preventive measures. There are specific environmental laws enacted to monitor as well as regulate the environmental issues in India. These laws not only imply duties to the people but also to corporate personalities.

Air (Prevention and Control of Pollution) Act, 1981 is a legislation that works towards the controlling of air pollution by preventive measures and sanction (in case of breach). Organizations also need to comply with these directions and if they don't follow the directions then action is taken against them under S.40 of the Act. Similar is the Water (Prevention and Control of Pollution) Act, 1974 which is aimed at controlling and preventing water pollution. S.47 of the Act makes polluting of water by companies an offence.

There are several other legislations with respect to environmental protection that the individuals and the companies have to comply with, such as: the Indian Forest Act, 1927; the Forest (Conservation) Act, 1980; the Environment Protection Act, 1986; Storage and Import of Hazardous Chemical Rules, 1989; the National Environment Tribunal Act, 1995; the Public Liability Insurance Act, 1991, Hazardous Wastes Rules, 2008, etc.

C. Welfare of Workmen and Labour

An organization without a workforce is unimaginable. Workmen and employees are one of the pillars of an organization. So, the organization must keep their workmen's rights protected, and keeping all this is not just a part

of their strategic growth but regulatory compliance. To ensure the same, the Government has laid down certain regulations that businesses/ employers have to carry out. Some legislations that govern organization-workman include: The Workmen's Compensation Act, 1923; the Trade Union Act, 1926; The Industrial Disputes Act, 1947; the Maternity Benefits Act, 1961; The Contract Labour (Regulation and Abolition) Act, 1970; the Payment of Gratuity Act, 1972; the Equal Remuneration Act, 1976, etc. Each of these legislations have their own goals which are stated in their objectives.

Regulatory compliance is recognized as a compulsion that organizations have to adhere to, strictly, which is formed by the highest authority, i.e. Government. However, it can be observed that the concept of Regulatory Compliance in itself is very meaningful, essential and well-organized. Whilst it forms a structure of working between the government and the organizations, at the same time it maintains a balance in society by representing that organizations have the same duties to fulfill as citizens and towards citizens and their well-being. It controls the exploitation of resources (whether human or substantive) by the organizations. One other feature, that can be observed, is that they are evergreen; which is obvious as regulations are a set of rules, and it is known that law has a static nature, yet, it will change according to the requirements.

4(A)1.1 LEARNING OBJECTIVES

After going through this Unit, we expect you to be able to:

- Explain the concept, need and scope of regulatory law;
- Critically analyse the purposes, powers, rights and responsibilities of regulatory authorities; and
- Discuss the typology of regulatory law.

4(A)1.2 CONCEPT, NEED AND SCOPE OF REGULATORY LAW: SIGNIFICANCE OF SOCIAL AND DISTRIBUTIVE JUSTICE

Social justice and distributive justice are the fundamental principles that guide the development and implementation of regulatory laws. These principles aim to ensure fairness, equity, and the equitable distribution of resources and opportunities within society. Regulatory laws play a crucial role in promoting social and distributive justice by addressing inequalities, protecting vulnerable populations, and advancing the common good.

4(A)1.2.1 Concept

Social and distributive justice in regulatory laws refers to the principles and practices aimed at ensuring fairness, equity, and the just distribution of resources, opportunities, and benefits within society through the framework of regulations. Here's how these concepts manifest in regulatory laws (Freeman, 2006, pp. 297 – 325).



Redistribution of Resources: Regulatory laws can help redistribute wealth and resources in society by implementing progressive taxation policies, imposing regulations on income and wealth distribution, and providing social welfare programs such as unemployment benefits, healthcare, and education subsidies. Progressive taxation laws are regulatory measures that impose higher tax rates on individuals or corporations with higher incomes or profits, thereby redistributing wealth from the affluent to those with low income, low profits, and fewer resources. Income Tax Act, 1961 which provides for income tax rates based on one's income is an example of this. Additionally, the introduction of GST which is a consumption tax that includes exemptions and lower rates for essential goods and services helps reduce the tax burden on low-income households.

Protecting Vulnerable Populations: Regulatory laws often include provisions to protect vulnerable populations such as children, the elderly, the minorities, and the individuals with disabilities. These laws may establish anti-discrimination measures, minimum wage standards, workplace safety regulations, and social assistance programs to ensure that all members of society have access to basic rights and opportunities.

Ensuring equal access to opportunities: Regulatory laws promote equal access to opportunities by preventing discrimination based on factors such as race, gender, religion, sexual orientation, disability, or socioeconomic status. They may mandate affirmative action programs, equal employment opportunity requirements, and access to education and healthcare services to level the playing field for marginalized groups.

Preventing Exploitation and Abuse: Regulatory Laws protect individuals from exploitation and abuse by setting standards for fair labour practices, consumer rights, and business conduct. They also regulate working conditions, product safety, financial transactions, and environmental practices so as to prevent exploitation of workers, consumers, and the environment. One of the best examples is The Sexual Harassment of Women at Workplace (Prevention,

Prohibition and Redressal) Act, 2013. This law was enacted to prevent and address sexual harassment of women in the workplace and to ensure their safety and dignity at work. It requires employers in both the public and private sectors to establish internal complaints committees (ICCs) to receive and address complaints of sexual harassment. By mandating the establishment of ICCs and imposing penalties for noncompliance, this law aims to prevent exploitation and abuse of women in the workplace, promote gender equality, and create a more inclusive and equitable work environment where all employees are treated with dignity and respect irrespective of gender.

Environmental Justice: Regulatory laws address environmental injustices by regulating pollution, hazardous waste disposal, and industrial activities that disproportionately affect low-income communities and marginalized populations. They promote environmental equity by ensuring that all communities have access to clean air, water, and natural resources. For example, The Forest Rights Act (Scheduled Tribes and Other Traditional Forest Dwellers Recognition of Forest Rights) Act, 2006 is a legislation that recognizes the rights of forest-dwelling communities, including the Scheduled Tribes and other traditional forest dwellers, to inhabit and cultivate forest land that they have been traditionally using for sustenance and livelihood. By granting legal recognition to the customary rights of forest-dwelling communities the Forest Rights Act promotes environmental justice by ensuring that these communities have a stake in the management and conservation of forest resources.

Promoting Economic Stability and Security: Regulatory laws contribute to social and distributive justice by promoting economic stability, reducing poverty, and mitigating the impacts of economic crises. They regulate financial markets, banking practices, and corporate behavior to prevent financial exploitation, market failures, and systemic risks that disproportionately harm vulnerable populations. An example of legislation that has existed from the pre-independence era in India regulating economic stability and security is the Reserve Bank of India Act 1934. By establishing a detailed regulatory framework for monetary policy, banking, and financial markets, the RBI Act contributes to economic stability and security in India. It helps to maintain price stability, safeguard the banking system against risks, and protect the interests of consumers and investors. Additionally, the RBI's role in regulating and supervising financial institutions helps to mitigate systemic risks and prevent financial crises, thereby promoting economic stability and security of the nation.

Fostering Social Cohesion and Solidarity: Fostering social cohesion and solidarity involves promoting a sense of belonging, mutual respect, and shared values among members of society. Regulatory laws can play a crucial role in addressing social inequalities, protecting the rights of marginalized groups, and promoting inclusivity. The Constitution of India 1950 provides a clear regulatory framework based on principles of justice, equality, and fraternity laying the foundation for fostering social cohesion and solidarity among its diverse population. It provides a common set of values and ideals that bind together individuals and communities from different backgrounds, promote harmony, understanding, and cooperation in society.

4(A)1.2.2 Need

The need for regulatory laws arises from several factors that are inherent in modern societies which may be summarized as follows:

Protection of Public Interest



Market Failures



Maintaining Order and Stability



Addressing Externalities



Ensuring Public Health and Safety



Consumer Protection



Financial Stability



Promoting Innovation and Growth



Protection of Public Interest: Regulatory Laws are necessary to protect the interests of the public from various forms of harm, including health risks, financial exploitation, environmental degradation, and safety hazards. They ensure that businesses and individuals operate in a manner that prioritizes the well-being of society as a whole.

Market Failures: In free-market economies, market failures such as those resulting in monopolies, information asymmetry, externalities, and public goods provision issues can occur. Regulatory laws are needed to correct these market failures and ensure fair competition, consumer protection, and the efficient allocation of resources (Stiglitz, 2010, pp.64-68).

Maintaining Order and Stability: Regulatory Laws help maintain social order and stability by establishing clear rules and standards of behavior for individuals and organizations. They prevent chaos, fraud, abuse, and unfair practices that can undermine trust in institutions and disrupt societal functioning.

Addressing Externalities: Many economic activities generate externalities, such as pollution, noise, and congestion, which impose costs on society that are not borne by the parties involved in the transaction. Regulatory laws, such as environmental regulations and zoning ordinances, aim to internalize these externalities and promote sustainable development.

Ensuring Public Health and Safety: Regulatory Laws play a critical role in protecting public health and safety by establishing standards and regulations for food safety, pharmaceuticals, workplace conditions, transportation, and other areas. They help prevent accidents, outbreaks of disease, and other threats to public well-being. For example, The Food Safety and Standards Authority of India (FSSAI) has been created for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import to ensure availability of safe and wholesome food for human consumption.

Consumer Protection: Regulatory Laws are essential for safeguarding consumer rights and interests in the marketplace. They ensure that consumers have access to accurate information, fair pricing, safe products, and recourse mechanisms in case of disputes or fraud. The Consumer Protection Act 2019 is the new legislation in India that protects the rights of consumers. (Glaeser, 2004).

Financial Stability: In the financial sector, regulatory laws are necessary to maintain the stability and integrity of financial markets, prevent systemic risks, and protect investors and depositors. They regulate banking activities, securities, trading, insurance, and other financial transactions to ensure transparency, accountability, and risk management (Mishkin, 2001, pp.324 – 356).

Promoting Innovation and Growth: Regulatory laws are also needed to foster innovation and economic growth by providing a stable regulatory environment that encourages investment, entrepreneurship, and technological advancement while balancing it with social and environmental concerns.

4(A)1.2.3 Scope

The scope of regulatory laws is broad and encompasses various aspects of society, economy, and governance. Here are some key areas within the scope of regulatory laws.

Business and Commerce: Regulatory laws govern business practices, including company formation, corporate governance, contracts, taxation, competition, intellectual property rights, advertising, and consumer protection. For example there are detailed provisions under the Companies Act 2013 for the incorporation of companies, powers and responsibilities of promoters, directors, etc., and corporate finance.

Financial Regulation: Regulatory laws in the financial sector oversee banking activities, securities market, insurance, investment management, derivatives markets, and credit rating agencies. They aim to ensure financial stability, market integrity, investor protection, and fair competition. The Securities Exchange Board of India (SEBI) is responsible for regulating the securities market.

Environmental regulation: Regulatory laws address environmental concerns such as pollution control, waste management, resource conservation, climate change mitigation, and biodiversity protection. They set standards for emissions, water quality, land use, and environmental impact assessments (Esty, 2006, pp.1-47).

Health and safety: Regulatory laws establish standards and protocols to ensure the health and safety of individuals in various settings, including workplaces, healthcare facilities, food production, transportation, and consumer products. They mandate safety equipment, hygiene practices, regulatory inspections, and response procedures for emergencies (Gostin, 2008, pp.30 – 68.).

Consumer Protection: Regulatory laws protect consumer rights and interests by regulating product safety, labeling, advertising, pricing, warranties, and dispute resolution mechanisms. They aim to prevent fraud, deception, unfair practices, and exploitation of vulnerable consumers (Morgan & Yeung, 2007, pp.93 -120).

Labour Regulation: Regulatory laws govern employment relationships, including wages, working hours, occupational health and safety, discrimination, harassment, collective bargaining, and employee benefits. They aim to protect workers' rights, promote fair labor practices, and maintain industrial peace. The Government of India has consolidated 29 Central Labour Laws into four labour codes namely Code on Wages, 2019, Code on Social Security, 2020, Industrial Relations Code, 2020 and Occupational, Safety, Health and Working Conditions Code, 2020.

Public Utilities: Regulatory laws oversee essential services such as electricity, water supply, telecommunications, and transportation. They regulate service quality, pricing, access, infrastructure investment, and competition to ensure reliable and affordable services for the public.

Food and Drug Regulation: Regulatory laws ensure the safety, efficacy, and quality of food, pharmaceuticals, medical devices, cosmetics, and other consumer products. They regulate production processes, labeling, advertising, distribution, and post-market surveillance to protect public health. The Central Drugs Standard Control Organisation (CDSCO) under Directorate General of Health Services, Ministry of Health & Family Welfare, Government of India is the National Regulatory Authority of India responsible for drug regulation.

Data Protection and Privacy: Regulatory laws govern the collection, use, storage, and sharing of personal data by businesses and government agencies. They establish rights for individuals, obligations for data controllers, security requirements, and mechanisms for consent, disclosure, and enforcement. The India Digital Personal Data Protection Act, 2023 (DPDPA) is a landmark legislation that aims to safeguard the privacy of individuals in the digital age. The Act came into effect on September 1, 2023, and it applies to all organizations that process personal data of individuals in India.

Transportation Regulation: Regulatory laws oversee transportation systems, including road traffic, aviation, maritime, and rail transport. They set safety standards, licensing requirements, traffic rules, infrastructure development, and environmental impact assessments. The Motor Vehicles Act 1988 is an example of Law enacted for the purpose of ensuring road transportation and motor vehicle safety.

Check Your Progress

Notes: a) Write the answer in the space given below the question.

b) Check your answer with the one given under “Answers to ‘Check Your Progress’ Questions” of this Unit.

1. Examine the need and scope of regulatory laws with emphasis on how regulatory laws contribute to society.

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4(A)1.3 REGULATORY AUTHORITIES: PURPOSES, POWERS, RIGHTS AND RESPONSIBILITIES

A regulatory authority, also known as a regulatory body, agency, or simply regulator, is an autonomous enforcing body created by the government. These authorities are created to regulate, supervise, and govern diverse industries like insurance, finance, education, and healthcare, among others. Each sector in India has its Regulatory Authority. They may be independent or act under executive supervision.

In the 1990s with the beginning of an era of economic reforms, commonly known as the LPG (Liberalisation, Privatisation and Globalisation) in India, India liberalized industries and handed over sectoral governance to regulatory bodies. These bodies played a constructive role in ensuring a free and fair market. Post-1990s, privatisation saw the advent of the 'Indian Regulator' that became the 'nurturer' and 'parent' of its sector. The regulators incentivized private investment by giving them functional autonomy and shielding them from interference of cumbersome administrative procedures. Also, regulatory bodies have shown that empowered regulators can bring fruitful results. For example,

- The Competition Commission of India (CCI) functions as a market regulator by preventing and regulating anti-competitive practices in the country. In August 2016 the CCI imposed a penalty of over Rs. 6700 crore on 11 cement companies as well as their trade association for cartelization.
- Food Safety and Standards Authority of India (FSSAI) was established for food safety and National Board for Agriculture and Rural Development (NABARD) takes care of the financing of the rural development. Telecom Regulatory Authority of India (TRAI), National Green Tribunal (NGT), and others are examples of regulatory entities in India.
- Securities and Exchange Board of India (SEBI) plays a crucial role in the Indian financial system by regulating the securities market, ensuring transparency, and protecting investors interests.

4(A)1.3.1 Purposes

Regulatory authorities are accountable for implementing the rules and regulations in various sectors. The main purpose for which these entities are established is to establish standards for operations in their respective fields. They oversee whether the established norms are applied, and also enforce and ensure that the rules and regulations of various sectors are implemented. The purposes of regulatory authorities may be summarized as follows (Baldwin, Cave, & Lodge, 2012, pp. 3-34).

Ensuring compliance: Regulatory bodies enforce laws, regulations, and standards within their respective sectors. They monitor businesses, organizations, and individuals to ensure them to comply with the established rules and guidelines.

Guarantee that the market is fair and transparent: Regulatory bodies work to create a level-playing field within industries by preventing anti-competitive practices such as monopolies, price fixing, and unfair trade practices. They foster competition, which can lead to innovation, efficiency, and lower prices for consumers. Example Competition Act 2002 is enacted with the main objective of regulating Anti competitive agreements, Abuse of Dominance and Combinations.

Regulations and Instructions: Regulatory bodies often educate stakeholders, including businesses, consumers, and investors, about relevant regulations, standards, and best practices. They may also provide resources and information to help stakeholders navigate complex regulatory requirements. In India there are various consumer forums which were formed as a result of the consumer movement in India. These consumer forums create awareness among consumers about consumer rights and also represent the individual consumers in the consumer courts.

Remedial actors: Regulatory bodies may act as mediators or arbitrators in resolving disputes between parties within their sectors. They may facilitate negotiations, conduct investigations, and issue rulings to address conflicts and ensure fair outcomes. The Chartered Institute of Arbitrators (CIArb) is the world's leading professional body promoting the resolution of disputes by arbitration, mediation and other forms of alternative dispute resolution (ADR).

Facilitating market Development: Regulatory bodies play a role in promoting the growth and development of industries within their jurisdiction. They may provide guidance, support, and incentives to encourage investment, innovation, and expansion. The Industrial (Development and Regulation) Act, (IDRA) which came into force in 1952 empowers the government to take necessary steps for the regulation and important industries.

Overall, regulatory bodies play a crucial role in maintaining order, promoting fairness, and safeguarding the interests of society within various sectors of the economy. Their effective functioning is essential for ensuring stability, transparency, and progress in both domestic and global contexts. By fulfilling their mandates effectively, regulatory authorities contribute to the stability, prosperity, and well-being of society as a whole.

4(A)1.3.2 Rights and Responsibilities

The rights and the responsibilities of a regulatory authority include the following:

1. ***Establishing and strengthening safety standards:*** Regulatory authorities have the right to establish and amend rules, regulations, and guidelines governing their respective sectors. They can set standards, requirements, and procedures to promote safety, fairness, and efficiency.
2. ***Ensuring consistent compliance with their standards:*** Regulatory authorities have the right to enforce laws, regulations, and standards within their respective jurisdictions. They can investigate violations, issue warnings, fines, sanctions, or other penalties to ensure compliance.

3. *Make and amend rules:* Regulatory authorities have the right to establish and amend rules, regulations, and guidelines governing their sectors. They can set standards, requirements, and procedures to promote safety, fairness, and efficiency.
4. *Protecting consumers:* Regulatory authorities are responsible for safeguarding the interests of the public, including consumers, investors, workers, and the environment. They must prioritize public welfare, safety, and well-being in their regulatory decisions and actions.
5. *Adjudicating disputes and controversies:* Regulatory authorities have the authority to make decisions, rulings, and determinations on matters within their purview. This may include granting licenses, permits, approvals, or authorizations, as well as adjudicating disputes and appeals.
6. *Conducting hearings:* Regulatory authorities are responsible for resolving disputes and conflicts between parties within their domains. They provide mechanisms for dispute resolution, mediation, and appeals to ensure fairness, justice, and consistency in regulatory outcomes.

Check Your Progress

Notes: a) Write the answer in the space given below the question.

b) Check your answer with the one given under “Answers to ‘Check Your Progress’ Questions” of this Unit.

