ARBITRATION TO ACHIEVE SUSTAINABLEDEVELOPMENT GOAL OF 'ACCESS TO JUSTICE' IN INDIA: A CONSTITUTIONAL AND JURISPRUDENTIAL PERSPECTIVE

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I. INTRODUCTION

The Constitution of India, which holds preservation of human rights in high esteem, dearly embraces the idea of social justice. Amongst the chief components of the idea of social justice, the jurisprudence of access to justice holds extreme prestige. With the Constitution inspired by the tenets of a 'Welfare State', it is the primary duty of the State to ensure that its citizens have access to time-bound justice and due effectuation of their legal and fundamental rights. To achieve this, it is pertinent that the State provides for judicial as well as non-judicial forms of dispute resolution which can cater to the above-mentioned needs. The State must further ensure that social-evils like ignorance and poverty do not pose as impediments in the path of securing justice.

It cannot be doubted as one of the most effective means to achieve speedy justice is to embolden the Alternative Dispute Resolution (ADR)mechanism within the country as it will encourage reforms in the areas of expediting resolution process together with ensuring a strong in-country mechanism for out-of-court settlement of disputes.Even though, in today's time several new ADR mechanisms have developed, yet Arbitration, already a well-known traditional alternative to litigation, still retains its popularity for it has truly proven to be a sustainable andreliableformofdisputeresolution. It is known fact that administration of justicein India is plagued with delay and access to justice is rather a cumbersome process. This leaves the people wanting for a forum which can provide them with speedier and not-so-costly access to justice, andADR mechanism can prove to be a leading example for such requisites in view of the newly adopted sustainable development goals (SDGs).

II. ARBITRATION

India is one of the signatories to the New York Convention, which opens the door for the enforcement of international arbitral awards. In the context of the details provided in the introductory part of the paper, it can be simply put that arbitration as a process provides for an alternative method for dispute resolution which has proven to be affordable, cheaper, and quicker when compared to the ordinary methods or the formalprocess of litigation.The procedures adopted by the arbitrationare generally suited to the facts and circumstances of each case in furtherance to the aim to avoid futile expenses and unnecessary delays along with providing a fair means for settling the disputes at hand.

The essence of equity and contract, both acquires a position when deliberating upon the concept of arbitration. *Firstly*, the fact that Arbitration as a method of dispute resolution involves the contours of equity also does not come as a surprise, for its very invention was inspired by the idea to expressly capture full power in favour of equity. The philosophy of arbitration is centred around settling disputes peacefully than by force. It aims at securing maximum benefits and avoiding injuries. It calls for parties to have patience when wronged

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and provides the option of negotiations for solving dispute than by opting to use force. It is due to these philosophies that general preference for dispute resolution must shift from normal court motions to arbitration.[1]*Secondly*, the philosophy of contract is an offshoot to the philosophy of arbitration. It establishes a connection between the economic and philosophical theories of law. The economic contract theories give due weightage to efficiency and gives a fillip to individual autonomy and maximisation of social welfare.[2] The Natural Law theory via its descriptive sociological claims that search of knowledge is the devout pursuit of all humans along with ensuring justice to fellow men as they are devoted for ensuring their survival.[3]Arbitration clause is of unique significance and character in a contract in comparison to other constituent clauses. While the latter clauses determine the mutual obligations undertaken by the parties in all circumstances, the arbitration clause does not impose any obligations for either of the parties to each other. Rather the arbitration clause is a product of agreement between both the parties to settle in a tribunal (constituted by them) any dispute which shall emerge with respect to the obligations which are mutually agreed and reciprocated by the parties to one another.[4]

III. HISTORY & DEVELOPMENT

"*Cut the living child in two and give half to one and half to the other*".[5]

Interestingly, this statement may represent what was to be the first decision given by an arbitrator for resolving a dispute. The case was that King Solomon was approached by two women, each claiming the parentage of the boy. The King thus called for a sword and ordered the bifurcation of the child into two, with one half going to one woman and the other half going to the other woman.[6]What this case reflects is that the women sought to approach a third party whom they considered to be a wise, trusted, and independent entity, to resolve their dispute. Thus, they may have opted to appear before the wise and trusted King Solomon as their arbitrator instead of treading on the path of litigation. It is possible that at that point of time all disputes were solved in this manner only, but the striking fact that the women pursued justice by referring the matter to an arbitrator of their choice. This choice of preference of judge characterises this proceeding as an arbitral proceeding.[7]

However, this story has led to the birth of various myths about arbitration, such as arbitrationbeing a process wherein parties, instead of going to the courts, approach an arbitrator of their own choice, with whom they discuss the matter with and the arbitrator "splits the baby". Yet, these myths stand unsupported by the story of King Solomon's first arbitration.This is because, as the story further reveals, after giving the decision to cut the baby into two, the woman who was the real mother of the boy pleaded before the king to spare the boy even if he orders him to be given to the first woman. But the first women, supporting the king's decision, replied that neither of them should have the child and the child thus must be cut in two! Confronted by these new testimonies, King Solomon modified

[1]Jody S Kraus, *Philosophy of Contract Law*, The Oxford Handbook of Jurisprudence and Philosophy of Law, (Oxford University Press,2004).
[2]*Ibid.*
[3] Philip Selznick, *Sociology and Natural Law,* Natural Law Forum, Notre Dame Law School (1961).
[4] Abraham Mathew,"The Philosophy of Arbitration" 8(4)*International Journal of Business, Economics and Law* (2015).
[5]New King James Version, *The Bible* (1982).
[6]*Ibid.*
[7]Frank D. Emerson, "History of Arbitration Practice and Law"19 *Cleveland State Law Review* 155 (1970), *available at*:https://engagedscholarship.csuohio.edu/clevstlrev/vol19/issl/19.pdf(last visited on Aug. 05, 2019).

the order and refrained from splitting the boy in two.[8] This again raises the unsaturated question regarding the reality of arbitration. The following probabilities would have been considered by King Solomon for deciding the outcome: -

"1. Concur with the first woman's request to cut the baby into two halves so that neither gets to have him;

2. Deliver the boy to the first woman heeding the request of the other woman.

3. Deliver the baby to the second woman by dissenting to the requests of both the women

4. Deliver the baby to any other person not paying heed to the pleas of both the women."

Philosophically, these questions reveal that parties have no say in the elimination of possible outcomes. The parties may prefer their own possible solutions, but they are not binding on the arbitrator to follow what the parties present before him/her. In the above example of King Solomon's story, it is clearly discernible that it was the strategy of the mother to say that the baby does not belong to her to save the boy's life. The King thus could clearly decide that the best way to settle the dispute was to let the real mother have her child back. An important observation is also that arbitrators do possess the autonomy to reject certain possible outcomes as per their discretion.This is indeed what King Solomon did, for he discarded all the other probabilities and chose the third option to give the baby back to his mother. It is therefore widely believed that he had been bestowed by God, the wisdom to administer justice.[9]

One may infer from this case that Divine Wisdom or Divine Providence or Divine Reason is the real power ruling over the world. The nature of law is present in all concepts and ideas of the government of things by God, who is the Ruler of the Universe. It is of a type, proper for the creation of laws or the norms. Moreover, as the conceptions of things by Divine Reason is not subjected to time, it must be considered as eternal.[10]In terms of legal philosophy however, Natural Law is a requisite for the administration of justice by God. It is therefore undisputed that Natural Law is a major component of the arbitration jurisprudence. Therefore, the arbitrators are bound by the principles of natural law and rules of natural justice even though there is no application of precedents. One must not forget that these principles are basic constituents of the vast sea of legal philosophy.It is for this reason only that no person, who stands to gain or profit by the victory of one party over the other, should be chosen to be an arbitrator, for he has taken a bribe and consequently cannot be labelled as trustworthy. This also means that the conditions of war and controversy are antithetical to the laws of nature.[11]King Solomon's famous judgement[12] is therefore, observed as amongst the earliest examples of arbitral procedures, for one can clearly spot the principles of flexibility, speed andfairness associated with it backed by the wisdom and experience of King Solomon as themutually chosen arbitrator, whose deft application of the principles of equity and law guided the case to its final conclusion. All these principles are the hallmarks of arbitration.[13]

Arbitration as a mechanism can be simply explained as the method in which two parties approach a mutually appointed third party to resolve the emergent disputes between the parties. The decision of such a party is binding on both the parties.The roots of arbitration can be found to extend way deep into ancient history. In earlier days (i.e. even before history