2. Examine the role of regulatory authorities in bringing about compliance of laws under different sectors.

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4(A)1.4 TYPOLOGY OF REGULATION

Regulatory law plays its role in the vital areas of common interest to the society as a whole. These areas are economy, public interest and environment, and accordingly the regulatory law, based on its area of regulation, can be classified into three broad types, viz. economic regulation, public interest regulation and environmental regulation.

4(A)1.4.1 Economic Regulation

“Economic regulation” refers to rules that limit who can enter a business (entry controls) and what prices they may charge (price controls). For example, taxi drivers and many professionals (lawyers, accountants, beauticians, financial advisers, etc.) must have licenses to do business; these are examples of entry controls. As for price controls, for many years, airlines, trucking companies, and railroads were told what prices they could charge, or at least not exceed.

Companies providing local telephone service are still subject to price controls in all states.

Economic regulation consists of two types of regulations: structural regulation and conduct regulation. Structural regulation is used for regulating market structure. Examples of structural regulation are: restrictions on entry and exit and rules against individuals supplying professional services in the absence of recognized qualifications. Conduct regulation is used for regulating behaviour in the market. Examples of conduct regulation are: price control, rules against advertising, and minimum quality standards.

Economic regulation is mainly exercised on natural monopolies and market structures with limited or excessive competition. Economic regulation, in its essence, seeks to modify economic behavior by certain economic agents. It works as the application of law by the government or other agencies with various objectives in mind, such as correcting market failures, protecting the environment, controlling restrictive trade practices, or monopoly pricing. Regulation is one of the ways by which the government intervenes in the market. Thus, regulation is by government agencies or autonomous bodies statutorily created. Secondly, it is private sector firms or economic agents that are regulated. Third, economic regulation seeks to modify the behavior of private firms or economic agents or to influence economic processes to yield outcomes that are welfare-enhancing for society as a whole.

Regulation refers to actions undertaken by the central or state governments to influence market outcomes, such as the quantity traded of some good or service, or their price or quality. Regulation can also be in the form of taking steps to ensure that monopolies are not formed or collusive behavior by firms does not take place. It can take the form of enforcing property rights. The government can also take steps to regulate activity that creates or most likely to create negative externalities. Governments can take direct steps to prevent pollution by firms, for instance by prohibiting firms from spilling sewage into rivers, instead of resorting to taxation. Often the government sets up special agencies that act as regulators in various areas.

In India some important regulatory authorities are: the Securities and Exchange Board of India (SEBI) for capital markets, the Insurance Regulatory and Development Authority of India (IRDAI) for regulating insurance companies, the Pension Fund Regulatory and Development Authority (PFRDA), Telecom Regulatory Authority of India (TRAI) for regulating the entry and exit of firms, conducting auctions and also pricing in the telecom sector, Food Safety and Standards Authority of India (FSSAI) related to food, Bureau of Indian Standards (BIS) for ensuring a generally high standard of quality of products, Central Drugs Standard Control Organisation (CDSCO) for drug pricing etc, National Green Tribunal (NGT) for maintaining environmental standards, and Competition Commission of India (CCI) to regulate competition.

The CCI was established in 2003 to oversee competition and enforce the Competition Act, 2002. The CCI became operational in 2009. It replaced the Monopolies and Restrictive Trade Practices Commission which had been set up to oversee the Monopolies and Restrictive Trade Practices Act, of 1969.

The Competition Commission of India acts to prevent monopolies, to ensure competition to oversee mergers and acquisitions.

There are several ways in which government regulates private sector providers of goods and services. One way is what is called *direct regulation*. Direct regulation is also known as *command-and-control regulation*. In this form of regulation, the government takes certain actions to control the amount of a certain activity. In this form of regulation, the government aims at control of quantity. The example of pollution is an instance of direct regulation. Ensuring the safety of food and medicines is another instance of direct regulation. Food Safety and Standards Authority of India (FSSAI) regulates levels of safety of food products in India.

Sometimes the government intervenes in the market by setting a maximum or minimum price for some product. The regulated price may take the form of price controls. These controlled prices may be above or in some case below the equilibrium market price that would otherwise prevail.

Price regulation may specify a particular price that firms must charge, or may instead restrict firms to setting prices within some range. If the concern of the regulating agency is that a regulated monopolist will set prices too high, regulation is likely to specify a maximum price that can be charged. If the regulated firm has some unregulated competitors, the regulatory agency may also be concerned that the regulated firm will engage in *predatory pricing* (that is, pricing so as to force its competitors to exit the market). In that situation, regulation is likely to involve a minimum price as well as a maximum price.

The two principal variables that regulators have controlled are price and the number of firms, the latter through restrictions on entry and exit. These variables are important because the price and the number of firms are the main determinants of both allocative and productive efficiency. Entry may be regulated at several levels. First, entry by new firms may be controlled, as is typically done in the regulation of public utilities. In addition to controlling entry by new firms, a regulatory agency may also control entry by existing regulated firms. These markets may already be served by other regulated firms or may be unregulated markets. A basis for exit regulation is that regulation strives to have services provided to a wider set of consumers than would be true in a free market. Attaining this goal may entail regulated firms serving unprofitable markets, which creates a need for regulations that forbid a regulated firm from abandoning a market without regulatory approval.

Sometimes regulators may try to regulate some other variables like quality of service. The essence of economic regulation is the limitation of firm behavior regarding price, quantity, and entry into and exit of markets. Firms choose many other decision variables. One of these is the quality of the product or service that they produce. A regulatory agency may specify minimum standards for the reliability of a service.

4(A)1.4.2 Regulation in the Public Interest

According to public interest theories of regulation, the regulation of firms or other economic actors contributes to the promotion of the public interest. This public interest can further be described as the best possible allocation of

scarce resources for individual and collective goods and services in society. In Western economies, the allocation of scarce resources is to a significant extent coordinated by the market mechanism. In theory, it can even be demonstrated that, under certain circumstances, the allocation of resources using the market mechanism is optimal. Because these conditions often do not apply in practice, the allocation of resources is not optimal from a theoretical perspective. This situation is described as a market failure.

A market failure is a situation where scarce resources are not put to their highest valued uses. In a market setting, these values are reflected in the prices of goods and services. A market failure thus implies a discrepancy between the price or value of an additional unit of a particular good or service and its marginal cost. Equalization of prices and marginal costs characterizes an equilibrium in a competitive market. If costs are lower than the given market price, a firm will profit from a further expansion of production. If costs are higher than price, a firm will increase its profits by curtailing production until price again equals marginal cost. A market equilibrium, and more generally an equilibrium of all markets is thus a situation of an optimal allocation of scarce resources. In this situation supply equals demand and under the given circumstances economic agents can do no better.

One of the methods of achieving efficiency in the allocation of resources when a market failure is identified is government regulation. In the earlier development of the public interest theories of regulation, it was assumed that a market failure was a sufficient condition to explain government regulation. But soon the theory was criticized because it assumed that theoretically efficient institutions could be seen to efficiently replace or correct inefficient real-world institutions. This criticism has led to the development of a more serious public interest theory of regulation by an “Economics of Law” approach. In the original theory, the transaction costs and information costs of regulation were assumed to be zero. By taking account of these costs, more comprehensive public interest theories developed. It could be argued that government regulation is comparatively the more efficient institution to deal with several market failures. Thus, this approach, in contrast to the earlier approach, suggested that in the presence of market failure, government regulation can comparatively improve the situation, but there is no guarantee that regulation will lead to optimal efficiency conditions.

For example, concerning the public utilities, as we have seen, the transaction cost of government regulation in establishing fair prices and a just rate of return are lower than the costs of unrestricted competition. These more serious versions of the public interest theories do not assume that regulation is perfect. They do assume the presence of a market failure, and assume that regulation is comparatively the more efficient institution and also, that for example, deregulation takes place when more efficient institutions develop. These theories also assume that politicians act in the public interest or that the political process is efficient and that information on the costs and benefits of regulation is widely distributed and available.

4(A)1.4.3 Environmental Regulation

Most environmental regulations fall into two broad categories: prescriptive regulations (also referred as command-and-control) and incentive-based regulations.

Prescriptive Regulations

Command and control is the dominant form of environmental regulation in the world. Its fundamental principle is for the regulator to specify the steps individuals or firms must take to mitigate/solve the environmental problem. There are two basic types of prescriptive regulations: technology standards and performance standards.

- Technology standards typically specify a particular type of equipment that must be used.
- Performance standards typically stipulate the maximum emissions allowed per unit of economic activity. This is a more flexible method of regulation, which typically leads to improved cost-effectiveness (at least compared to that of a technology standard).

Often, a regulation combines performance standards with technology standards. Prescriptive regulations may be present in conjunction with fines and penalties associated with non-compliance; these are different from — and should not be confused with — economic incentives to abate pollution.

Two key features that distinguish prescriptive regulations from incentives-based regulations are:

- restricted choice for the polluter as to what means to be used to achieve an appropriate environmental target, and
- a lack of mechanisms for equalizing marginal costs of managing emission among several different polluters.

The advantage of prescriptive regulations is in greater certainty in the pollution levels, as well as in simplifying monitoring of compliance with a regulation.

The disadvantages with prescriptive regulations are:

- cost (costliness) of administering the regulation;
- reduced incentives (for a firm) to find better ways to control pollution;
- not accounting for residual damage from the pollution that is still emitted after controls are in place;
- difficulty in satisfying the equimarginal principle.

For the equimarginal principle to hold, in controlling emissions from several polluters, marginal cost of emission control must be the same for all polluters.

Incentive-Based Regulations

Economic incentives, in contrast to prescriptive regulations, provide rewards to potential polluters to do what is perceived to be in public interest. Three basic types of economic incentives are: marketable permits, emission fees, and liability.

Emission fees involve the payment of a charge per unit of pollution emitted. It then becomes in a polluter's interest to reduce emissions.

Marketable permits allow polluters to buy and sell the right to pollute. By enabling the trade of permits, something of similar character to a prescriptive regulation (a permit to pollute) becomes an economic incentive. The marketable permit system is often referred as cap-and-trade, wherein the regulator sets a cap on overall emissions, and allows trading among polluters to determine who emits what. Trading induces a price or value on a permit to pollute.

Liability is based on a simple concept: if you incur a damage, you must compensate for the damage. Importantly, the regulator does not prescribe a polluter any action, rather it enforces the responsibility for consequences.

The advantages of incentive-based regulations (over prescriptive regulations) are:

- mitigated informational requirements;
- enhanced incentives to innovate;
- polluter paying for control costs as well as pollution damage; and
- equimarginal principle holds for most types of economic incentives.

The disadvantages of economic incentives are:

- difficulty in developing a regulation that efficiently and perfectly addresses the complexities of environmental transformation;
- administrative/bureaucratic difficulties in adjusting the level of incentives in accordance with the new information;
- political challenges to instituting emission fees, as they, in essence, facilitate the wealth transfer from firms to the government.

Check Your Progress

Notes: a) Write the answer in the space given below the question.

b) Check your answer with the one given under “Answers to ‘Check Your Progress’ Questions” of this Unit.

3. Describe the role of regulatory Laws in shaping economy, public interest and environment.

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4(A)1.5 LET US SUM UP

Regulatory Laws are rules or directives created by government bodies to control and govern the actions of individuals, businesses, and organisations. They serve various purposes, primarily aiming to protect public interests, ensure fair

markets, safeguard the environment, and promote social justice. Regulatory laws essentially pertain to the following.

➤ *Economic Regulation:*

- a. Ensure market efficiency, competition, and prevent monopolistic practices.
- b. Stabilise financial markets to prevent crisis and ensure economic stability.
- c. Protect consumers and investors from fraud and unfair practices.

Examples: SEBI and CCI

➤ *Public Interest Regulation:*

- a. Protect health, safety, and welfare of the public.
- b. Ensure equitable access to essential services like healthcare, education, and housing.
- c. Uphold public order and standards, including ethical business practices and social norms.

Examples: Consumer Protection Laws, Public Health Laws.

➤ *Environmental Regulation:*

- a. Protect natural resources and biodiversity,
- b. Reduce pollution and manage waste effectively.
- c. Promote sustainable development and address climate change.

Examples: Environmental protection Act.

➤ *Social and Distributive Justice:*

- a. Promote fairness in the distribution of resources and opportunities.
- b. Address social inequalities and protect vulnerable populations.
- c. Ensure legal frameworks support social equity and justice.

Examples: Anti discrimination Laws, Social Welfare Laws.

➤ *Implementation and Enforcement:*

- a. Regulatory authorities are agencies responsible for creating, implementing, and enforcing regulations. Examples are SEBI and NGT.
- b. Effective enforcement of laws requires resources, political will, and public compliance.

Thus, regulatory laws play a crucial role in maintaining order, protecting public interests, and ensuring fairness in society. They are essential for managing the complexities of modern economies and safeguarding the well-being of the

public and the environment. Balancing the need for regulation with the potential costs and burdens remains a central challenge for policy-makers and regulatory authorities.

4(A)1.6 ANSWERS TO ‘CHECK YOUR PROGRESS’ QUESTIONS

1. Regulatory laws are indispensable for maintaining societal order, protecting public interests, and promoting fair practices across various sectors. Their scope encompasses economic stability, consumer protection, environmental sustainability, public health, social justice, and digital security. Through well-crafted and effectively enforced regulations, societies can ensure balanced and equitable development, safeguard public welfare, and address emerging challenges in a dynamic world. The critical areas of their need and the scope of their application includes the following:
 - a) Market efficiency and stability
 - b) Consumer Protection
 - c) Environmental Protection
 - d) Public Health and Safety
 - e) Social and Economic Equity
 - f) Maintaining Public Order.

(Note: Each of the above heads needs to be explained in detail, if the student wants to make it a long answer).

2. Regulatory authorities are essential in implementing, enforcing, and ensuring compliance with laws across various sectors. Their functions extend from crafting and updating regulations to monitoring compliance, imposing sanctions, and fostering industry best practices. The role of regulatory authorities may be explained under the following heads:

A. Financial Sector

- **Role of Authorities:** Regulatory bodies such as the Reserve Bank of India (RBI) and the Securities and Exchange Board of India (SEBI) oversee financial institutions, markets, and instruments.
- **Compliance Mechanisms:**
 - *Supervision and Audits:* Regular inspections and audits of banks and financial institutions to ensure adherence to financial regulations.
 - *Reporting Requirements:* Mandating detailed disclosures of financial activities, risk management practices, and compliance with capital requirements.
 - *Enforcement Actions:* Imposing penalties for non-compliance, including fines, suspension of trading licenses, and legal actions.

➤ **Examples:**

- *RBI's Role:* The RBI sets guidelines for banking operations, such as the Prudential Norms for classification, provisioning, and income recognition of loans.
- *SEBI's Actions:* SEBI monitors securities markets, enforces compliance with listing requirements, and takes action against insider trading and fraud.

B. Consumer Protection

➤ **Role of Authorities:** Agencies like the Consumer Protection Councils in India ensure that consumers' rights are protected against unfair trade practices.

➤ **Compliance Mechanisms:**

- *Grievance Redressal Mechanisms:* Providing platforms for consumers to file complaints against defective products or unfair services.
- *Market Surveillance:* Monitoring advertising and marketing practices to ensure they are truthful and not misleading.
- *Enforcement:* Issuing recalls for unsafe products and penalizing companies for deceptive practices.

➤ **Examples:**

- *Consumer Protection Act, 2019:* This act empowers authorities to act against unfair trade practices and product defects.

C. Public Health and Safety

➤ **Role of Authorities:** Regulatory bodies like the Food Safety and Standards Authority of India (FSSAI) ensure food safety and quality standards.

➤ **Compliance Mechanisms:**

- *Licensing and Certification:* Issuing licenses to food businesses and ensuring compliance with safety standards.
- *Inspections and Testing:* Conducting regular inspections and testing food products to ensure they meet health and safety standards.
- *Enforcement Actions:* Imposing fines, revoking licenses, or initiating legal actions against violators.

➤ **Examples:**

- *FSSAI's Role:* The FSSAI enforces food safety standards, such as recalling Maggi noodles due to excessive lead levels in 2015.

D. Environmental Regulation

Regulatory Law

- **Role of Authorities:** Agencies like the Central Pollution Control Board (CPCB) in India enforce environmental laws to control pollution and protect natural resources.
- **Compliance Mechanisms:**
 - Environmental Clearances: Granting or denying environmental clearances for industrial projects based on environmental impact assessments.
 - Monitoring and Reporting: Regular monitoring of pollution levels and requiring industries to report their emissions and waste management practices.
 - Enforcement Actions: Imposing fines, shutting down non-compliant facilities, and pursuing legal action against violators.
- **Examples:**
 - *CPCB's Actions:* CPCB issues directives to curb pollution in industrial zones and monitors compliance with standards like the National Ambient Air Quality Standards (NAAQS).

E. Labor and Employment

- **Role of Authorities:** Organizations like the Ministry of Labour and Employment enforce labor laws to ensure fair treatment and safety of workers.
- **Compliance Mechanisms:**
 - Labor Inspections: Conducting inspections to ensure compliance with wage laws, working conditions, and safety standards.
 - Dispute Resolution: Providing mechanisms for resolving labor disputes and grievances.
 - Penalties and Sanctions: Imposing fines and other penalties for violations of labor laws.
- **Examples:**
 - *Labour Codes:* The implementation of the Code on Wages, 2019, aims to simplify wage regulations and ensure timely payment.

F. Social Welfare

- **Role of Authorities:** Regulatory bodies administer welfare schemes and ensure equitable distribution of resources.
- **Compliance Mechanisms:**

- *Eligibility Verification:* Ensuring that welfare benefits are provided to eligible beneficiaries through verification and audits.
- *Monitoring Utilization:* Tracking the use of welfare funds and preventing misuse or fraud.
- *Enforcement:* Taking action against mismanagement or corruption in welfare programs.

➤ **Examples:**

- *MGNREGA:* The Mahatma Gandhi National Rural Employment Guarantee Act provides a legal right to employment and its implementation is monitored by authorities to ensure compliance.

G. Technological and Digital Compliance

- **Role of Authorities:** Regulatory bodies like the Ministry of Electronics and Information Technology (MeitY) in India oversee data protection, cybersecurity, and digital transactions.

➤ **Compliance Mechanisms:**

- *Data Protection Regulations:* Implementing standards for data privacy and security, such as the Personal Data Protection Bill in India.
- *Cybersecurity Guidelines:* Issuing guidelines and frameworks to protect against cyber threats.
- *Enforcement Actions:* Penalizing companies for data breaches or failure to comply with cybersecurity standards.

➤ **Examples:**

- *CERT-In:* The Indian Computer Emergency Response Team (CERT-In) monitors cybersecurity incidents and issues advisories for compliance.

H. Market Regulation

- **Role of Authorities:** Agencies like the Competition Commission of India (CCI) prevent anti-competitive practices and promote fair trade.

➤ **Compliance Mechanisms:**

- *Antitrust Investigations:* Probing and addressing anti-competitive behaviors like cartels, monopolistic practices, and mergers that reduce competition.
- *Regulatory Approvals:* Reviewing and approving mergers, acquisitions, and business practices to ensure they comply with competition laws.