[8]*Ibid*.
[9]*Ibid.*
[10] J.G. Dawson, *Aquinas: Selected Political Writings,* (Oxford Blackwell,1948).
[11]Abraham Mathew, *supra* note 4.
[12]*Ibid.*
[13]*Ibid.*

was recorded), with an organised legal and judicial system being non-existent, it was natural for humans to seek the assistance of the elders of the tribes to hand down a final and binding judgement to resolve the disputes between neighbours. The society continued to progress and after considerable time elapsed, there started to emerge new ideas such as those dealing with property and exclusive rights of men. These ideas emerged before the establishment of a system for distributive justice. This unsettled period saw the disputes being settled either by mutual agreement or by reference to an indifferent unbiased person, whose superior wisdom and sense of equity was trusted by them.[14]It is a well-established fact that possession of rights would become meaningless if they are not backed by supportive mechanisms for their effective justification. It is this philosophy which led to the idea of access to justice being labeled as 'the most basic human right'. Thus, the States not only had to provide their citizens with the formal right of having equal right to justice, but the states also had to back these claims with an affirmative action to provide their people with effective access to justice.

The year 1956 saw the emergence of three practical approaches in the U.S.A, U.K and other European countries, centering on the idea of access to justice.[15]The first wave of approach in this new movement dealt with the concept of legal aid. The second approach aimed to reform the provision of legal representations for 'diffused' interests, especially in the realms of consumer protection and environment protection.The third approach to access-to-justice dealt with it, yet, at the same time, went much beyond the earlier approaches and tried to articulately and comprehensively attack the barriers preventing easy access to justice. This last approach further encouraged the exploration of a wide and diverse variety of reforms which ranged from changes in the structure of the courts to the creation of new courts; utilizing lay persons and para-professionals both on the bar and bench; modifying the substantive law to avoid disputes and facilitate their effective resolution; and promoting the use of private informal mechanism for resolution of disputes.This approach, therefore, is undoubtedly unafraid to adopt radical and comprehensive innovations, which traverse much beyond the realm of legal representations.[16]

IV. ROLE OF ARBITRATION IN ACHIEVING SUSTAINABLE GOAL OF 'ACCESS TO JUSTICE'

Sustainable Development Goal 16 of the United Nations: Peace, Justice, and Strong Institutions[17]

The 2030 Agenda for Sustainable Development comprises of 17 interlinked goals were set up by United Nations general assembly in 2015. It provides a strong plan to achieve peace and a sustainable future for everyone. The goals serve as call to action by all the countries – be they developed and developing countries - and achieve collective ideals through global partnership.

The promotion of peaceful and inclusive societies is important for achieving the ideal of social justice within all societies. This requires that address the pertinent issues facing the

[14] Vincet Powell Smith, "Settlement of Disputes by Arbitration Under Shari'ah and Common Law"34 *Islamic Studies* (1995).
[15]Ved Kumari,Aman Hingorani, *et.al., Alternative Dispute Resolution*1 (Faculty of Law, University of Delhi 2018).
[16]*Ibid.*
[17] U.N. SDG Report 2018 highlights progress being made in many areas of the 2030 agendas, provides the blueprint for dignity, peace and prosperity for people and the planet, now and in the future; *available at:* http://www.sdgs.un.org/sdg16/eng.pdf (last visited on Aug. 05, 2019).

world today such as the threats of international homicide, violence against children, human trafficking, and sexual violence. This would ensure the provision of access to justice for all and for building effective, accountable institutions at all levels. The relevant provision of the SDGs in this regard is mentioned as below:

"***SDG 16:****Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.*"[18]

"***16.3 Promote*** *the rule of law at the national and international levels and ensure equal access to justice for all*

16.6 Develop *effective, accountable and transparent institutions at all levels*

16.7 Ensure *responsive, inclusive, participatory and representative decision-making at all levels*

16.8 Broaden *and strengthen the participation of developing countries in the institutions of global governance*

16.a Strengthen *relevant national institutions, including through internationalcooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime*

16.b Promote *and enforce non-discriminatory laws and policies for sustainable development.*"[19]

The 16th goal of SDG goals i.e., Peace, Justice and Strong Institutions, talks about conflict, insecurity, weak institutions and limited access to justice, that remains a huge threat to sustainable development. Therefore, SDG goals promote the creation of just, peaceful and inclusive societies for only they can ensure sustainable development, provide access to justice for all and build effective and accountable institutions at all levels.