➤ **Examples:**

- *CCI's Interventions:* The CCI investigates mergers that might create monopolies, such as its examination of the Flipkart-Walmart deal to ensure competitive practices.

3. Regulatory laws play a fundamental role in shaping economic activities, protecting public interests, and preserving the environment. In the economic realm, they ensure fair competition, market transparency, and financial stability. For public interest, they safeguard health, safety, and social welfare while upholding ethical standards and public order. Environmentally, they control pollution, manage natural resources sustainably, and promote ecological justice. Through their comprehensive and dynamic scope, regulatory laws foster a balanced and orderly society, contributing to the well-being of individuals and communities while supporting sustainable development and economic growth.

(Note: Each of the heads namely Economic Regulation, Regulation in Public Interest and Environment Regulation needs to be explained in detail, if the student wants to make it a long answer).

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4(A)1.8 UNIT-END EXERCISES

In your own interest, you may prepare the answers to the following questions which may be useful as a part of your preparation for your term-end examinations.

1. In what ways can regulations enhance market efficiency and prevent monopolistic practices?
2. How do regulatory laws impact economic growth and competitiveness?
3. Why are regulatory laws essential for protecting consumer rights?
4. How can regulatory frameworks balance environmental protection with economic development?
5. Why are regulatory laws crucial for public health and safety?

4(A)1.9 UNIT-END ACTIVITY

If you like to further enhance your interest, you may attempt to perform the following activity.

- 1) You may try to find out what adjustments are needed in regulatory frameworks to address the challenges posed by emerging technologies like Artificial Intelligence and Blockchain.

UNIT- 4(A)2 DISPUTE RESOLUTION LAW

Structure

- 4(A)2.0 Introduction
- 4(A)2.1 Learning Objectives
- 4(A)2.2 Adjudication and Dispute Resolution (ADR): Concept, Significance and Scope
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 - 4(A)2.2.2 Significance of ADR
 - 4(A)2.2.3 Scope of ADR: Range of ADR Methods/Mechanisms
 - 4(A)2.2.4 Advantages and Disadvantages of ADR
 - 4(A)2.2.5 ADR v. Litigation: Pros and Cons
- 4(A)2.3 ADR Methods/Tools/Mechanisms: Knowledge and Skills
 - 4(A)2.3.1 Negotiation
 - 4(A)2.3.1.1 Definition
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 - 4(A)2.3.3.1 Law Governing Arbitration and Conciliation: Current Status
 - 4(A)2.3.3.2 Types of Arbitration
 - 4(A) 2.3.3.3 Arbitral and Conciliation Process: Stages
 - 4(A)2.3.4 Adjudication
 - 4(A)2.3.5 Comparison of Certain Aspects of Negotiation, Mediation, Arbitration, Conciliation and Adjudication
 - 4(A)2.3.6 Restorative Justice
 - 4(A)2.3.6.1 History of Restorative Justice
 - 4(A)2.3.6.2 Objectives of Restorative Justice
 - 4(A)2.3.6.3 Assumptions of Restorative Justice
 - 4(A)2.3.6.4 Applications of Restorative Justice
 - 4(A)2.3.6.5 Major Issues in Development of Restorative Justice
 - 4(A)2.3.6.6 Benefits of Restorative Justice

- 4(A)2.4 Let Us Sum Up
- 4(A)2.5 Answers to ‘Check Your Progress’ Questions
- 4(A)2.6 References and Suggested Readings
- 4(A)2.7 Unit-End Exercises
- 4(A)2.8 Unit-End Activities

4(A)2.0 INTRODUCTION

You may recall that in Unit-3 of Block-1 of this course, MAEE-002, you studied about organisation of the Justice Delivery System in India and in Unit-4 of the same Block you studied the concepts of *Rule of Law* -- with emphasis on basic strands of the concept of rule of law, supremacy of regular law, equality before law and constitution as the result of ordinary law of the land – and *Formal and Substantive Conceptions of Rule of Law* as well as the *Principles of Natural Justice* that have profound implications for implementation of law in the formal system of adjudication by the courts. In the present unit, i.e. in Unit-4(A)2, we attempt to present to you the dispute resolution law, from the point of view of Alternative Dispute Resolution (ADR) law, as an alternative to the Formal Legal System.

In the context of Alternative Dispute Resolution (ADR) law, it is significant to take note of what Gandhiji said: “I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter men’s hearts. I realized that the true function of a lawyer was to unite parties given as under. The lesson was so indelibly burnt unto me that the large part of my time, during the twenty years of my practice as a lawyer, was occupied in bringing about private compromises of hundreds of cases. I lost nothing, thereby not even money, certainly not my soul.” (<https://medium.com/@vedabhyaskundu/the-gandhian-jurisprudence-of-nonviolence-a-path-to-alternate-dispute-resolution-aa792b25be22>).

Conflict is a fact of life. It is not good or bad. However, what is important is how we manage or handle it. Negotiation techniques are often central to resolving conflict and as a basic technique these have been around for many thousands of years. *Alternative Dispute Resolution (ADR) is an alternative to the Formal Legal System.* ADR refers to a variety of streamlined resolution techniques designed to resolve issues in controversy more efficiently when the normal negotiation process fails. It is an alternative to litigation. It was being thought of in view of the fact that the courts are over-burdened with cases. The said system emanates from dissatisfaction of many people with the way in which disputes are traditionally resolved resulting in criticism of the courts, the legal profession and sometimes lead to a sense of alienation from the whole legal system- thus, the need for ADR.

With the spread of ADR programs in the developed and developing world, creative uses for and designs for ADR systems are proliferating. Successful programs are improving the lives of individuals and meeting broad societal goals. There is a critical mass of ADR experience, revealing important lessons as to whether, when and how to implement ADR projects.

Arbitration has a long history in India. Arbitration in India is an age-old concept, originating in ancient India and is still practiced as a grass root system called *Panchayat(s)*. It is still prevalent today in villages where the seniors of the village or community act as mediators and resolve disputes of villagers and/or community. Therefore, it cannot be said that Arbitration as a concept or Alternate Dispute Resolution is a foreign import on the Indian legal system. *In ancient times, people often voluntarily submitted their disputes to a group of wise men of a community -- called the panchayat -- or a binding resolution.*

Modern arbitration law in India was created by the Bengal Regulations in 1772, during the British rule. The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others. Until 1996, the law governing arbitration in India consisted mainly of three Acts:

- (i) the 1937 Arbitration (Protocol and Convention) Act,
- (ii) the 1940 Indian Arbitration Act, and
- (iii) the 1961 Foreign Awards (Recognition and Enforcement) Act.

The 1940 Act was the general law governing arbitration in India along the lines of the English Arbitration Act of 1934, and both the 1937 and the 1961 Acts were designed to enforce foreign arbitral awards (the 1961 Act implemented the New York Convention of 1958). Increasingly, arbitration is recognized as the most effective method of solving commercial disputes, especially those of an international dimension. It can achieve equitable solutions more quickly than litigation, and at less cost; it allows parties to adopt whatever procedure they choose for the resolution of differences; it enables parties to decide where disputes shall be heard. Within and around Asia, India offers both the resources and a venue for Arbitrations and dispute resolution procedures and is dedicated in its mission to advancing and supporting arbitration as a means of resolving commercial disputes (https://www.tndalu.ac.in/econtent/2_Alternate_Dispute_Resolution.pdf).

Indians, however, have long been aware of the advantages of arbitration, acknowledging its value as a method of resolving disputes, and more recently has extended tradition by the statutory adoption of the United Nations Commission on International Trade Law (UNCITRAL), 1966 as a Model Law for international commercial arbitration and the UNCITRAL Rules of Arbitration, with relevant modifications to fit into its institutional framework. In the field of resolving legal controversies, mediation stands tall as an informal method of dispute resolution, in which a neutral third party, called as the mediator, attempts to assist the parties in finding resolution to their problem through the mediation process. While technically, mediation has no legal standing, the parties can commit to certain agreed points to writing and sign this document, thus producing a legally binding contract in some jurisdiction specified therein.

Mediation differs from most other conflict resolution processes because of its simplicity, and clarity of its rules. It is employed at all levels from petty civil disputes to global peace talks. It is thus difficult to characterize it independently of these scales or specific jurisdictions — where ‘Mediation’ may in fact be formally defined and may in fact require specific licenses. Mediation is a

flexible, non-binding dispute resolution process in which a neutral third party (the mediator) assists two or more disputants to reach a voluntary, negotiated settlement of their differences. The parties have ultimate control of the decision to settle and the terms of resolution. The mediator uses a variety of skills and techniques to help the parties reach a settlement, but has no power to decide. *The parties remain the decision makers, ensuring the retention of primary party autonomy.* Mediation is an interest-based process because it is designed to help the parties clarify any underlying motivations or interests. Mediators help parties prove the strengths and weaknesses of their legal positions, enhance communications, explore the consequences of not settling, and generate settlement options.

Mediation results in creative solutions, including those where both sides can profit from the settlement terms and are generally confidential. Mediation is defined in Black's Law Dictionary as a private, informal dispute resolution process in which a neutral third party, the mediator, helps disputing parties to reach an agreement. In contrast to mediation, arbitration is a formal, quasi-judicial process where a neutral third party, the arbitrator, renders a binding award on the basis of material placed before him. Arbitration proceedings closely mirror proceedings in a court of law. In a voluntary effort, the mediator facilitates communication between parties and encourages settlement. In mediation, there is, unlike in arbitration, a considerable latitude available to the mediator, as he can privately discuss the merits of a dispute with each party individually -- unthinkable in the adversarial arbitration process.

In this context, you need to know about another term, **conciliation**. There seems to be a considerable lack of clarity as to the scope of the word 'mediation' and 'conciliation'. Further, there is, for example, no consistency in the use of these terms worldwide. A number of ADR systems perceive them to be synonymous. The US and Australia use the term 'mediation', while 'conciliation' is commonly used in China, Japan, Thailand and Singapore.

It is interesting that the United Nations Commission on International Trade Laws (UNCITRAL) has rules for conciliation and not for mediation, while the World Intellectual Property Organization (WIPO) has rules for mediation but none for conciliation. Even the Code of Civil Procedure (Amendment) Act, 1999 incorporates, for the purposes of mediation and conciliation, the language used in the UNCITRAL Rules for Conciliation, thus perpetuating this terminological ambiguity. As the French arbitrator Professor Charles Jarrosson says, there is a subtle difference between mediation and conciliation - one of degree rather than nature (<http://www.thehindubusinessline.in/2001/07/02/stories/040220sa.htm>).

Nevertheless, mediation is a more proactive form of conciliation, the latter being more passive in the senses that the conciliator has an evaluative role as opposed to the facilitative role of the mediator. Unlike a mediator, who has to be active and see that justice is done, the conciliator is a withdrawn neutral. With a sophisticated and well-placed legal system, India is also a party to the New York Convention (on enforcement of arbitration awards) allowing arbitral awards to be enforced by the Courts in almost any country around the world. In India, varied ADR mechanisms exist for resolving disputes outside the courts.

The choice of the ADR method, however, largely depends on the nature of the dispute and relation of the parties. The general ADR methods of resolving disputes are arbitration, conciliation, mediation, negotiation, consumer forums, etc. Thus, there are sufficient ADR mechanisms in India and the only requirement is their application in true letter and spirit. Arbitration is the most commonly used method in India for resolving and adjudicating various disputes.

The Arbitration and Conciliation Act, 1996 governs the arbitration procedures in India. Section 5 of the Act provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I (Sections 2 to 43), no judicial authority shall intervene except where so provided in the said part. This clearly indicates the legislative intent to minimize supervisory role of courts to ensure that the intervention of the court is minimal. Section 4 is a deeming provision, which lays down that where a party proceeds with the arbitration without stating his objection to non-compliance of any provision of Part I from which the parties may derogate or any requirement under arbitration agreement, it shall be deemed that he has waived his right to so object.

Section 7 provides that the arbitration agreement shall be in writing and such an agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (4) of Section 7 provides the conditions under which a document or exchange of letter or exchange of statement of claim and defence may amount to an arbitration agreement.

Section 11 of the Act provides for appointment of arbitrators and sub-section (6) thereof empowers the Chief Justice of the High Court or any person or institution designated by him to make such an appointment on the happening of certain conditions enumerated in clauses (a), (b) or (c). Section 16 of the Act is important and it provides that an arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or authority of the arbitration agreement. Thus, the base provided by the Act, if supplemented by a sound e-governance infrastructure, is sufficient to accommodate the mandates of online dispute resolution mechanism (ODRM) in India.

In this Unit, the focus of our discussion will be on these ADR methods, tools or the mechanisms mentioned above.

4(A)2.1 LEARNING OBJECTIVES

After going through this Unit, you should be able to:

- acquire the knowledge and skills related to ADR Methods such as Negotiation, Mediation, Arbitration, Conciliation, Adjudication, and Restorative justice;
- discern the principles of diversity of interests, conflicts, disputes, and resolution strategies;
- appreciate the significance of different methods of settling the disagreement peacefully by way of compromise, negotiation or fair agreements; and
- apply the principle of diplomacy as a win-win situation for both parties.

4(A)2.2 ADJUDICATION AND DISPUTE RESOLUTION (ADR): CONCEPT, SIGNIFICANCE AND SCOPE

In this section, we will discuss the concept, significance and scope of ADR.

4(A)2.2.1 Concept of ADR

Alternative Dispute Resolution, commonly known as ADR, refers to dispute resolution mechanisms outside the realm of judicial processes. The concept of Conflict Management through ADR has introduced a new mechanism of dispute resolution that is essentially of a non-adversarial kind. A dispute is essentially a *lisinterpartes* and the justice dispensation system in India has found an alternative to such forms of adversarial litigation in the form of ADR Mechanism.

The entire ambit of ADR can be broadly studied under two major methods - arbitration and mediation. Arbitration is the procedure by which parties agree to submit their disputes to an independent neutral third party, known as an arbitrator, who considers arguments and evidence from both sides, then hands down a final and binding decision. In contrast to arbitration, mediation is a process whereby the parties involved utilize an out-side party to help them reach a mutually agreeable settlement. Rather than dictate a solution to the dispute between the two parties, the mediator — who maintains scrupulous neutrality throughout — suggests various proposals to help the two parties reach a mutually agreeable solution. These methods of dispute resolution enable parties to deal with the underlying issues in dispute in a more cost-effective manner and with increased efficacy.

Moreover, these mechanisms have the advantage of providing parties with the opportunity to reduce hostility, to resolve conflict in a peaceful manner, and achieve a greater sense of justice in each individual case. The resolution of disputes takes place usually in the comfort and privacy of the parties, as opposed to open proceedings in a court of law, and is more viable, economic, and efficient. Immense party autonomy safeguards the rights of the parties to choose the law and rules governing the arbitration, the language, the venue, the number of arbitrators, in relation to the arbitration proceedings. All of these facets go into making ADR mechanisms essentially people-friendly. ADR Mechanisms have proven to be one the most efficacious mechanisms to resolve disputes of an international commercial, familial, and domestic corporate nature.

4(A)2.2.2 Significance of ADR

We can understand the significance of ADR by looking at the *reasons behind introduction of ADR in India*. ADR in India is an attempt made by the legislators and judiciary alike to achieve the “Constitutional goal” of achieving complete justice in India. ADR first started as a quest to find solutions to the perplexing problem of the ever-increasing burden on the courts. A thought-process that started off to rectify docket explosion, later developed into a separate field solely catering to various kinds of mechanisms which would resolve disputes without approaching the Formal Legal System (FLS). The reasoning given to

these ADR mechanisms is that the society, state and the party to the dispute are equally under an obligation to resolve the dispute as soon as possible before it disturbs the peace in the family, business community, society or ultimately humanity as a whole.

In a civilized society, principles of natural justice along with the “Rule of Law” should result in complete justice in case of a dispute. Rule of law is defined as the state of order in which events conform to the law.

ADR in India was founded on the Constitutional basis of Articles 14 and 21 which deal with ‘Equality Before Law’ and ‘Right to Life and Personal Liberty’ respectively. These Articles are enshrined under Part III of the Constitution of India which lists the Fundamental Rights of the citizens of India. ADR also tries to achieve the Directive Principle of State Policy relating to equal justice and free legal aid as laid down under Article 39-A of the Constitution. The Acts which deal with Alternative Dispute Resolution are Arbitration and Conciliation Act, 1996 (discussed in detail later) and the Legal Services Authorities Act, 1987. Section 89 of the Civil Procedure Code, 1908 makes it possible for arbitration proceedings to take place in accordance with the Acts stated above.

In India, the quest for justice has been an ideal, which the citizens have been aspiring for generations down the line. Our Constitution reflects this aspiration in the Preamble itself, which speaks about justice in all its forms: social, economic and political. Justice is a constitutional mandate. About half a century of the Constitution at work has tossed up many issues relating to the working of the judiciary; the most important being court clogging and judicial delays.

Here, the glorious uncertainties of the law frustrated the aspirations for an equal, predictable and affordable justice is also a question, which crops up often in the minds of the people. We are a country of about one and a half billion people. The fundamental question is: How do we design and structure a legal system, which can render justice to a billion people? The possibility of a justice-delivery mechanism in the Indian context and the impediments for dispensing justice in India is an important discussion. Delay in justice administration is the biggest operational obstacle, which has to be tackled on a war footing. In a country like India, which aims to protect the socio-economic and cultural rights of citizens, it is extremely important to quickly dispose the cases, as the courts alone cannot handle the huge backlog of cases.

Therefore, this explains the need for Alternative Dispute Resolution in India. This can be effectively achieved by applying the mechanisms of ADR. These are the reasons behind the introduction of ADR in India.

4(A)2.2.3 Scope of ADR: Range of ADR Methods/ Mechanisms

The **scope** of ADR is very wide. Alternative Dispute Resolution (ADR) refers to the different ways people can resolve disputes without a trial. Common ADR processes include *mediation*, *arbitration*, and *neutral evaluation*. However, ADR includes the mechanisms of Preventive ADR, Negotiated ADR, Facilitated ADR, Fact-Finding ADR, Advisory ADR, Imposed ADR, Negotiation, Conciliation Mediation, Mediation-Arbitration (Med-Arb), Medola, Mini-Trial: Arbitration,

Fast track Arbitration, Neutral listener Agreement, Rent a judge, Final offer arbitration, *Lok Adalat*, among others, which present ADR Spectrum.

A brief outline of several kinds of ADR mechanisms that presents the range of ADR spectrum is given below:

- **Preventive ADR:** Preventive ADR works on the principles of partnering and joint efforts. It arises out of written or orally created ADR clauses, and is essentially governed by a set of rules as a result of negotiations prior to the partnership. Joint problem solving is the key feature.
- **Negotiated ADR:** This is essentially a principle-based mechanism, and works primarily on positional problem solving. Parties have their own choices and remain in their position, while they discuss without third party interference and work to achieve a compromise.
- **Facilitated ADR:** This works in the form of Conciliation and Mediation, whereby resolution is facilitated with the intervention of a third party or a neutral party, who works on both sides, in an attempt to create a win-win situation for the both.
- **Fact-Finding ADR:** Fact Finding ADR is essentially neutral, and merely works to cull out factual data. Experts maybe appointed towards this end, and the parties are free to choose even Magistrates for the task.
- **Advisory ADR:** Advisory ADR is purely neutral, and evaluates the requirements of the parties, and provides them the requisite advice. It involves private judging, a summary jury and a compendium of trials and mini-trials. The outcome is not binding.
- **Imposed ADR:** This refers to ADR mechanisms that are imposed by statute or rule book upon the parties, and this results in binding outcomes that oblige the parties to act in a certain manner.
- **Negotiation:** Negotiation refers to a non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute. There is no binding outcome at the end of the dispute, and parties are free to accept or refute following the decision therein.
- **Conciliation Mediation:** Conciliation Mediation, or Conciliatory Mediation, refer to a non-binding procedure in which an impartial third party is appointed as the conciliator/mediator. He then assists the parties privy to the dispute, in reaching a mutually satisfactory and agreed settlement of the dispute. Given that this too, is a form of non-binding ADR, the parties are free to accept or refuse to follow the decision made therein.
- **Med-Arb:** Med-Arb is a hybrid mechanism that refers to a procedure which combines conciliation or mediation and arbitration. Initially where the dispute is not settled through a process of conciliation or mediation within a period of time agreed in advance by the parties, arbitration is resorted to as an alternative. The outcome of the Mediation or Conciliation is not generally construed to bind the parties, but the outcome of the Arbitration is binding.

- **MEDOLA:** Medola refers to a procedure in which if the parties fail to reach an agreement through mediation, a neutral person selected by the parties themselves, who may be the original mediator or an arbitrator, will select between the final negotiated offers of parties such selection being binding on the parties.
- **Mini-Trial:** Mini trials are non-binding procedures in which the disputing parties are presented with summaries of their cases to enable them to assess the strengths, weaknesses, and prospects of their case and then an opportunity to negotiate a settlement with the assistance of a neutral adviser. This presents a chance to the parties to analyze the liable outcomes of their cases, and then permits them to choose a course of action that suits their needs best.
- **Arbitration:** Arbitration refers to a binding ADR mechanism, in which the dispute is submitted to an arbitral tribunal which decides (an 'award') on the dispute that is binding on the parties. Parties are free to choose the number of arbitrators, the arbitrators themselves, the rules and laws governing the arbitration, the procedures, the venue and the language.
- **Fast track Arbitration:** Fast track arbitration refers to a form of arbitration in which the procedure is expedited manifold, and is rendered in a particularly short time and at reduced cost.
- **Neutral listener Agreement:** In this mechanism, the parties to a dispute discuss their respective best settlement offers in confidence with a neutral third party who, after his own evaluation, suggests settlements to assist the parties to attempt a negotiated settlement.
- **Rent a judge:** The disputing parties mutually approach a referee, usually a retired judge, before whom they present their case in informal proceedings. The referee judge gives his decision which is enforceable in a court of law. The fee of the referee is paid by the parties.
- **Final offer arbitration:** In this mechanism, each party submits its monetary claim before a panel that renders its decision by awarding one and rejecting the other claim.
- **Lok Adalats:** Lok Adalat is a system of ADR developed in India. It literally means "People's court". The system of *Lok Adalats* is an improvement on that and is based on the principles of Mahatma Gandhi, and is a non-adversarial system, whereby court sessions are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they think fit. The sessions are usually presided by retired judges, social activists, or members of legal profession.

4(A)2.2.4 Advantages and Disadvantages of ADR

Some advantages and disadvantages of ADR are discussed below:

(A) **Advantages of ADR:** These are as given below.

1. **Party autonomy:** Because of its private nature, ADR affords parties the ease and opportunity to exercise greater control over the way their dispute is resolved as opposed to court litigation. Parties are free to select the most appropriate decision-makers for their dispute. They may choose the applicable law, place and language of the proceedings. Increased party autonomy can also result in a faster process, as parties are free to devise the most efficient procedures for their dispute. This can result in material cost savings.
2. **Neutrality:** ADR is generally neutral to the law, language and institutional culture of the parties, thereby avoiding any home court advantage that one of the parties may enjoy in court-based litigation, where familiarity with the applicable law and local processes can offer significant strategic advantages.
3. **A single procedure:** Through ADR, parties can resolve in a single procedure a dispute, thereby avoiding the expense and complexity of multi-jurisdictional litigation, and the risk of inconsistent results.
4. **Confidentiality:** ADR proceedings are private. Parties can choose to keep the proceedings and outcomes confidential.
5. **Finality of Awards:** Unlike court decisions, which can generally be contested through one or more rounds of litigation, arbitral awards are not normally subject to appeal.
6. **Enforceability of Awards:** The United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the New York Convention, generally provides for the recognition of arbitral awards on par with domestic court judgments without review on the merits. This greatly facilitates the enforcement of awards across borders. Domestic laws also provide for ease in enforcement of awards.
7. **Expenses are kept down:** Attorneys and expert witnesses are expensive, meaning litigating a case can easily run up sky-rocketing bills. ADR offers the benefit of getting the issue resolved quicker than would occur at trial — and that means less money spent for both sides.
8. **ADR is speedy:** Trials are lengthy, without exception. In many jurisdictions it could take years before you even get to begin arguing your case before a judge, much less get a verdict. There are better things you could be doing with your time.
9. **Increased Control over the Process and the Outcome:** In ADR, parties typically play a greater role in shaping both the process and its outcome. In most ADR processes, parties have more opportunity to tell their side of the story than they do at trial. Some ADR processes, such as mediation, allow the parties to fashion creative resolutions that are not available in a trial. Other ADR processes, such as arbitration, allow the parties to choose an expert in a particular field to decide the dispute.

10. **Preserves Relationships:** ADR can be a less adversarial and hostile way to resolve a dispute. For example, an experienced mediator can help the parties effectively communicate their needs and point of view to the other side. This can be an important advantage where the parties have a relationship to preserve.
11. **Increases Satisfaction:** In a trial, there is typically a winner and a loser. The loser is not likely to be happy, and even the winner may not be completely satisfied with the outcome. ADR can help the parties find win-win solutions and achieve their real goals. This, along with all of ADR's other potential advantages, may increase the party's overall satisfaction with both the dispute resolution process and the outcome.
12. **Improved Attorney-Client Relationships:** Attorneys may also benefit from ADR by being seen as problem-solvers rather than combatants. Quick, cost-effective, and satisfying resolutions are likely to produce happier clients and thus generate repeat business from clients and referrals of their friends and associates.

(B) **Disadvantages of ADR:** These are as given below.

1. **No guaranteed resolution:** With the exception of arbitration, other ADR processes do not always lead the resolution. That means it is possible that you could invest the time and money in trying to resolve the dispute out-of-court and still end up having to go to court.
2. **Arbitration decisions are final, accordingly no right to appeal:** With a few exceptions, the decision of a neutral arbitrator cannot be appealed against if the parties decide against the appeal in their arbitral agreement. Decisions of a court, on the other hand, usually can be appealed to a higher court.
3. **Delaying Tactics:** ADR processes can also be used as a delaying tactic or as an attempt by a disputing party to gain useful intelligence on its opponent before going down the litigation route in any event.
4. **Limited Process:** ADR is limited in the way it cannot, without consensus, involve multiple parties. The court system enables disputing parties to bring in third and fourth parties involved in the same dispute, to apportion the ultimate responsibility all on one occasion. This often saves much time and delay.
5. **Vested Interests:** As this may play a role. Partiality, bias and vested interests may vitiate the procedure.

4(A)2.2.5 ADR v. Litigation: Pros and Cons

Some pros and cons of ADR v. Litigation include the following.

- ADR is mostly a private proceeding, litigation is public.
- ADR works mostly for civil and commercial issues, Litigation works more in relation to civil and criminal issues.

- ADR requires limited evidentiary processes, while Litigation requires rules of evidence to be followed.
- Parties select the neutral party in ADR, but judges for litigation are appointed by the courts.
- ADR is informal, litigation is formal.
- ADR is usually binding, appeal is not always permitted. In litigation appeals are easily possible.
- In ADR, the services of advocates may be enlisted at the discretion of the parties. But in litigation, advocates are mandatory.
- ADR is generally speedier than litigation.
- Costs owed in ADR involve fees for the neutrals, in courts, court fees ought to be paid.
- ADR is a cheaper process, litigation is expensive.
- ADR permits party autonomy, litigation does not.
- ADR allows judicial intervention only on certain occasions, litigation itself entails judicial involvement.
- While many legal practitioners engage in ADR processes, there is no legal or professional requirement for either the ADR practitioner or for party representatives at ADR processes to be legally qualified or to be members of legal professions such as the bar or the law society.

Role of Lawyers and Technical Experts in ADR: While ADR dabbles with the legal side in determining disputes between parties, as a rule, disputes involving qualitative issues are better addressed by technically trained neutrals than legal specialists. A technical skill set proves to be a valuable asset in evaluating qualitative disputes such as whether or not a project, design, system or component was performed appropriately and if it was the best choice. The benefit of knowledge and actual experience in the subject matter is useful in deciding if the outcome was reasonable or whether the performance of the parties was appropriate given the circumstances.

A neutral trained in the appropriate matter has a better opportunity to gain the respect of the parties and thus either recommend or facilitate a solution which all parties can live with. Sometimes a technical solution presented on a project might be the perfect answer but to different question than that posed by the project.

A technically trained neutral may be better qualified to discern those subtleties. In disputes with substantial expert or technical testimony, technical experts are better equipped to deal with the technical nuances presented by experts. Lawyers, on the contrary, have a great role to play where ADR is concerned. Clients come to advocates with problems, in an attempt to seek solutions for their disputes. An advocate has to make sure that his client is assured justice, and this need not be granted to him only by way of the judiciary itself, but also by way of ADR. ADR works to the advantage of the lawyer and his client, as there

is immense importance attached to the expeditious settlement of the dispute. A lawyer can combine both, legal and technical acumen within the ambit of his practice, in pertinence to ADR, and aid myriads of clients in the process.

Check Your Progress

Notes: a) Write the answer in the space given below the question.

b) Check your answer with the one given under “Answers to ‘Check Your Progress’ Questions” of this Unit.

1. Explain the concept of ADR.

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2. Discuss the scope of ADR.

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3. What are the Pros and Cons of ADR?

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4(A)2.3 ADR METHODS/TOOLS/MECHANISMS: KNOWLEDGE AND SKILLS

In this section, we focus our discussion on the knowledge and skills related to ADR methods/tools.

4(A)2.3.1 Negotiation

Is conflict bad? Would life be happier if no conflict in life exists? Though the answer to these questions as ‘NO’ sounds strange, in reality conflicts help the growth of the society. People differ and they use negotiation to resolve their differences by using negotiation as a method. Imagine, if you would like to buy a television, would you agree to the price quoted by the seller? Or would you bargain? Is bargaining a way of negotiation and resolving the differences between you the buyer, and the seller? The answer would be ‘YES’. Therefore, everyone is a negotiator and every one negotiates several times in his life time.

That is the reason why negotiation is treated as the most important mode of alternative dispute resolution. It is the primary method of resolution of disputes. The success and failure of this mode has resulted in the development of the more refined methods. All these refined processes have negotiation as the foundation on which new alternatives have been added later to overcome the defects. Therefore, study of Negotiation is a must for you as a student of ADR as this will open up a gateway to the better understanding of all other ADR processes.

4(A)2.3.1.1 Definition

Negotiation is a process which is chiefly based on the dialogues and discussions between the parties. This process can be defined as follows; “It is a process of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests” (Mathews, 1953).

Negotiation is a process, which focuses on *protection of the interests of the parties through adjustment*. This is in contrast to the approach of the judiciary which tries to protect the right of an individual by enforcing it or ordering compensation for it. Second important departure is, the concept of relationship. Negotiation also concentrates on *protection of relationship between the parties*, for which the judiciary shows complete disregard. Therefore, we can say that negotiation can be the most suitable process for resolving dispute where protection of the relationship is the paramount consideration.

4(A)2.3.1.2 Kinds of Negotiation

(i) **Informal negotiation:** It is a direct communication between the parties. Here the intervention of a third person or an outsider does not exist. Only the affected parties are involved in the dialogue and discussion for the purpose of resolving the dispute. Chances of failure of this process are high.

The main reason for its failure is that more importance is given to the emotional factor rather than protection of interest. The presence of emotions causes a deadlock.

Advantages:

- Informal negotiations are secretive.
- Involvement of a third person is nil.
- There are no procedural hassles during negotiation.

Disadvantages:

- Parties direct involvement results into an emotional bargain.
- Parties tend to get identified with position.
- Interests are replaced with egos.
- Emotional satisfaction becomes the major objective.

- Frequently ends with deadlock.
- Frequent deadlocks lead to breakdown of negotiation.
- Breaking down of negotiation leads to additional enmity.

(ii) **Formal Negotiation:** To overcome the defects of the informal negotiation, a modification was introduced and it became another genera of negotiation called the 'formal negotiation'. The modification is in the form of introduction of a third party as a representative of the parties to the dispute. Each party here appoints a negotiator, and this negotiator is supposed to negotiate on behalf of the parties. In this process the parties remain in control of the process through the negotiator, though they have no direct control over it. The negotiator has to negotiate on the basis of the interests expressed to him by the party which appoints him. The addition of this negotiator as a third party helps to cure the defects of the informal negotiation as there is absence of emotion.

Advantages:

- Formal negotiations are conducted by the third party which helps to avoid emotions.
- Involvement of outsiders helps to focus on the problem and the future than on the past and the ill-will.
- There is absence of procedural hassles during negotiation.
- Negotiation becomes more objective.
- Negotiator can successfully avoid deadlocks.
- Negotiator can adopt a different approach all together.
- A different approach can avoid major conflicts or prevent conflict all together.
- Interests to be protected takes centre stage and not the emotions.
- Protection of interests reduces enmity.

Disadvantages:

- It may end with deadlock.
- Parties may force the negotiator to take a definite position.
- Parties may insist on emotional satisfaction.

4(A)2.3.1.3 Modes of Negotiation

After studying the kinds of negotiation and its advantages and disadvantages, let us understand the modes of negotiation. When we want to go for a negotiation, the basic issue would be about how to negotiate? There are two choices available to us. We can either go in for a hard negotiation or else for a soft negotiation.

(a) **Position-based or Hard Negotiation:** In this mode of negotiation, the negotiators choose to take positions at the preliminary stage of negotiation.

They choose the position of a victim or a sufferer. For example, in a case of breach of a contract, the party takes a position that he is a victim, and that his rights need to be addressed. The negotiator is automatically prompted to bargain hard, thereby making it impossible for him to change and adapt. This consequently leads to an unwise agreement. During negotiation, when the client takes the position of a victim, almost instantly, ego gets attached to it and the rest of the bargain is directed towards the satisfaction of this ego, rather than finding a solution to the problem. Arguing over positions, thus, endangers an ongoing relationship. The task of jointly devising an acceptable solution tends to become a battle.

- (b) **Soft Negotiation:** This mode of negotiation is opposite to hard negotiation. The Negotiator here adopts a gentler style of negotiation. This depends on the needs of the parties and the object behind the negotiation. In this kind of negotiation, the parties, instead of viewing the other side as an adversary, prefer to view them as friends. The emphasis is not on the goal of victory but on the necessity of reaching an agreement. In soft negotiation, the standard moves are to make offers and concessions, which aim to win the trust of the other party. A soft negotiator tries to adopt the role of a friend and is willing to repose faith in the other party. His approach makes him yield to the demands of the other party, in order to avoid confrontation. In this mode of negotiation, if a soft negotiator meets a hard negotiator, it leads to exploitation, resulting into the feel of being cheated. Thereafter, the party attempts to find ways to breach the agreement which is referred to as a 'settlement agreement'. This type of a settlement agreement, though favours one party, ultimately leads to litigation wherein relationship becomes a casualty. Both approaches lead to an unwise agreement. The negotiator therefore needs to adopt a process which will yield a wise agreement.

Neither of the modes is advisable as the soft negotiator allows himself/herself to be exploited, and the hard negotiator exploits the other party. Under both circumstances, the settlement agreement fails to achieve an important object of negotiation that is the 'commitment' to settlement agreement. In absence of a commitment, the chances of breaching the settlement agreement would be very high. In case of such a breach, the parties will be left with no option but to approach the court. So, all the attempts made, will go in vain if parties end up in court. Therefore, we have to know how to obtain a commitment? The mode which is available to obtain a wise agreement which is agreeable to both the parties exhibiting commitment to the agreement is by adopting "Principled Negotiation".

- (c) **Principled Negotiation:** For a 'Principled Negotiation', we have to prepare a plan of action keeping in mind the possible scope of mistakes in case of soft and hard negotiations and avoiding them consciously. The plan of action of a good negotiator contains flexibility, multiple solutions, and adaptability. This flexibility provides an opportunity to the negotiator to take ad hoc decisions. This helps in having a comprehensive approach and gives more control over the proceedings thus avoiding frequent re-consultation with the client, which may affect the level of trust between the negotiating parties. During negotiation, the whole process can be

subjected to self-analyses by posing three questions such as the following to yourself:

- (i) Whether I have produced a wise agreement?
- (ii) Whether I have produced an efficient agreement?
- (iii) Whether the negotiation has had any positive impact on the relationship with the other party?

If the answer is 'yes', then it can be concluded that you have a principled negotiation at hand. Now let us see the differences among the Soft, Hard and Principled negotiations as presented below:

Soft Negotiation

- Participants are friends
- The goal is to reach an agreement
- Makes concessions to improve relationship
- Soft on the people and the problem
- Trust others
- Readily changes position
- Offers are made
- Disclosure of bottom line
- Acceptance of mutual losses and gains to reach an agreement.
- Searches for a solution agreeable to other party.

Hard Negotiation

- Participants are adversaries
- The goal is to gain victory
- Demands concessions as a condition of the relationship
- Hard on the problem and the people
- Distrust others
- Digs into position
- Threats are made
- Misleading as to bottom line
- Demand of one-sided gains as the price of agreement.
- Searches for a solution in their own favour.

Principled Negotiation

- Participants are problem solvers.
- The goal is to have a wise outcome reached efficiently and amicably.
- Separates the people from the problem
- Soft on people, hard on the problem
- Proceeds independent of trust.
- Focuses on interests, not on positions
- Interests are explored
- Avoids having a bottom line
- Inventing options for mutual gain.
- Develops multiple options to choose from and decide later.

Harvard Principles: The principled negotiation is designed on the basis of seven principles laid down by Harvard University, popularly known as 'Harvard Seven Principles' – (i) Interests, (ii) Options, (iii) Legitimacy, (iv) Relationship, (v) Communication, (vi) Alternatives, and (vii) Commitment. These are designed to achieve the basic principles which should be made as a part of the negotiation.

For a successful negotiation process, above seven Harvard Principles on Negotiation have to be followed. These principles propose to eliminate selfish bargain, replacing it with Principled Bargain.