Besides, section 89 of the Indian Code of Civil Procedure, 1908, provides fortheoptionof ADR mechanism. With the introduction of Indian Arbitration Act in 1940, the issues whichcould not be resolvedwithin the stipulated time frame by following the traditional courtprocedures, were redressed through arbitration.Sub-section 2 of section 89, of the Code of Civil Procedure, provides that "where a dispute has been referred for Arbitration or Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 would apply".The 129th Report of the Law CommissionofIndia[20]and the Justice Malimath Committee Report[21]advocated the need for amicable settlement of disputes between parties and also made it mandatory for the courts to refer the disputes for resolutionthrough alternate means other than litigation,once the issues were framed by the court.

Arbitration today has emerged as the most popular out of all other ADR mechanisms be it that of mediation, negotiation etc. Arbitration & Conciliation Act of 1996 is the most important Indian legislation dealing with Arbitration within the country. This act laid the foundation stone of the Arbitration Tribunals and bestowed on it, certain powers mentioned in its various provisions. This Act is inspired by the United Nations Commission on International Trade Law[22] (UNICITRAL), Chambers of Commerce (organized by either

[18]*Ibid.*

[19]*Ibid.*

[20]Law Commission of India, "129th Report on Arbitration" (1988),*available at*: https://lawcommissionofindia.nic.in/129report/1988.html (last visited on Aug. 08, 2019).

[21] Justice Malimath Committee Report(1989-90) underlined the need for alternative dispute resolution mechanism such as mediation, conciliation, arbitration, etc. as a viable alternative to the conventional court litigation. See https://www.mha.gov.in/sites/defult/files/criminal-justice-system.pdf(last visited on Aug. 08, 2019).

[22]United Nations Commission on International Trade Law UN Doc A/31/98, 31st Session Supp. No 17.

region or trade), the Indian Council of Arbitration (ICA), the Federation of Indian Chamber of Commerce and Industry (FICCI), and the International Centre for Alternate Dispute Resolution (ICADR) are some of the major forums of arbitration in India.

The commitment to neutrality and mutuality are the biggest advantages derived through the recourse to arbitration for resolving disputes. This is achieved by the various choices provided to the contending parties with respect to- place of arbitration, language to be employed, rules/procedure to be followed,legal representation, nationality of the procedure (in case of international commercial arbitration), appointment of arbitrators, element of confidentiality. Moreover, with the development of intellectual property rights and the patent regime, fast track arbitration is needed for the resolution of various disputes such as: copyrights, patents, and trademarks infringement; destruction of evidence; violation of patent and trademark laws; construction disputes in time-bound projects, licensing contracts; and others.[23]

Judiciary in India, has unquestionably failed to dispense justice expeditiously. In-fact the challenge to deliver speedier justice has been an insurmountable one so far for the Indian judiciary. Surprisingly, this is not a first-hand challenge but rather this challenge is as ancient as laws themselves and today has accelerated to such an extent that failure to solve it would soon lead to a catastrophic collapse of the entire edifice of the judicial system. This problem is further compounded by the astoundingly low population to judge ratio as compared to the developed countries.

The absence in any Act or Code of a fixed deadline for termination of cases has been one of the banes plaguing the Indian Justice System. This means that sometimes years are spent in solving cases. Arbitration thus can act as a major succor in relieving the justice system of its present burdens. The case in favour of arbitration is also made due to the complex laws along with cumbersome court procedures. The district court are further afflicted with poor infrastructure and lack of proper computerized records which further displays the diabolic state of our justice system. Arbitration with its easy to understand, informal and hassle- free procedures presents itself as an attractive forum for the parties to refer their dispute to it. Thus, the Indian Judiciary needs to identify, realize, and rectify its inefficiencies. All these truly justify the adoption of arbitration and implementation by the Indian Judicial system as a means to resolve disputes.