(i) Interests: Interests are the needs or the desires of the negotiators. The parties involved in a negotiation always attempt to protect their own interests. However, an expert negotiator tries to assess the concerns, objectives, needs, desires, or fears of the other party.

The Method: First you must understand that negotiators are human beings, and they carry emotions. In every dispute the negotiator has two kinds of interest:

- a) Interest in substance.
- b) Interest in relationship.

You need to separate the relationship with the substance. If you do not separate them, then you tend to do positional bargaining. When you fail to separate the relationship with the substance, parties tend to treat statements as personal attack. Unnecessary interferences would be drawn as to your intentions and attitudes.

Examples: If a father says to his child “Your marks are very low”, the child may react to such statement with “You think I am not studying and simply playing? Actually, the father may be addressing the problem, but the child thinks that it is a personal attack on his ability to study. If the father and the child could separate their relationship and only concentrate on the substance that is low marks, then they can objectively identify the solution. The next step is identifying interests. The interests are also of two other types, vis., the conflicting interests, and the common interests. Enlisting conflicting interest provides a path for the negotiation which helps to draw a fair outline of the approach of the opposite party. Identifying conflicting interest would be helpful in addressing the fears of the other party. However, the most important factor is the common interest. Once the common interest is enumerated and explained, the opposite party tends to understand the importance of the success of the negotiation. Common interest always binds the parties together and helps them understand and appreciate the needs and importance of each other.

Example: You are looking for a house on rent. You have found a landlord and would like to negotiate the rent with him. What are the common and conflicting interests?

Common Interests

- Both want stability
- Both would like to maintain the apartment well
- Both want good relationship

Conflicting Interests

- Amount of Rent
- Amount of Advance
- Vacating the premises
- Who has to pay for maintenance
- Payment of water and electricity charges

(ii) Options: The negotiator proposes Options. Options are the possible ways by which the parties could work together, balancing their interests and more or less satisfy them in a negotiated agreement. The success of negotiation depends upon the number of options that parties propose. The exercise of enlisting ‘options’, includes the act of enumerating the various interests of the parties. You need to invent the options for mutual gain.

Example: You are negotiating for a settlement in an accident case on behalf of your client. Your client has suffered multiple fractures in his right leg. What are the options you have? You could ask for:

1. Onetime payment, or
2. Medical expenses and compensation, or
3. Medical expenses and compensation with an assurance of further payment in case of future complications.

This example as to options, sufficiently explains that negotiation is a process where the parties have no restriction for coming out with options. When parties concentrate on the interests, their rights and liabilities take a backseat. With the different options available, the parties feel that they belong to the process, they feel recognized and they enjoy the importance and credibility given to them for including the options aired by them during negotiation. All this helps in developing the first principle, 'relationship'.

The only method available to a negotiator to ensure loyalty of the parties towards settlement agreement is by providing legitimacy to the demands of the parties. Legitimacy is an attempt made by the negotiator to provide a justification to the demand made by his party. The discussion between professionals will not be emotion based, but objective based. Thus, legitimacy brings in moral force to the demand made by the parties.

(iii) Legitimacy: It can be explained by providing objective standards relied upon for making such demand e.g., in case of demand of compensation for the breach of a contract, the negotiator will assess the total loss suffered and it is liquidated by referring to the market value. In case of ambiguity in the contract as to transportation charges, the negotiator will rely on the precedents followed in such trade or business.

The objective standards also include the negotiator's effort to convince the other party regarding his honest objective and to convince them that even the Court of law will follow the same standards and therefore the outcome of the litigation would be largely similar. The success of negotiation and the respect to the settlement agreement depends on the feeling of belonging, fair treatment and the feeling that a fair procedure has been followed. Fair procedure is a slippery slope.

For example, in a partition between two brothers, if the eldest brother does the splitting of share to his best capacity impartially, and then selects his share, the younger one may have an objection. The younger one may have a doubt in his mind, even though the elder has acted fairly. Therefore, this cannot be a fair procedure. The better way to deal with this situation is to give options to one of them to split the shares and the other to select.

(iv) Relationship: Relationship is an important aspect of the negotiation process. The main reason to adopt negotiation is to protect the relationship between the parties. The regular judicial mechanism or Arbitration is an efficient process. However, it leads to sacrificing of relationship due to the adversarial approach in the justice delivery system from day one itself. As two or more parties deal with one another in a negotiation process, protecting relationship becomes the

major object, even though it may be a one-time transaction and they may have no past or ongoing interaction.

Usually people look at short-term gains, and are ready to sacrifice relationship for it. However, to be successful, one should always invest in long-term gains. To be successful, you need to adopt a good negotiation process. Handling relationship causes the most anxiety in the process of negotiation. You do not want to spoil your relation at the same time you do not want to give up.

You need to separate the problem from relationship, if you have to resolve the dispute without destroying the relationship. You need to be firm on the problem but soft on the people.

Example: You have a money lending firm and your friend wants to borrow money from you. Your firm has a policy, insists on collateral security for a loan. Your friend says, he being a friend of yours want waiver of the condition of collateral security. How do you handle the situation? If you say that you cannot waive the condition, you spoil your relation with the friend. If you waive the condition there is a possibility that you may suffer loss if your friend fails to pay. Remember the rule -- “separate the problem from the people”.

You need to clearly explain to your friend that the firm’s rule has nothing to do with the friendship. Loan is a business deal; therefore, it needs to be in accordance with your firm’s policy. If you fail to do this, you may lose friendship or money. In any event, you spoil your relationship with your friend.

(v) Communication: During negotiation, people tend to get angry, depressed, fearful, hostile, frustrated, offended and confused about their perception as reality. When they are confronted with this situation, the principle which helps to overcome it is communication. Parties must talk to each other. The more you discuss the problem, more clarity is brought to the discussion table. Miscommunication or a vague communication may lead to misunderstandings. This misunderstanding affects the trust between the parties, which may lead to misinterpretation of the statements. This may also prejudice the relationship, and further lead to deadlock in the negotiation process. If not, then it may lead to counter reactions, further damaging the relationship between the parties. This may lead to further misunderstandings.

The lack of proper communication may lead to such vicious circle, which may be very difficult to break and will lead to two main casualties, viz., the failure of the negotiation process itself; and the souring of the relationship between the parties. Even if the negotiation fails, keep the communication open. For example, if the other party refuses to all your proposals, you could still keep open the communication by saying that, “it is unfortunate that we could not reach any agreement but, we are still open to new proposals.”

(vi) Alternatives: As a lawyer does not depend on single argument or issue, similarly you also should not depend on one single process. Your endeavour should always be to find the alternatives. Your attempt to settle the dispute depends on the BATNA (Best Alternative to a Negotiated Agreement), which is usually discussed in the preliminary stage of negotiation. This helps in deciding as to whether to agree to the proposal or not to agree. If you have no alternatives, you would be forced to agree in the negotiation. As mentioned

above, negotiation is one of the processes of resolution of dispute. There may be various other options available to the parties, in case negotiation fails. There is no guarantee that the negotiation would be successful. What if the negotiation fails? The knowledge of the alternatives helps you during negotiation as you would be in a position to decide and choose between the options available.

For example: In case of an accident, the offender offers to compensate for the loss suffered due to the damage to the vehicle. Before agreeing to his proposal, the negotiator has to check BATNA. Alternatives available here would be, to file a suit and claim damages from the Motor Vehicle Tribunal or to forego the litigation and make a claim against the insurer of the vehicle (Insurance Co). Out of the three alternatives, litigation causes delay, includes lawyers' expenses and if contributory negligence plea is accepted then the amount of compensation gets reduced. Litigation is a risk, but we have to think whether it is worth taking.

Does it offer much more compensation than the offer made by the other party? If the answer is yes, then litigation can be BATNA. Applying to the insurer (insurance Co.) and claiming compensation directly cannot be a BATNA, as the Insurance Co. will pay for the loss according to the agreement. Most of the spare parts of the vehicle involved are not included in the Insurance coverage. In addition, the party may lose the 'non-claim bonuses for the next insurance coverage. So, litigation will be the BATNA if the offenders offer is much lower than the prescription of law.

(vii) Commitment: The success of negotiation depends on the commitment of both the parties. The negotiator has to include pre-conditions, if any, to ensure their commitment to the negotiation. These pre-conditions help in assessing the attitude of the opposite party. If the party is interested in negotiation or believes in negotiation then the parties' involvement will be of higher level and chances of agreement will be high. Even in a case where the party is new to negotiation and has framed no opinion, these pre-conditions help in understanding the inclination of the other party. These pre-conditions also help in assessing the parties' ability to assent to the final agreement.

4(A)2.3.2 Mediation

Negotiation which we discussed above, the way it developed, suffers from certain defects. These defects were answered effectively by formulating a new genus of ADR in form of 'Mediation'. The fundamental process in mediation is nothing but a negotiation. However, mediation is a slightly modified version which has been developed to overcome the defects involved with the negotiation process. "Mediation is a dispute resolution process where the parties discuss the subject matter in presence of the third party called mediator, who is experienced and has trust and faith of both parties and who tries to bring out an amicable settlement between the parties."

Mediation is the involvement of a third person called the Mediator. This person acts as a catalyst between the parties and tries to achieve an amicable settlement between parties. Involvement of the third party does not change the style of proceedings. It basically remains a negotiation, but takes place in the presence of a third person.

4(A)2.3.2.1 Stages of Mediation

Mediation resembles the negotiation process, it being an improvement over the negotiation process. The improvement is in the form of introduction of the third independent party to oversee the negotiation process. In other words, it is a controlled negotiation process. This being the situation, the basic principles remain same. Even in mediation seven Harvard Principles play a very important role. The party's behavior in mediation has to be guided by these principles. The difference lies in the stages of mediation where the mediator plays an important role.

1. ***Convening Process:*** At this stage mediator makes preliminary arrangements such as the venue for mediation and time. It is always better to select a neutral venue for conducting mediation. Before fixing the time and venue you may need to consult both the parties for their consent and availability.
2. ***Mediator's introduction and developing ground rules to be followed in the Mediation:*** The first session of mediation involves two important components, where in the mediator needs to introduce himself and the procedure that is going to be followed during the mediation.
3. ***Statement of problem by Negotiators:*** After mediator's introduction both the parties may be allowed to state the problem.
4. ***Re-statement of the problem by mediator:*** After hearing the problem from both the parties, you need to restate the problem. Restating the problem means you are summarizing the problem. Summarizing the problem has its own advantage. It not only shows that you have understood the dispute between the parties, but also that if there is any thing missing the parties would be free to add.
5. ***Collection of additional information if necessary:*** In case the problem explained by the parties is not clear or more information is required to understand the dispute fully and properly, the mediator may seek additional information or documents in support of such dispute.
6. ***Setting the agenda for Mediation:*** Once the problem is clear, the mediator needs to set the agenda. Setting agenda is similar to framing issues. It is nothing but identifying the differences and framing them in the form of issues for negotiation.
7. ***Facilitating negotiation:*** After framing issues the mediator invites the negotiators to negotiate.
8. ***Mediator generating options:*** Remember the negotiation principles. Generating options is more important for a successful negotiation. Therefore, mediator must encourage and help the parties to generate options. He needs to play proactive role in generating options.
9. ***Private meetings if necessary:*** In case of necessity you may hold private meetings. Private meeting means you could talk to only one party and request the other party to move out of the mediation room. Before you conduct the private meeting, you need to explain to both the parties that you may be conducting private meetings and the purpose of the meeting is not to hamper the other party's interest, but to convince the party for

settlement. Private meeting also may be conducted to get the inside information which the party may not be comfortable in disclosing in the presence of the other party. Private meeting also helps the parties to express the apprehensions freely to the mediator and the mediator could understand these apprehensions. Mediator should build the confidence among the parties that the private meetings are not going to affect his neutrality towards the mediation of the dispute.

10. **Persuasion to reach a settlement:** The role of the mediator in mediation is not of a mute spectator but he has to actively involve the parties to reach a settlement. Therefore, persuasion to reach settlement does not mean that the mediator will force the parties for settlement, but he will encourage and motivate the parties to settle. The role of the mediator is to avoid situations having the effect of hampering the process of negotiation between the parties.
11. **Realistic agreement:** If the negotiation is successful and the parties reach a settlement then the mediator should see whether the agreement is realistic. At this stage mediator is not assessing whether the agreement between the parties is reasonable he has to see whether it is an enforceable agreement according to the law.
12. **Summing up and reducing the settlement into writing:** Once the mediator is satisfied that the agreement is enforceable by law then he needs to sum up the agreement and write the same. After that he should make sure that the parties read it, and then get their approval.

Role of a Mediator: The main role of the mediator is to avoid deadlocks. The purpose of his appointment is to keep the parties at the negotiation table. If any party tries to break the negotiation process, then mediator becomes active and immediately gets involved in resolving the deadlock. His presence reduces the risk of emotional bargain, and in cases where it is unavoidable, he can act as a vent to the emotions of the parties. This venting of emotions brings the party back on to negotiation table and it helps to create a better negotiation atmosphere.

Requisites of the Mediator include the following.

1. He must maintain neutrality.
2. He should maintain confidentiality.
3. He should separate people from the problem.
4. He should motivate parties to negotiate.
5. He needs to counsel the negotiators about the process of mediation.
6. He should provide scope of venting emotions by the parties.
7. Sometimes mediator may act as face saver.
8. He must resist the temptation of being a via media.
9. He must help the negotiators in identifying their interests and settling their dispute.

The role of a Mediator is deemed to have lesser involvement compared to a Conciliator. The major theoretical difference drawn is regarding the ability to make suggestions as to possible ways of settlement of disputes. During Mediation, the mediator is not supposed to make any such suggestions. A Conciliator however is allowed to make suggestions as to possible ways of settlement of dispute.

4(A)2.3.2.2 Statutory Recognition of Mediation

Mediation is recognised under section 89 of Civil Procedure Code added as an amendment in 2002.

Sec 89: Settlement of disputes outside the Court

- (1) *Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for...*
- (d) *mediation.*
- (2) *Where a dispute had been referred-*
- (d) *for mediation, the court shall affect a compromise between the parties and shall follow such procedure as may be prescribed. The provision under CPC has transformed a mediator from non-statutory to a statutory authority.*

4(A)2.3.2.3 Types of Mediation

Different types of mediation are discussed below.

(1) Lawyer supported Mediation: Lawyer-supported mediation is a “non-adversarial method of alternative dispute resolution (ADR) to resolves disputes, such as to settle family issues at a time of divorce or separation, including child support, custody issues and division of property”.

The approach sets out to integrate the contribution of family lawyer or solicitor with that of a family mediator. Users of lawyer-supported mediation first meet their respective lawyers to take advice before jointly attending mediation sessions. Legal advice is taken between sessions to inform options being discussed at mediation. Following mediation, the lawyers are called upon to review any agreement reached and to make aspects of it legally binding. In the event of lawyer-supported mediation failing to deliver a partial or full agreement, both parties are free to retain their respective lawyers to pursue litigation. This is not the case with collaborative law where a breakdown in roundtable negotiations requires each party to instruct a new family lawyer before proceeding with court action.

(2) Party-directed Mediation: Party-directed mediation (PDM) is an approach to mediation that seeks to empower each party in a dispute, enabling each party

to have more direct influence upon the resolution of a conflict, by offering both means and processes for enhancing the negotiation skills of contenders. The intended prospect of party-directed mediation is to improve upon the ability and willingness of disputants to deal with subsequent differences.

The concept behind party-directed mediation, depending upon the degree to which a case lends itself, is that if and when parties wish to spend the time to acquire the skills necessary to become more effective negotiators, then they can be empowered to achieve a self-directed resolution. The concept is most effective for disputants who wish to have a greater hand in resolving their own conflicts.

Party-directed mediation is of special value where individuals or stakeholders will continue to have ongoing interactions, as well as for conflicts with significant interpersonal aspects. As people become more talented negotiators, through adoption of enhanced negotiation skills, they tend to deal more effectively with conflict.

Two of the most salient elements of party-directed mediation generally are:

- *A pre-caucus or pre-mediation meeting* between the mediator and each of the parties prior to the joint session, and
- *A 'joint session'*, where parties face each other and speak directly to each other, rather than through the mediator.

In some instances, the pre-caucus may be so effective that parties go on to solve their conflict without a mediator. In fact, most people are able to resolve most of their conflicts without a mediator. There are times, however, when mediators are very much needed.

- ***Pre-caucus or pre-mediation meeting:*** In the pre-caucus, the mediator meets with each party separately, away from other parties, before they are ever brought together into a joint session. The purpose of the pre-caucus is to help each party release their pent-up concerns enough to enable them to gain a broader perspective, and to prepare the parties to pursue their own agenda in the ensuing joint session. This is done through a listening approach called *non-directive empathic listening* and then helping participants through a self-evaluative process and sharing interpersonal negotiation skills with them.
- ***Joint session:*** In the joint session, individuals are situated so they sit face-to-face in order to address each other directly, rather than through the mediator. To enhance this delegation of responsibility, clients sit facing directly across a table from each other, while the mediator sits at a distance from both. This assures that both parties must address each other, directly. Parties often must be reminded that the mediator is there to help the parties take responsibility for managing their own conflict, rather than to judge between the merits of the position of one party or the other.

4(A)2.3.3 Arbitration and Conciliation

Arbitration is essentially a dynamic field of sorts, warranting that the field is still expanding into a wider horizon of practice and theory. The quintessence of

arbitration lies in the settlement of disputes by a tribunal chosen by the parties themselves, rather than by the Courts constituted by the State. The popularity of arbitration as a mode of settling disputes is due to the fact that arbitration is regarded as speedier, more informal and cheaper than conventional judicial procedure and provides a forum more convenient to the parties who can choose the time and place for conducting arbitration and the procedure. Where the dispute concerns a technical matter, the parties can select an arbitrator who possesses appropriate special qualifications or skills in the trade.

As a concept and as a process, arbitration is well embedded in commercial practices and in the socio-economic realm of the legal practice. When two persons have agreed to settle a dispute through arbitration, what they really mean is that the actual and final resolution of their dispute will rest with a third person called the arbitrator. The essence of arbitration, therefore, is that it is the arbitrator who decides the case and not the ordinary civil courts established by the state. The law of arbitration is based upon the principle of referring the disputes to a domestic tribunal substituted in the place of a regular Court. Thus, arbitration can be defined as a reference to the decision of one or more persons called arbitrators of a particular matter in difference or dispute between the parties. Halsbury defines “arbitration” as the reference of dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a Court.

A number of ADR systems perceive and use the terms ‘mediation’, ‘arbitration’ and ‘conciliation’ synonymously.

4(A)2.3.3.1 Law Governing Arbitration and Conciliation: Current Status

Arbitration and Conciliation Act, 1996 which is very comprehensive in its nature is modeled on the Model Arbitration Law (MAL) of the United Nations Commission on International Commercial Arbitration, 1985 as, in the Geneva Assembly of the United Nations heavy emphasis has been laid on these rules constituting the recommended uniform model law on arbitral among all countries.

The term ‘arbitration’ is not defined under the Arbitration Act, but the term ‘arbitration agreement is defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between the parties. Sec.7(5) of the Act expressly provides that reference to a document containing an arbitration clause would constitute an arbitration agreement. As defined under Section 2(1)(a) it covers any arbitration whether it is administered by any permanent arbitral institution or not. It also covers arbitration relied on voluntary agreement by the private parties or by operation of law.

(a) Arbitration Act, 1940

The Arbitration Act, 1940, dealt with only domestic arbitration. Under the 1940 Act, intervention of the court was required in all the three stages of arbitration, i.e. prior to the reference of the dispute to the arbitral tribunal, in the duration of the proceedings before the arbitral tribunal, and after the award was passed by the arbitral tribunal. Before an arbitral tribunal took cognizance of a dispute, court intervention was required to set the arbitration proceedings in motion. The

existence of an agreement and of a dispute was required to be proved. During the course of the proceedings, the intervention of the court was necessary for the extension of time for making an award. Finally, before the award could be enforced, it was required to be made the rule of the court.

While the 1940 Act was perceived to be a good piece of legislation in its actual operation and implementation by all concerned - the parties, arbitrators, lawyers and the courts, it proved to be ineffective and was widely felt to have become outdated.

(b) UNCITRAL (United Nations Commission On International Trade Law) Model Arbitral Law

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to consider the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

Amendments to articles 1(2), 7, and 35(2), a new chapter IV A to replace article 17 and a new article 2A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernize the form requirement of an arbitration agreement to better conform with international contract practices.

The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Arbitral Law is the amended version. The UNCITRAL Model Arbitral Law is divided into eight chapters.

- Chapter I - General Provisions
- Chapter II - Arbitration Agreement
- Chapter III - Composition of Arbitral Tribunal
- Chapter IV - Jurisdiction of Arbitral Tribunal
- Chapter V - Conduct of Arbitral Proceedings
- Chapter VI - Making of Award and Termination of Proceedings
- Chapter VII - Recourse Against Award
- Chapter VIII - Recognition and Enforcement of Awards

UNCITRAL Arbitration Rules: Adopted by UNCITRAL on 28 April 1976, the UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitration and the conduct of arbitral proceedings

and establishing rules in relation to the form, effect and interpretation of the award.

The UNCITRAL Arbitration Rules are a comprehensive, internationally accepted set of rules, which parties can adopt for an arbitration arising under their contract. These rules, however, are designed essentially for a non-institutional form of arbitration. Neither UNCITRAL nor any other institution plays any role in the administration of the arbitration. Lack of institutional support often means delays and frustrations in arbitration according to these rules. Parties need to make special provision if they are to enjoy the benefit of institutional support in the conduct of an UNCITRAL rules of arbitration.

The two main areas to be considered are: (a) Appointment of the arbitrator(s); and (b) Institutional support for the progress of the arbitration. Parties are encouraged to appoint their own arbitrators, or to rely on institutions to aid them in the process.

The UNCITRAL Arbitration Rules do not provide for the management of the financial and other practical aspects of the arbitration. This is left entirely to the arbitral Tribunal and the parties. The Tribunal fixes its own fees, determines the amount of deposits towards its fees, collects the deposits from the parties, and pays itself at the end of the arbitration from the deposits. The parties and the Tribunal also try to manage other administrative chores in the proceedings. The rules are segregated into four sections:

- Section I: Introductory Rules
- Section II: Composition of the Arbitration Tribunal
- Section III: Arbitration Proceedings
- Section IV: The Award

(c) The Arbitration and Conciliation Act, 1996

The 1996 Act, which repealed the 1940 Act, was enacted to provide an effective and expeditious dispute resolution framework, which would inspire confidence in the Indian dispute resolution system, attract foreign investments and reassure international investors in the reliability of the Indian legal system to provide an expeditious dispute resolution mechanism. The 1996 Act has two significant parts - Part I provides for any arbitration conducted in India and enforcement of awards there under. Part II provides for enforcement of foreign awards. Any arbitration conducted in India or enforcement of award there under (whether domestic or international) is governed by Part I, while enforcement of any foreign award to which the New York Convention or the Geneva Convention applies, is governed by Part II of the 1996 Act. Under Section 44 of the Indian Arbitration and Conciliation Act, 1996, a foreign arbitration a foreign award by definition means an award passed in such territory as the Central Government by notification may declare to be a territory to which the New York Convention applies. Hence, even if a country is a signatory to the New York Convention, it does not ipso facto mean that an award passed in such a country would be enforceable in India. There has to be further notification by the Central Government declaring that country to be a territory to which the New York

Convention applies. About 40 countries have been notified so far by the Indian government.

The 1996 Act contains two unusual features that differed from the UNCITRAL Model Law. First, while the UNCITRAL Model Law was designed to apply only to international commercial arbitrations, the 1996 Act applies both to international and domestic arbitrations. Second, the 1996 Act goes beyond the UNCITRAL Model Law in the area of minimizing judicial intervention. The changes brought about by the 1996 Act were so drastic that the entire case law built up over the previous fifty-six years on arbitration was rendered superfluous. The Government of India enacted the 1996 Act by an ordinance, and then extended its life by another ordinance, before Parliament eventually passed it without reference to a Parliamentary Committee - a standard practice for important enactments.

In the absence of case laws and general understanding of the Act in the context of international commercial arbitration, several provisions of the 1996 Act were brought before the courts, which interpreted the provisions in the usual manner. The Law Commission of India prepared a report on the experience of the 1996 Act and suggested a number of amendments. Based on the recommendations of the Commission, the Government of India introduced the Arbitration and Conciliation (Amendment) Bill, 2003, in Parliament for amending the 1996 Act. It has not been taken up for consideration. In the meantime, Government of India, the Ministry of Law and Justice, constituted a Committee popularly known as the Justice Saraf Committee on Arbitration', to study in depth the implications of the recommendations of the Law Commission of India contained in its 176th Report and the Arbitration and Conciliation (Amendment) Bill, 2003. The Committee submitted its report in January 2005.

Arbitration and courts: Arbitration is the reference of dispute or difference between two or more parties to a person chosen by the parties or appointed under statutory authority, for determination of the same. In a broad sense, it is substitution of ordinary judicial machinery by a mutually chosen tribunal i.e., an Arbitrator.

The 1996 Act has limited the powers of court rather restricted the exercise of judicial powers, in other words confined the extent of judicial intervention as provided under Section 5 of the Act - "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part." Finality of Arbitral Award under Section 35 is subject to this part according to which an arbitral award shall be final and binding on the parties and persons claiming under them respectively. Thus, the Act itself provided finality of arbitral awards and its enforcement (Section 36) without intervention of the Court.

The Arbitral Tribunals are empowered to settle any objections raised in respect of jurisdiction or scope of authority of the arbitrators. Arbitration offers definite advantages that litigation from its very nature can never provide. Courts have always adopted a conservative approach to problems. Courts are put into a strait jacket as they are obliged to follow fixed procedure and fixed rules of evidence. Arbitration, on the contrary, is more informal. The Evidence Act is not applicable to arbitration. The Civil Procedure Code has no application. The arbitrator need

only to proceed in a manner conforming to justice, equity and good conscience. He is not bound by any formulated rules. One of the major advantages of arbitration is that an expert arbitral tribunal can be selected considering the field of dispute; so much so, the entire procedure can be conducted without the intervention of expert lawyers, with major gains in speed and economy. Thus, many disputes as to quality in commodity trades, many disputes arising out of construction contract, among others of a similar cadre, can be settled through arbitration in a speedy manner at lesser cost and more quickly than through courts.

Arbitrators and judges are similar in the business of dispensing justice - the judge in the public sector and the arbitrator in the private sector. The public legal system of any country represents a compromise between conflicting demands for quality, speed and cheapness of the decision - making process. Of these, quality of decision making is usually given the highest priority. Speed at which the decision is arrived at and the cheapness of the procedure have suffered considerably. Litigants had to queue up for the services of the Court and to accept the delay, the inconvenience and often the loss consequent on the delay.

However, the success of any arbitration depends to a certain extent, upon the personality of the arbitrator. The arbitrator should always bear in mind the range of procedures open to him so as to be able to suggest to the parties the course which will save costs without reducing to an unacceptable extent the quality of the decision-making process.

Arbitrability and Non-arbitrability of Disputes: Arbitrability refers to whether a dispute is capable of being subject to arbitration, or not. While only some disputes seem to take to arbitration, by their nature, the subject matter of some disputes is simply not capable of arbitration. Broadly, two groups of legal procedures cannot be subjected to arbitration.

- Procedures which necessarily lead to a determination which the parties to the dispute may not enter into an agreement upon: Some court procedures lead to judgments that are binding on all members of the general public, or public authorities in their capacity as such, or third parties, or which are being conducted in the public interest.
- Some legal orders exclude or restrict the possibility of arbitration for reasons of the protection of weaker members of the public, e.g. consumers. Examples: German law excludes disputes over the rental of living space from any form of arbitration, while arbitration agreements with consumers are only considered valid if they are signed by either party, and if the signed document does not bear any other content than the arbitration agreement. On a generic note, the above-mentioned kinds of disputes are not arbitrable. However, each dispute is best assessed on a case by case basis, indicating whether the dispute in question is arbitrable or not.

List of matters which cannot be referred to Arbitration

With a sophisticated and well-placed legal system, India is also a party to the New York Convention (on enforcement of arbitration awards) allowing arbitral awards to be enforced by the Courts in almost any country around the world. In India, varied ADR mechanisms exist for resolving disputes outside the courts.

The choice of the ADR method largely depends on the nature of the dispute and relation of the parties.

The general ADR methods of resolving disputes are arbitration, conciliation, mediation, negotiation, consumer forums etc. Thus, there are sufficient ADR mechanisms in India and the only requirement is their application in true letter and spirit. Arbitration is the most commonly used method in India for resolving and adjudicating various disputes.⁴ The Arbitration and Conciliation Act, 1996 governs the arbitration procedures in India. As per section 2(3) of the Act “This part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.” List of matters which cannot be referred to Arbitration:

- a) Matters related to industrial disputes.
- b) Matters related to criminal proceedings [except few matters].
- c) Matters related to charities or charitable trusts.
- d) Matters related to dissolution or winding up of Companies.
- e) Insolvency matters e.g. adjudication of a person or an insolvent.
- f) Matters related to claim for recovery of octroi duty.
- g) Matrimonial causes (except matters relating to settlement of terms of separation or divorce).
- h) Relating to proceedings for appointment of guardian of a minor or lunatic.
- i) Testamentary matters e.g. validity of a will.
- j) Relating to possession of leased premises governed by the provisions of the Bombay Rents, Hotels and Lodging House Rates Control Acts, 1947.
- k) Relating to suit under section 92 of the code of Civil Procedure, 1908.
- l) Relating to title to immovable property in a foreign country. Any matter, which is contrary to public policy or unless, under any other law, such a dispute is not capable of determination by arbitration.

Interim Measures by Court: The Act has been enacted on the line of UNCITRAL model law of International Commercial Arbitration. The Act provides autonomy to the parties in various matters and has reduced the intervention of court to the minimum. However, the courts can intervene to give effect to various matters as permitted by the Act. One such situation is to grant interim measures of protection as contemplated by Section 9.

Interim Measures by the Court: Section 9 of the 1996 Act: It will be apposite to advert to section 9 of the Act which reads thus: A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings or for an interim measure of protection in respect of any of the following matters namely:

- The preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement.
- Securing the amount in dispute in the arbitration
- The detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or - authorizing any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.
- Interim injunction or the appointment of a receiver.
- Such other interim measures of protection as may appear to the Court to be just and convenient. And the court shall have the same power for making orders as it has for the purpose of and in relation to, any proceedings before it.

Obviously, all such factors, which the court considers in passing interim order, would be applicable to orders passed under Section 9 of the Act also. Basically, the party seeking injunctive relief should establish a likelihood of success on the merits, irreparable harms that might be caused to him if the interim relief is denied and the balance of convenience in its favour. It may be relevant to point out that the Arbitration Act, 1996 of England makes interim relief more stringent in the sense that it permits such relief only when the parties have not otherwise agreed and only if and to the extent that the arbitral tribunal or any institution agreed to by the parties has no power or is unable for the time being to act effectively. Thus, the English Arbitration Act has minimized the intervention of the court and as such the provision is truly pro- arbitration.

The Supreme Court, in *Sundaram Finance Ltd. v. NEPC India Ltd.* (AIR 1997 SC 565), held that Section 9 is available even before the commencement of the arbitration. It need not be preceded by the issuing of notice invoking the arbitration clause. This is in contrast to the power given to the arbitrators who can exercise the power u/s 17 only during the currency of the tribunal. Once the mandate of the arbitral tribunal terminates, Section 17 cannot be pressed into service. The Supreme Court also made an observation about the relevance of Arbitration Act, 1940 in interpreting the Act of 1996. The Court held that the provision of this Act has, therefore, to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words, the provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act.

Provisions contained in section 9 regarding the availability of interim relief even before the arbitration proceedings commence may be misused by a party. It may so happen that after obtaining an interim order from the court it may not take initiative to have an arbitral tribunal constituted. This will amount to reaping the benefit of the interim order without any time limit. As per Sub-Sec (4), where a party makes an application under sub-section (1) for the grant of interim measures before the commencement of arbitration, the Court shall direct

the party in whose favour the interim measure is granted, to take effective steps for the appointment of the arbitral tribunal in accordance with the procedure specified in section 11, within a period of thirty days from the date of such direction. As per Sub-sec (5), the Court may direct that if the steps referred to in sub-section (1) are not taken within the period specified in sub-section (4), the interim measure granted under sub-section (2) shall stand vacated on the expiry of the said period; Provided that the court may, on sufficient cause being shown for the delay in taking such steps, extend the said period. In Sub-sec. (6), where an interim measure granted stands vacated under sub-section (5), the Court may pass such further direction as to restitution as it may deem fit against the party in whose favour the interim measure was granted under this section. Thus, if the Amendment Bill is passed, it will be then mandatory on the part of the party who has obtained interim relief from a court to constitute the arbitral tribunal expeditiously. Failure to do so, a party may run the risk of automatic vacation of the interim measure. This is a step in the right direction.

The Court will generally consider the following considerations while granting interim relief under section 9:

- (i) The party applying for interim relief must establish a prima-facie case.
- (ii) The balance of convenience should be in its favor.
- (iii) The party will suffer irreparable loss or injury if the interim measure is denied to it.
- (iv) The exercise of discretion has to be in beneficial manner depending upon the circumstances of each case.

4(A)2.3.3.2 Types of Arbitration

As mentioned elsewhere above, you may recall that a number of ADR systems perceive and use the terms 'arbitration', 'mediation' and 'conciliation' synonymously.

There are different modalities of arbitration processes, depending upon varied factors, such as the agreement of the parties, the kind of reference made, the place or persons conducting the arbitration, and such other factors as shall be explained in due detail. While ultimately the goal is one and the same- i.e., that of settling the differences between the parties in question, there lies a perceptible difference in each kind from the other. The most generic types of arbitration are herein enunciated:

1. **Ad-hoc Arbitration:** *Ad hoc* arbitration is a proceeding that is not administered by others and requires the parties to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support. Provided the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, cheaper and faster than an administered proceeding. The absence of administrative fees alone makes this a popular choice. Other advantages include astute party autonomy, in that the parties have the option of negotiating a complete set of rules, establishing procedures which fit precisely their particular needs. However, the

- disadvantage lies in the fact that this approach can require considerable time, attention and expense without providing assurance that the terms agreed will address all eventualities.

2. ***Institutional Arbitration:*** Institutional arbitration refers to the arbitration procedure undertaken by parties, in consonance with an arbitration institution. Plenty of popular institutions such as the London Court of International Arbitration, the ICC institute of Arbitration, the International Court of Arbitration, Singapore International Arbitration Centre, Hong Kong Institute of Arbitration Centre, to name a few, administer arbitration procedures on a regular basis. Each institute has a set of rules that govern arbitral proceedings conducted by them, and while parties may be free to choose the substantive laws governing their arbitration and disputes allied therein, the procedural laws are essentially governed only by the rules of these institutions. The advantages of institutional arbitration to those who can afford it are apparent. Foremost are:

- (i) availability of pre-established rules and procedures which assure that arbitration will get off the ground and proceed to conclusion with dispatch;
- (ii) administrative assistance from institutions providing a secretariat or court of arbitration;
- (iii) lists of qualified arbitrators, often broken out by fields of expertise;
- (iv) appointment of arbitrators by the institution should the parties request it;
- (v) physical facilities and support services for arbitrations;
- (vi) assistance in encouraging reluctant parties to proceed with arbitration and
- (vii) an established format with a proven record.

The primary disadvantages attending the institutional approach are:

- (i) administrative fees for services and use of facilities may be high in disputes over large amounts, especially where fees are related to the amount in dispute. For lesser amounts in dispute, institutional fees may be greater than the amount in controversy;
- (ii) the institution's bureaucracy may lead to added costs and delays and the disputants may be required to respond within unrealistic time frames.

3. ***Statutory Arbitration:*** Statutory Arbitration refers to any form of a mandatory arbitration which is imposed on the parties by operation of law. In such a case the parties have no option as such but to abide by the law of land. It is apparent that statutory arbitration differs from the above types of arbitration because:

- (a) The consent of parties is not necessary;
- (b) It is compulsory arbitration; and
- (c) It is binding on the Parties as the law of land.

For Example: Section 31 of the North Eastern Hill University Act, 1973, Sections 24, 31 and 32 of the Defence of India Act, 1971 and Section 43(c) of The Indian Trusts Act, 1882 are the statutory provision, which deal with statutory arbitration. There are more than 25 central Acts providing for statutory arbitration in India. For example, under the Co-operative Societies Act and under the Telegraph Act etc. arbitration is provided for statutorily. The provisions of these statutes to the extent inconsistent with the provisions of the Arbitration Act will prevail over the provisions of the Arbitration Act.

4. **Domestic Arbitration:** Any Arbitration which occurs in India and all the parties bear the nationality or originate from India is termed as Domestic Arbitration. This arbitration mechanism involves no external elements with respect to enforcement or actual carriage of the arbitration process and is entirely within the scope of the territory of India.
5. **International Arbitration:** Any Arbitration in which any party belongs to any nationality or origin other than India and the dispute is to be settled in India, such arbitration is termed as International Arbitration. Such arbitration mechanisms involve some aspect that is international in character — perhaps in terms of jurisdiction or even in terms of the laws and rules, or the enforceability.
6. **Mandatory/Statutory Arbitration:** This form of arbitration refers to a method that is prescribed by a statute, or a legislative prerequisite. “Statutory Arbitrations” are arbitrations conducted in accordance with the provisions of certain special Acts which provide for arbitration in respect of disputes arising on matters covered by those Acts. There are about 24 such Central Acts. Among them are the Cantonments Act, 1924, the Indian Electricity Act, 1910, the Land Acquisition Act, 1894, the Railways Act, 1890 and the Forward Contracts Regulation Act, 1956. Many State Acts also provide for arbitration in respect of disputes covered by those Acts, including Acts relating to co-operative societies. The provisions of the Arbitration Act, 1940 generally apply to those arbitrations unless they are inconsistent with the particular provisions of those Acts, in which case the provisions of those Acts will apply (Sections 46 and 47, Arbitration Act, 1940).
7. **Voluntary Arbitration:** Voluntary Arbitration is arbitration by the agreement of parties. It is a binding adversarial dispute resolution process in which the disputing parties choose one or more arbitrators to hear their dispute and to render a final decision or award after an expedited hearing. In the case of a dispute over a contract or other legal matter, arbitration may be in order. Arbitration involves the use of a neutral party to both review and help settle the dispute. The use of arbitration helps keep the matter from going to the courts, and may be either compulsory or voluntary.