Arbitration law with the application of neutral transnational rules helps in ensuring equal access to justice for all at the national and international levels. The ease of dispute settlement and acceptance of arbitration will definitely lead to the development of effective, accountable and transparent arbitral institutions with uniform rules and simple procedures. The aim to reach a win-win situation without compromising on inclusivity, participation, responsiveness, and representative decision making attracts parties as they feel comfortable in dealing with their respective differences through arbitration rather than referring it to conventional litigation forums. Arbitration is not only beneficial to the disputants, but it also helps in developing a good governance within developing countries like India, since people start developing the habit of co-operation and working together, which is the foremost requirement for a country to develop. This in-turn helps in achieving the SDG 16.8 i.e.,broaden and strengthen the participation of developing countries in the institutions of

[23]*See generally,* WIPO Arbitration and Mediation Centre: Guide to WIPO Arbitration, *available at:* http://www.wipo.int/amc.html (last visited on Aug. 06, 2019).

global governance. Moreover, the non-discriminatory laws of arbitration help in achieving the constitutional goal of Welfare State thereby promoting and enforcing policies for sustainable development.

V. CONSTITUTIONAL PERSPECTIVE

The basic need of democracy is to secure the rule of law, which means governance not by people but by principles. It is the dynamic concept of supremacy of law.It imposes negative constraints on government action and also an affirmative duty of fairness. In the context of judiciary, rule of law means independent judiciary.The rule of law and principles of natural justice are inherently related to each other. It is protection from excesses of power by the authorities or who are in a commanding position. It means fairness, equity and equality, reasonableness.

The Rule of law and principles of natural justice do have constitutional basis and are well founded in Articles 14 and 21 of Constitution of India. These Articles incorporate substantial and procedural due process. For instance, Article 21 includes the element of fairness and brings it into action when any accused is deprived of personal liberty. In the same way, Article 14 also provides for natural justice by prohibiting discriminatory class legislation.The foundation of ADR lies in three basic principles of natural justice as such:

i. *Nemo judex in causa sua*(rule against bias)i.e.,no one should be made a judge in his own cause.[24]
ii. *Audi alterum partem* (hear the other side) i.e.,No one can be deprived of his/herabsolute right or be punished without having been given an opportunity to propose explanation. Each and every person has a right to have notice of the case, a right to present his/ her case, a right to provide evidence and a right to rebut adverse evidence. Evidence should not be taken on the back of other party.[25]
iii. *Reasoned decisions*(rule against dictation) i.e.,The Report of the enquiry to be shown to the other party, should be based on reasoned decisions.The order should speak for itself.[26]

The Constitution of India is based on the tenants of a welfare state. Thus, a primary responsibility of the State then is to remove all hinderances towards them securing access to justice. The enforcement of fundamental and legal rights, along with an efficient, effective, and time-bound deliverance of justice through judicial as well asextra-judicial forums of dispute resolution is a way forward approach for the state.The duty of the State is to ensure free legal aid to the indigent and vulnerable person, who cannot defend himself/herself in a court of law due to the lack of moneyor other social handicaps. Providing legal aid is implied under Article 39A and Article 21 of the Indian Constitution.It was initiated by Committee report made by Justice P.N. Bhagwati and Justice V.R. Krishna Iyer. CILAS (Committee for the implementation of Legal Aid Services) also came into existence within all the courts starting from Munsif courts to the Supreme Court of India. It became approachable for the poor and weaker sections of the population. This formed the basis of the states adopting Lok Adalat through the State Legal and Advice boards. These developments were inspired by the

[24]*See generally*, Amita Dhanda, MP Jain and SN Jain,*Principles of Administrative Law*(Lexis Nexis, India, 7th edn., 2017).
[25]*Ibid.*
[26]*Ibid.*

pristine philosophy that the law should help and supportthe poor and needy who have inadequate means to fight their causes.

The Indian Constitution[27] reflects these aspirations within the Preamble[28]of the Indian Constitution when it envisions about justice in all its forms i.e., social, economic, and political justice. The Preamble further secures to the people Social, Political, Economic, liberty to of this country. The expression Justice symbolises a plethora of judicial and non-judicial apparatus which are tasked with securing the ideals mentioned in the constitution namely those of Legal Aid Camps, Village Courts, Family Courts, Mediation Centres, Commercial arbitration, Consumer Protection Forums, Women Centres, etc. which are but various facets of effective Alternative Dispute Resolution system. The Constitution of India through its several provisions which aim to promote justice, seeks to create social harmony between the individual conduct and the general welfare of society. A just act is one where the conduct of an individual promotes general well-being of the entire community.