In compulsory arbitration, the parties involved are required to go through the third party to settle their dispute. If an arbitration clause is included in a contract, and if the contract itself is valid, the parties must abide by the clause. Arbitration may also be ordered by a court as a means to prevent a situation from going to trial, and the parties must comply or face possible sanctions.

Another possibility is voluntary arbitration. In this instance, the sides involved agree on their own to use an outside party, like an arbitration attorney, to help settle their differences. No contract or law requires this action, yet deciding to use arbitration can save money, time and maybe even good will. In business relationships, all of these are important. If the matter is personal, such as in a divorce proceeding, voluntary arbitration can be equally valuable. Whether you are mandated by a contract or court, or you choose voluntary arbitration, educating yourself beforehand will help you be prepared for the process.

8. **Foreign Arbitration:** When arbitration proceedings are conducted in a place outside India and the Award is required to be enforced in India, it is termed as Foreign Arbitration.
9. **Sector-wise Arbitration:** Arbitration is essentially a prominent feature in most sectors today, given the expedite nature with which disputes are settled. The ease of settlements and flexibility in procedure are essentially the key ingredients that draw most sectors towards arbitrating their differences. A few of the prominent areas where arbitration has played a significant role are enunciated hereunder.
 - **Commodity Arbitration:** The trade and commodity sector work on a transnational level, involving clientele from multiple nations. The role of arbitration in the trade and commodities market has been tremendous, as is evident from the fact that the genre of international commercial arbitration is a separate one by itself. The New York City Commodities Arbitrators is a famous institution devoted to arbitration in the commodities sector.
 - **Maritime Arbitration:** Maritime law refers to the law that governs the realm of shipping and trade involving shipping. Plenty of disputes, spawning from territory issues, to custom-duty issues arise, warranting speedy settlement to enable a smooth flow of trade and ease in functioning of the economy. Arbitration, given its speed and flexibility, has come to play an immensely influential role in this field. Several institutions dedicated to Maritime Arbitration exist, such as the Maritime Association of the United States of America, the Society of maritime arbitrators, the London Maritime Arbitration Centre and the Singapore Maritime Arbitration Centre.
 - **Construction Arbitration:** The construction industry is another popular industry that is involved in international business. Plenty of nations outsource construction requirements to foreign nationals, or foreign companies, and this interaction paves the way for differences and disputes. Once again, the ease and flexible nature of arbitration

warrants a clear applicability of its services in dispute settlement. The Construction Industry Arbitration Council is a popular organization devoted to arbitration in the construction sector.

- *Securities Arbitration:* The securities sector, dealing with the share markets and all other modes of funding for a company, often sparks several differences between the parties. Pricing of shares, ownership issues, voting rights, veto powers and jurisdictional issues are common areas of differences between the parties to any securities agreement. Parties are free to place their demands as regards their own quantum of damages as they require, and the power of compromise that is achieved through arbitration draws this mode of dispute settlement into the world of the securities sector. Most common arbitration institutions deal with this field of dispute resolution.
- *IT Sector Arbitration:* IT disputes differ from disputes in other industries mostly in their substance. IT projects tend to be complex and characterized by a network of responsibilities shared between parties that are dedicated to carry through a technology-related, long term relationship. Thus, IT disputes typically center on contractual or intellectual property (IP) law issues. The Indian Council of Arbitration (ICA), which is now considered to be an apex arbitral institution in the country, has started the process of identifying and training specialized arbitrators for disputes connected with the IT industry. In relation to this aspect, the ICA conducted an in-depth seminar on Alternate Dispute

4(A)2.3.3.3 Arbitral and Conciliation Process: Stages

The first stage in arbitration is the formulation of the arbitration agreement whereby the parties agree to submit their present or future differences to arbitration. In case of any dispute, one of the parties to the contract must file a request for Arbitration and pay the required fee to an Arbitration Institution referred to in the agreement that provides Arbitration services. Often the Arbitration Institution will suggest an arbitrator or arbitrators to which the parties must agree. The arbitrator may be an attorney, judge, or business person. After the parties have defined their dispute, there will be a hearing, often at the arbitrator's office, where the parties present evidence and witnesses in a fairly informal manner without the formal rules of evidence used in court litigation. After the evidence has been presented, the arbitrator reaches a decision and usually later sends the parties a written reasoned opinion (an award). In India, an award passed by an arbitration tribunal has the force of a decree. Thus, it can be executed in the same manner in which a court decree can be executed.

A) Arbitral Process: The stages in an arbitral process are as follows:

- **Step 1: Filing and Initiation:** Arbitration cases commence when one party submits a demand for Arbitration, along with a copy of the arbitration provision and the appropriate filing fee to the concerned arbitrator or institution, as the case may be. From there, the respondent will be notified by the Arbitrator or the Institution, and a deadline will be set for an answer and/or counterclaim.

- **Step 2: Arbitrator Selection:** Following the respondent's answer, the parties are to identify and select arbitrators from their roster of neutrals. The parties' criteria are used to identify neutrals with qualifications that match the needs of the case. Once parties agree on the neutral, the arbitration proceedings may begin. If an even number of neutrals have been chosen by each party, the chosen neutrals work to choose a Presiding Arbitrator.
- **Step 3: Preliminary Hearing:** This meeting, conducted by the arbitrator, is the first opportunity for the parties and the arbitrator to discuss directly the substantive issues of the case. At this point, procedural matters such as the exchange of information, witness lists, etc., also will be discussed.
- **Step 4: Information Exchange and Preparation:** Parties make ready their presentations, and the arbitrator can address any impasses or challenges related to information sharing. The goal of this stage is to arrive at the point where evidence and arguments may be presented in the hearings.
- **Step 5: Written Submissions and Oral Arguments:** Written submissions may be submitted by the parties to the arbitrator, as agreed between themselves. Ideally, written submissions are an enumeration of all lines of arguments to be put forth by the parties in their oral submissions.
- **Step 6: Hearings:** At this stage, parties have an opportunity to present testimony and evidence to the arbitrator in order to arrive at resolution. All lines of argument ought to be presented. It is to be remembered that any question as to the jurisdictional competence of the arbitral tribunal ought to be raised before submitting the first statement on the substance of the dispute.
- **Step 7: Post-Hearing Submissions:** This stage of the process provides parties with an opportunity to submit additional documentation, if allowed by the arbitrator. If this stage is necessary, it usually occurs shortly after hearings.
- **Step 8: The Award:** The arbitrator closes the record regarding the case and issues a decision, inclusive of an award. It is not mandatory that the arbitrator's decision contain reasons, but a reasoned decision works to the advantage of all the parties involved, given that the fundamental rules of natural justice ought to be followed. Parties ought to sign the award once passed.
- **Step 9: Enforcement of the Award:** The award, after passage, ought to be enforced. Enforcement is as in the case of a decree by a civil court.
- **Step 10: Appeal:** If either party is not satisfied with the award passed, it may go in for an appeal to set the award aside, in consonance with s.34 of the 1996 Act.

Arbitral Tribunal: An arbitral tribunal or arbitration tribunal is a panel of one or more arbitrators which is convened and sits to resolve a dispute by

way of arbitration. The tribunal may consist of a sole arbitrator, or there may be two or more arbitrators, which might include a chairman, presiding arbitrator or an umpire. The parties to a dispute are usually free to agree the number and composition of the arbitral tribunal. In India, an arbitration clause which provides for two (or any other even number) of arbitrators is understood to imply that the appointed arbitrators will select an additional arbitrator as a chairman of the tribunal, to avoid deadlock from arising. Different legal systems differ as to how many arbitrators should constitute the tribunal if there is no agreement. Tribunals are constituted for both, ad hoc and institutional arbitration proceedings. In the context of Institutional Arbitration, permanent tribunals are created, which have their own rules and procedures, and tend to be much more formal. They also tend to be more expensive, and, for procedural reasons, slower.

- **Appointment:** Party autonomy ensures that the parties are generally free to determine their own procedure for appointing the arbitrator or arbitrators, including the procedure for the selection of an umpire or chairman. If the parties decline to specify the mode for selecting the arbitrators, then the relevant legal system will usually provide a default selection process. Characteristically, appointments will usually be made on the following basis:

If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator within a stipulated time frame of a request in writing by either party to do so.

If the tribunal is to consist of an even number of arbitrators: Each party shall appoint an equal number of arbitrators and the arbitrators so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.

If the parties arrive at a deadlock where appointing an arbitrator is concerned, they will be permitted to refer, under s.11, Arbitration and Conciliation Act, 1996, to the Chief Justice of the High Court of the State in whose jurisdiction they are (for domestic arbitration) or the Chief Justice of India (for international arbitration), to appoint an arbitrator.

- **Duties, Functions and Powers:** The duties of a tribunal will be determined by a combination of the provisions of the arbitration agreement and by the procedural laws which apply in the seat of the arbitration. The extent to which the laws of the seat of the arbitration permit “party autonomy” (the ability of the parties to set out their own procedures and regulations) determines the interplay between the two. However, in almost all countries the tribunal owes several non-derogable duties. These will normally be:
 - to act fairly and impartially between the parties, and to allow each party a reasonable opportunity to put their case and to deal with the case of their opponent (complying with the rules of “natural justice”)

- to adopt procedures suitable to the circumstances of the particular case, so as to provide a fair means for resolution of the dispute.
- **Procedure:** Matters of procedure are normally determined either by the law of the seat of the arbitration, or by the tribunal itself under its own inherent jurisdiction (depending on national law). Procedural matters normally include:
 - (i) mode of submitting (and challenging) evidence
 - (ii) time and place of the hearing
 - (iii) language and translations
 - (iv) disclosure of documents and other evidence
 - (v) use of pleadings and/or interrogatories
 - (vi) use of legal advisors
 - (vii) the appointment of experts and assessors

B) Conciliation Process

Conciliation is also an Alternative Dispute Resolution process. The process of Conciliation has become more streamlined due to the passing of the Arbitration and Conciliation Act 1996. Conciliation is a process by which discussion between parties is kept going through the participation of a Conciliator. In conciliation the decision would be taken by the parties with the assistance of conciliator.

Conciliation procedure: Conciliation being a voluntary process, the law has taken ample care to provide voluntariness. The involvement of the parties is taken care of in each and every stage of the conciliation. Along with this, law also has taken care to avoid unnecessary delay tactics which parties may employ during the conciliation process.

- **Appointment:** The parties have prerogative to seek appointment of the Conciliator. The appointment can be done in consultation with both parties. In case of lack of consensus, the parties can appoint their own conciliator. Even though law provides for appointment of two conciliators, the spirit of the process of conciliation and the role of conciliator makes it necessary to conduct conciliation with only one conciliator.
- **Submission of statements:** Once the appointment of conciliator is done, he will request the parties to provide brief written information of the dispute. This information helps him to understand the general nature of the dispute as well as the points at issue. This general information may be later asked to be supported by documents and other evidences. These additional information and evidences can be used to convince the conciliating party to reach a settlement.

Role of the Conciliator: He should be independent and impartial. His role is to act as a catalyst and bring in speedy and amicable settlement among the parties. The role of the conciliator is guided by the major principles of objectivity, fairness and justice. While acting as conciliator he should give due regard to

the rights and obligations of the parties, usages of the trade and circumstances surrounding the dispute. To bring in speedy settlement, the conciliator may make a proposal of settlement. Such proposals will be kept for further discussion. Conciliation officer is required to maintain confidentiality. Any information disclosed to him cannot be used against the disclosing party in any proceeding before any authority. This provision helps parties to act freely and fairly in conciliation.

Settlement Agreement: The settlement agreement is arrived at by the parties with the assistance of the conciliator. Basically, it is a document of consent between parties wherein the conciliator has acted only as a facilitator. To achieve the speedy settlement the conciliator may opt for a short cut during conciliation proceedings. Where the conciliator finds elements of settlement, he will immediately announce the probable settlement agreement and it will be communicated to both parties.

The proposal of settlement agreement is not binding on the parties, but acts as mere persuasion and more importantly provides guidance for the further proceedings. This proposal has to be studied by both parties who will then pass their observation on the proposed settlement agreement. The observation of the parties provides invaluable insight into the minds of the disputing parties. With this invaluable information, the conciliator may make new proposed settlement agreement and achieve final settlement agreement between the parties. Once such agreement is achieved, it will be properly drafted by the conciliator and will be properly signed by both parties and the conciliator involved in the conciliation.

4(A)2.3.4 Adjudication

The word ‘adjudicate’ is derived from the Latin word ‘*adjudicare*’ which means ‘to hear or try and determine’, as a court; to settle by judicial decree; to adjudge (as), “the court ‘adjudicated’ upon the case. “Adjudication is the process of trying and determining a case judicially; the application of law to the facts and an authoritative declaration of the result. Adjudication differs from arbitration in several respects. While the former is the determination of matters in dispute by the decision of a competent court, the latter refers to the determination of such matters by the decision of an arbitrator or a team of arbitrators, whose decision may not be binding until confirmed by a higher Court or assented to by the parties.

Likewise, the court derives its power and authority from legislation and is peremptory and compulsory in nature, whereas an arbitrator derives his power and authority from the voluntary agreement or, say, the free will and consent of the parties to the dispute. Though the two terms are essentially different, in some countries they are used interchangeably. However, in India, the two are treated as distinct and separate processes.

Adjudication involves an independent third party, known as the adjudicator. He considers the submissions and disputes of both sides and arrives at a final outcome, that is a decision. The adjudicator has expertise in relation to the subject matter of the dispute. Adjudicators’ decisions are usually of a temporarily binding nature, i.e. they are binding on the parties unless and until challenged and

repealed in subsequent litigation through court or via the process of arbitration. There are very few such instances of cases where the matter is subsequently taken up for litigation or arbitration post-adjudication, in practicality.

Check Your Progress

- Notes:** a) Write the answer in the space given below the question.
b) Check your answer with the one given under “Answers to ‘Check Your Progress’ Questions” of this Unit.

4. What are the modes of negotiation?

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5. Discuss the types of arbitration.

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6. Explain the concept of adjudication.

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4(A)2.3.5 Comparison of Certain Aspects of Negotiation, Mediation, Arbitration, Conciliation and Adjudication

Here it appropriate for us to have a holistic, brief comparison of certain aspects of negotiation, mediation, arbitration, conciliation and adjudication, which will provide you comprehensive understanding of the ADR mechanisms that we have discussed above.

<i>Aspect</i>	Negotiation	Mediation	Arbitration	Conciliation	Adjudication
<i>Authority</i>	The parties begin their talk without interference of any third person	Mediator acting as facilitator	Arbitrator acting as adjudicator	Conciliator acting as evaluator	Adjudicator acting as independent third-party facilitator

<i>Outcome of proceeding</i>	Non-binding process	Not legally binding	Legally binding	Not legally binding	Legally binding until if the matter is submitted to arbitration, conciliation or judicial proceeding
<i>Confidentiality</i>	Based on trust	Based on mutual trust and commitment	As determined by law	As determined by law	Based on mutual trust and commitment
<i>Nature of proceeding</i>	Informal	Informal	Formal	Semi-formal	Semi-formal
<i>Basis of decision</i>	Parties will reach to compromise agreement with the mutual understanding	Depends on mutual understanding of parties	Evidence, submissions of parties to a dispute, witness, and law	Submission of parties	Terms of contract, evidence, and law
<i>Powers of the authority</i>	No power as such	No powers as such	As per law	As per law	As per the contract and law if applicable
<i>Agreement</i>	Not required	Not required	Prior Agreement required	Not required	Mention in the contract

4(A)2.3.6 Restorative Justice

As we all know that there are various alternatives of imprisonment and Restorative Justice (RJ) is one of it. In other words, it can be said that, RJ is a type of alternative method of justice in which the society addresses an offence and seeks reparation and it is a kind of new outline for the Criminal Justice System which is speedily gaining acceptance and support in international level. It is basically, a response to crime that focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused, and building peace within society. As per RJ, an offence as a harm to a person and the community and seeks to solve the problem and repair or restore the harm.

In the traditional justice systems, an offence is treated as a violation of the system and then the traditional system focuses on establishing blame or guilt, and then imposing punishment, but RJ gives an opportunity or a chance for victims to have a voice and for offenders to achieve realisation about what they have done, to feel true regret, and work towards reparation. In RJ, victim and offender play an active role, by expressing their feelings or approach and helping to decide the outcome. Hence, RJ is a kind of doorway to forgiveness of offenders by victims and a chance for re-integration of offenders and victims back into the society. Restorative Justice is a kind of problem-solving approach to crime which involves the parties themselves and the community generally, in an active relationship with statutory agencies. It is not any particular practice, but a set of principles which may orientate the general practice of any agency or group in relation to crime.

The principles of Restorative Justice are:

- making room for the personal involvement of those mainly concerned (particularly the offender and the victim, but also their families and communities)
- seeing crime problems in their social context
- a forward-looking (or preventative) problem-solving orientation
- Flexibility of practice (creativity).

Restorative Justice can be seen as criminal justice embedded in its social perspective, with the stress on its relationship to the other components, rather than a closed system in isolation.

As per the view of Burt Galaway and Joe Hudson (1990), the definition of restorative justice includes the following fundamental elements:

- Crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities, and the offenders themselves;
- The aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute;
- The criminal justice process should facilitate active participation by the victims, offenders, and their communities in order to find solutions to the conflict.”

But Howard Zehr (1990) viewed through a restorative justice lens as, “crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.” Joy Wundersitz and Sue Hetzel (1996), having the opinion that the restorative justice “holds that criminal behaviour is primarily a violation of one individual by another.

4(A)2.3.6.1 History of Restorative Justice

While Albert Eglash (1977) is generally credited with coining the term “restorative justice” in his article “Beyond Restitution: Creative Restitution,” the idea of justice to which he referred was not new. Restorative justice is not a “new wave” movement on the fringe of legal practice. Such conceptions of justice have been more or less prominent through most of history. The notion of restorative justice, in some form or the other, appears to have been with human societies since long. Clearly, restorative justice theory owes much to recent movements aimed at addressing the failures of the existing justice system and developing new ways of “doing justice.”

Van Ness, D.W., and Strong, K. (1997) identify five such movements:

- The informal justice movement emphasized informal procedures with a view to increasing access to and participation in the legal process. They focused on de-legalisation in an effort to minimise the stigmatisation and coercion resulting from existing practices.

- Restitution as a response to crime was rediscovered in the 1960's. The movement focused on the needs of victims, maintaining that meeting the needs of victims would serve the interests of society more generally.
- The victim's rights movement works to have the right of victims to participate in the legal process recognised.
- Reconciliation/conferencing movement – It has two major strands in this movement:
 - (i) Victim/offender mediation: Originating from efforts of the Mennonite Central Committee, this process brings victim and offender together with a mediator to discuss crime in order to form a plan to address the situation.
 - (ii) Family group conferencing movement in New Zealand arising out of the Maori traditions in New Zealand.
- The social justice movement – This label refers generally to a number of different groups working for a vision of justice as concerned inherently with social well-being.

4(A)2.3.6.2 Objectives of Restorative Justice

The prime objectives of restorative justice are:

- To concentrate fully to victims' needs or requirements i.e. material, financial, emotional and social (including those personally close to the victim who may be similarly affected);
- To prevent re-offending by reintegrating offenders into the society;
- To enable offenders to assume active responsibility for their actions;
- To recreate or restore a working community that supports the rehabilitation of offenders and victims and is active in preventing crime; and
- To provide a means of avoiding escalation of legal justice and the associated costs and delays.

4(A)2.3.6.3 Assumptions of Restorative Justice

Restorative justice is based on the following assumptions:

- That crime has its origins in social conditions and relationships in the society;
- That crime-prevention is based on societies taking some responsibility (along with local and central governments' responsibility for general social policy) for remedying those conditions that cause crime;
- That the aftermath of crime cannot be fully resolved for the parties themselves without facilitating their personal involvement;
- That justice measures must be flexible enough to respond to the particular exigencies, personal needs and potential for action in each case;
- That partnership and common objectives among justice agencies, and

between them and the community, are essential to optimal effectiveness and efficiency;

- That justice consists of a balanced approach in which a single objective is not allowed to dominate the others.

4(A)2.3.6.4 Applications of Restorative Justice

Restorative justice helped in various types of situation or crime occurred in the society. In criminal cases, victims have got a chance to completely express the impact of the crime upon their lives, to receive answers to any lingering questions about the incident, and to participate in holding the offender accountable for his or her actions. Offenders have also got a chance to convey their story that why the crime occurred and how it has affected their lives. They are given an opportunity to make things right with the victim to the degree possible through some form of compensation.

And also, in criminal cases, types of compensation include, but are not limited to money, community service in general, community service specific to the deed, self-education to prevent recidivism, and expression of remorse. In social justice cases, foster children are given the opportunity to describe what they hope for their futures and make concrete plans for transitioning out of state custody in a group process with their supporters.

Restorative justice sometimes happens in the context of a courtroom, and sometimes within a community or non-profit organisation. In the courtroom, the process might look like this for petty or first-time offenses; a case may be referred to restorative justice as a pre-trial diversion, with charges being dismissed after fulfillment of the restitution agreement. In more serious cases, restorative justice may be part of a sentence that includes prison time or other punishments.

4(A)2.3.6.5 Major Issues in Development of Restorative Justice

In this sub-section we attempt to highlight important issues related to development of restorative justice. Major issue in the development of restorative justice may be discussed as under:

(i) Defendants' Rights: Legal procedures and measures provide a great many protections and safeguards to defendants, both against wrongful conviction and disproportionate punishment. If these are removed, for instance by diversion from prosecution to a family group conference (even when this is dependent on the defendant's voluntary agreement), there is the possibility that innocent defendants may plead guilty to avoid a prosecution and that any accused person may be led to accept an excessive burden of punishment. The probability of either of these occurring in practice is low, but the possibility that they might do so in particular circumstances demands certain safeguards. The latter may lie in good practice guidelines (internal regulation) or in legal advice and judicial oversight (external regulation). An example of internal regulation would be the provision that mediators or facilitators should be neutral as regards the case in hand, that they should be properly accredited, and that they should be concerned with protecting against the dominance of any one party in negotiation.

No matter how well established such practice may be, however, there is still a need to ensure that it is always observed and to demonstrate that it is being observed. Provision of opportunity for taking legal advice may help defendants take sensible decisions on participation and on the final outcome, but they cannot ensure that they do. Ultimately there is no alternative to some form of judicial oversight, although this would be excessively costly in every case. Processes of appeal or complaint should therefore be established for any party who feels they have been unfairly treated. Moreover, agreements for all cases above a certain level of offence–seriousness should be automatically reviewed by a court. Community-based processes should never have access to the use of force or extreme sanctions – such as incarceration or physical punishment.

(ii) Victim’s Rights: Victims have a right to justice, and a right not to be further damaged by the processes of dealing with the offence. Their right to justice includes the expectation that offenders will be appropriately dealt with and the wrongness of Restorative Justice of their actions condemned. Participation in mediation may help victims to achieve this even more surely than if the case is left to normal justice processes, and it may also serve their other interests, of which a court takes no cognisance. Nevertheless, there is also the possibility of this not happening, and they may feel aggrieved at the outcome. The significant safeguards are the same as those above with regard to defendants’ rights, i.e. good practice, complaints procedures, and judicial oversight of the more serious cases. With regard to secondary victimisation, participation by the victim in any process (other than when required as a court witness) should always be voluntary; i.e. victims should themselves be allowed to determine whether or not the potential benefits of any course of action outweigh the likely costs.

To do so they need to be provided with full, unbiased information on the possible benefits and disadvantages, a chance to ask questions, and time to decide. Again, these amount to good practice among mediation services. Victims should also be provided with options for action that allows them scope to adjust their degree of involvement to the possible benefits to themselves – e.g. indirect mediation (without meeting the offender), a meeting with the offender, or participation in a group conference with members of the offender’s family. Victims should not be faced with unfair choices such as ‘a conference or nothing’. Similarly, the timing of mediation should be appropriate to the victim’s progress in emotional readjustment, not determined by the convenience of justice agencies or offenders’ interests.

(iii) Voluntariness: The principle of voluntariness has already been seen to be important with regard to parties’ rights, but it has a deeper importance to Restorative Justice. If processes are to be restorative for either party, any direct participation must be willing and free, with respect accorded to each, so that they feel committed to an outcome that they feel they have had a full part in determining, and so that they feel the process has been fair and considerate. Research on parties’ attitudes after mediation reveals that victims more often perceive mediation as fair than they do the court process.

This is almost certain because they have been given a chance to have their say and to have their personal needs considered. If victims are to feel that the process is fair, voluntary participation is essential. Offenders, too, must participate willingly if they are to be positively influenced by the process, although there

remains the question how voluntary their voluntary participation needs to be. Given that a personal encounter with the victim is something few miscreants will be positively enthused about, and some persuasion to take that route is not unreasonable, nor harmful, as long as involvement is ultimately willing and active. The offender, because of his/her actions, has an obligation towards the victim, and it is reasonable to expect some attempt to take responsibility and offer reparation. For the sake of the victim, persistently antagonistic offenders should not take part in direct mediation; it would in any case cause more harm than good for both parties.

(iv) The Balance between Victim and Offender: Previously, it has indicated that the parties in victim-offender mediation (unlike most other forms of mediation) are not to be considered balanced or equal. With admission of an offence, the offender has assumed the obligation to make good. This even applies where the offence has arisen out of a dispute with the victim, in which the victim may have been equally to blame or even more at fault. Any underlying dispute can only be dealt with when the current offence has been atoned for, when the bargaining table is once again level.

(v) Prioritisation: In the early days of the development of Restorative Justice Programmes, before caseloads built up to current levels, there was little need to prioritise. It is now evident, however, that it would not be possible to offer full mediation services to all those who might opt for it (60% of victims would choose to meet their offender on the basis of current experience, and this ratio could rise if services became more prevalent and accepted). The problem of how to prioritise is one that is not currently resolved, but it will have to be confronted more and more as services expand. (One of the most recently established projects, the VOCS programme in Inner London, has explicitly set down selection criteria at the outset in order to economise resources and ensure they go where most needed – and the Leeds Restorative Justice Victim-Offender Unit also has a written policy.)

As mentioned earlier, it is difficult to justify presenting some victims with the opportunity and others not merely on the basis of the characteristics of their offenders. While great consideration will yet need to be given to this problem, it may be that a great deal of informal victim consultation and negotiation work will need to be carried out by main grade officers of the various agencies, leaving referral of those cases which demand more time, effort or skill than can be provided in that way, to more formal, professionally-run services. It is already true, for example, that police officers spend some time mediating in disputes and probation officers are able to arrange reparation informally for some of their charges. This effort does, however, need to be backed up by appropriate training for the various professional groups, both as grounding in simple negotiation techniques, including issues surrounding contact with victims, and an understanding of when more substantial intervention needs to be offered.

(vi) Applicability: The issue of prioritisation raises the other issue of those cases where restorative approaches are most appropriate. There has been a tendency for people to see them as less appropriate for serious offences, those committed by older people or by offenders with a record of crime. There is little basis for these views, however. Mediation services, for instance, have been as

successful with adults as with juveniles, and generally with recidivists as with first-time offenders. There is usually more at stake, and therefore more to gain, in relation to serious crimes, and victim referrals usually involve more serious offences.

Mediation is just as likely to prove successful in serious cases as in minor ones (although a higher proportion of victims may be unable or unwilling to take part). As stated above, any limitation according to the type of offence or offender could be against the interests of victims. Limitation to minor crimes also reduces the cost-effectiveness of restorative measures. New services may sensibly concentrate at first on less serious cases as they acquire experience, but there are strong reasons for removing restrictions as skills and resources permit. The success of restorative measures is dependent on more personal considerations, such as parties' attitudes, feelings, motivations and social situations, than on formal characteristics like age or legal offence.

(vii) Stage of Application: There has been no noticeable difference in the relevance of mediation at the various stages of the criminal justice process.

(viii) Delays: Delays due to administrative procedures and workloads, however, should be differentiated from delays occasioned by productive work, which may serve victims and reduce the likelihood of further crime.

(ix) Punishment: There has been an impression in some quarters that restorative measures are soft. This may be associated with their being more concerned with personal issues than with social judgments, allowing offenders more of a voice, and being orientated more towards prevention than sanctions in their own right. Some programmes have also been associated with diversion from prosecution or incarceration, and this may also have given the process as a whole a flavour of leniency.

(x) Mediation and Reparation: There is a strong relationship between victim-offender mediation and reparation, but they are different entities. Mediation is a process that enables various ends to be fulfilled, according to the needs of the parties involved (including the society generally). While material reparation to the victim would normally be one of the outcomes of this process, there are some victims who wish to forgo this, happy with an apology and explanation, and perhaps agreements for the offender to carry out some community service or address the causes of their behaviour.

(xi) Justice and Fairness: Another major concern about restorative measures is that they remove some decisions to the realm of private negotiation and may therefore prevent equal treatment of all offenders, or justice in the legal sense. On the other hand, the general public often sees apologies and reparation as an essential element of complete justice, and mediation programmes are more often seen as fair by victims taking part than is the court process. Strict legal justice, removed from public participation, may be seen as partial and insufficient, leading to demands for greater severity as the only way in which victims and the general public are currently able to have a voice.

(xii) Confidentiality: What passes during mediation sessions is normally completely confidential, unless the parties agree otherwise. This limits the information that can be passed to justice agencies to the fact that mediation

has (or has not) taken place, and the outcome (a copy of the agreement). The exception to this would be information about the possibility of a future serious crime. Agencies (e.g. courts) might prefer to have fuller information than this – for instance the offender’s attitude and willingness during the process – but such information might be subjective and unreliable, and the condition of confidentiality is essential for the free sharing of views required for effective mediation.

4(A)2.3.6.6 Benefits of Restorative Justice

Restorative justice improves upon traditional criminal justice approaches by providing the following benefits:

- It views criminal acts comprehensively, rather than defining crime only as lawbreaking, it recognises that offenders harm victims, communities and even themselves.
- It involves more parties, rather than giving key roles only to government and the offender, it includes victims and communities as well.
- It measures success differently, rather than measuring how much punishment has been inflicted, it measures how much harm has been repaired or prevented.
- It recognises the importance of community involvement and initiative in responding to and reducing crime, rather than leaving the problem of crime to the government alone.
- Involvement by Criminal Justice Professionals in restorative justice will effectively change the present climate.

Check Your Progress

- Notes:**
- a) Write the answer in the space given below the question.
 - b) Check your answer with the one given under “Answers to ‘Check Your Progress’ Questions” of this Unit.

7. What do you mean by restorative justice?

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8. What is the major development in restorative justice?

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4(A)2.4 LET US SUM UP

ADR refers to a variety of streamlined resolution techniques designed to resolve issues in controversy more efficiently when the normal negotiation process fails. It is an alternative to the formal legal system. It is an alternative to litigation. In present times, early and speedy resolution of a dispute not only saves valuable time and money of the parties to the dispute but also promotes the environment for resolving the dispute amicably. The traditional mode of dispute resolution i.e. litigation is a lengthy process which leads to unnecessary delays in dispensation of justice as well as over-burdening the judiciary. In such a circumstance, ADR mechanisms like negotiation, mediation, arbitration and conciliation, adjudication and restorative justice etc. offer better and timely solution for resolution of a dispute. These ADR mechanisms are less adversarial and are capable of providing an amicable outcome in comparison to conventional methods of resolving disputes. As we are aware the courts are over burdened with cases. The said system emanates from dissatisfaction of many people with the way in which disputes are traditionally resolved resulting in criticism of the courts, the legal profession and sometimes lead to a sense of alienation from the whole legal system-thus, the need for alternative dispute resolution.

4(A)2.5 ANSWERS TO ‘CHECK YOUR PROGRESS’ QUESTIONS

1. The ADR denotes the process in which disputes are addressed and settled outside of the courtroom. Further, ADR refers to the ways in which disputes are resolved without litigation. These ways may involve negotiation, arbitration, or mediation, and adjudication etc. The processes of ADR are generally more expeditious and less pricey. As a matter of fact, ADR is used in disputes, which have the potential of leading to litigation. Such disputes may involve labour disputes, personal injury accusations, and divorce actions etc. Unlike traditional litigation, the procedures of ADR are generally collaborative, letting the parties realize each other's perspectives. ADR even lets the parties analyse and suggest creative solutions, which a typical courtroom does not permit to impose legally.
2. The scope of ADR in India encompasses a wide range of disputes, including civil, commercial, family, labour, intellectual property, and environmental disputes. ADR methods such as mediation, arbitration, negotiation, and conciliation are utilized for resolving conflicts efficiently and cost-effectively. Recent developments like Online Dispute Resolution and the establishment of *Gram Nyayalayas* further expand the scope of ADR in India.
3. The pros and cons of ADR are as follows.
 - *Pros of ADR:* Overall, the major benefit of all alternative dispute resolution methods is that they are often faster and less costly than litigation. Most of the options also protect the reputation and privacy of the parties involved. Of course, there are still clear pros and cons to each alternative dispute resolution method.

- *Cons of ADR*: The biggest disadvantage of ADR is that they may not always be fair. For example, there can be bias in the arbitration process as each party hires its own arbitrator. In negotiation, the party with the most leverage usually gets its way. There are alternative dispute resolution cases where one side wins in an unjust manner. Making sure that everything is fair lies in hiring impartial neutral parties that are competent.
4. The modes of negotiation include the following.
 - (i) Position-based or Hard Negotiation
 - (ii) Soft Negotiation:
 - (iii) Principled Negotiation
 - (iv) Relationship
 - (v) Communication
 - (vi) Alternatives
 - (vii) Commitment
 5. Types of arbitration are as under:
 - (i) Ad-hoc Arbitration:
 - (ii) Institutional Arbitration:
 - (iii) Statutory Arbitration:
 - (iv) Domestic Arbitration
 - (v) International Arbitration:
 - (vi) Mandatory/Statutory Arbitration
 - (vii) Voluntary Arbitration:
 - (viii) Foreign Arbitration:
 - (ix) Sector-wise Arbitration:
 6. Adjudication is the process of trying and determining a case judicially; the application of law to the facts and an authoritative declaration of the result. Adjudication differs from arbitration in several respects. Likewise, the court derives its power and authority from legislation and is peremptory and compulsory in nature, whereas an arbitrator derives his power and authority from the voluntary agreement or, say, the free will and consent of the parties to the dispute. Though the two terms are essentially different, in some countries they are used interchangeably. However, in India, the two are treated as distinct and separate processes. Adjudication involves an independent third party, known as the adjudicator. He considers the submissions and disputes of both sides and arrives at a final outcome, that is a decision. The adjudicator has expertise in relation to the subject matter of the dispute. Adjudicators' decisions are usually of a temporarily binding

nature, i.e. they are binding on the parties unless and until challenged and repealed in subsequent litigation through court or via the process of arbitration.

7. Restorative justice is a type of alternative method of justice in which the society addresses an offence and seeks reparation and it is a kind of new outline for the criminal justice system which is speedily gaining acceptance and support in international level. It is basically, a response to crime that focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused, and building peace within society. As per restorative justice, an offence as a harm to a person and the community and seeks to solve the problem and repair or restore the harm. In the traditional justice systems, an offence is treated as a violation of the system and then the traditional system focuses on establishing blame or guilt, and then imposing punishment, but restorative justice gives an opportunity or a chance for victims to have a voice and for offenders to achieve realisation about what they have done, to feel true regret, and work towards reparation.

In restorative justice, victim and offender play an active role, by expressing their feelings or approach and helping to decide the outcome. Hence, restorative justice is a kind of doorway to forgiveness of offenders by victims and a chance for re-integration of offenders and victims back into the society. Restorative justice is a kind of problem-solving approach to crime which involves the parties themselves and the community generally, in an active relationship with statutory agencies. It is not any particular practice, but a set of principles which may orientate the general practice of any agency or group in relation to crime.

8. Major issues related to development of restorative justice include the following.
 - i) Defendants' rights
 - ii) Victim's rights
 - iii) Voluntariness
 - iv) The balance between victim and offender
 - v) Prioritisation
 - vi) Applicability
 - vii) Stage of application
 - viii) Delays
 - ix) Punishment
 - x) Mediation and reparation
 - xi) Justice and fairness
 - xii) Confidentiality

4(A)2.6 REFERENCES AND SUGGESTED READINGS

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4(A)2.7 UNIT-END EXERCISES

In your own interest, you may prepare the answers to the following questions which may be useful as a part of your preparation for your term-end examinations.

1. What do you mean by Alternative Dispute Resolution?
2. What are the essential elements of an 'Arbitration Agreement'?
3. What are the advantages and disadvantages of ADR?
4. What type of disputes may be submitted to ADR?
5. What is Mediation?

6. How Negotiation differs from Mediation?
7. Discuss the process of Conciliation.
8. What are the benefits of restorative justice?

4(A)2.8 UNIT-END ACTIVITIES

If you like to further enhance your interest, you may attempt to perform the following activity.

1. ADR programs can increase access to justice for disadvantaged groups. How would you establish it?
2. ADR can increase satisfaction of disputants with outcomes. You can attempt to conduct a practical session on it.
3. Conduct a negotiation by adopting your skill.
4. How is practical session of mediation conducted?
5. If you are to appoint an arbitrator to resolve a dispute, what would be your practical approach for that?