Pursuing Justice thus essentially means pursuing the attainment of common good as distinct from good of mere individuals. Legal justice is an important component of social justice as the society gets disturbed when legal justice is denied. A legal justice systemmaintains social harmony by resolving the potential dispute at its very inception. In India, which aims to keenly guard the socio-economic and cultural rights of its citizens, it is exceptionally important to ensure expeditious disposal of cases. It is common knowledge that the Courts alone cannot lift the burden of huge backlog of cases before it. However, this can be efficiently mitigated through the application of mechanisms of Alternative Dispute Resolution. Arbitration can play an effective role in this regard.Article 21[29]declares*that "no person shall be deprived of his life or his personal liberty except according to procedure established by law"*.The words, *'life and liberty'*have to be interpreted broadly thereby widening its ambit.In *Hussainara Khatoon* v. *Home Secretary, Bihar*[30], right to speedy trial was considered as anelement of the right to life and personal liberty. The reason of this liberty in simple terms is that Article 21 is meant to redress that mental distress and anxiety which a person undergoes when wading through the litigation process which, along with delay, may hinder the capacity and the ability of the accused to defend himself.

Further, Article 39A[31](Free Legal Aid) states - "*The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities"*.[32]The promotion of justice is a pertinent function of the state, the achievement of which is facilitated by the ADR mechanisms. Therefore, legislations like Arbitration and Conciliation Act 1996, Legal Services Authority Act1987 along with Section 89 of Code of Civil Procedure, 1908 have been passed to promote justice *via* ADR mechanisms.

The purpose under Article 51(d)[33], which states that *"The state shall endeavour to*

[27]The Constitution of India, 1950. It lays down the framework to achieve justice to the people of India.
[28]*Id.*, Preamble.
[29]*Id.*, art. 21.
[30] AIR 1979 SC 1360.
[31]Inserted by the Constitution (42nd Amendment) Act, 1976.
[32]*Ibid.*
[33]The Constitution of India, *supra* note 27.

encourage settlement of International disputes by Arbitration".[34]Itis to provide of international peace and security.The main intention behind the Arbitration Act is speedy dispute resolution between the parties with a win-win situation.Our Constitution is supreme and the main source of other laws. It promotes peaceful settlement by arbitration which is the real motive behind the Arbitration Act. Mutuality and neutrality as basic elements of Arbitration, should be taken into consideration while resolving any commercial dispute with other countries. This will help in bringing harmony and co-operation among the nations. Therefore, the constitutional law is to be read in harmony with arbitration law.

VI. JURISPRUDENTIAL PERSPECTIVE

One theory is not applicable in totality but some element of each is taken. The same goes with Arbitration and it never developed in isolation. It is a law which developed with the passage of time along with the progress of society in which people started negotiating amongst themselves and following their own procedures. The Bentham's[35] perspective of 'Utmost happiness to Utmost people' is a thing which can hardly be achieved. In other words, it is a thing next to impossible.But to meet the ends of justice in the present society, which is largely composed of diverse people, arbitration can help in achieving 'Utmost satisfaction to Utmost people', which is the contemporary notion of the Bentham's proposition.

Balancing of the interest among the people in society is the basic concept of social engineering, propounded by Roscoe Pound[36], which evidently emphasizes on balancing of the conflict of interests between Individual and society. This conflict needs to be harmonized at the earliest, so that, it does not lead to further dispute. Pound's theory is called as Functional theory because ofits emphasis upon the function of law. To achieve this goal, ADR can be implemented, and Arbitration needs to be encouraged to further restrict the parties from approaching the court to settle their disputes and parties are given a friendly environment to settle their difference with amicable solutions.Principles of Socio-economic justice, liberty, fraternity, etc., were existing much before the coming of the Constitution and controlling the Indian Society, which means the Indian Justice System did not derive its normality solely from the Constitution but follows its normativity hierarchy from the principles of Natural Justice, Rule of Equity, etc.

The Grundnorm, the normative concept given by Kelsen[37], in case of Arbitration is the Rule of Natural Justice.The norms which existed in the society automatically and naturally can be properly referred to as Grundnorm. A Grundnorm will continue to remain a Grundnorm as long as it has minimum efficacy upon the society i.e., it continues to govern the society and also there is basic minimum effect and following of that principle in society e.g., secularism, socialism, dignity of life. Therefore, arbitration in order to succeed shall not hamper the continuity of Grundnorm i.e., it must not be opposing to public policy.In India, essence of Constitution, upon which other provisions even of arbitration, are based on, cannot

[34]*Ibid.*

[35] Jeremy Bentham (1748-1832), English utilitarian philosopher and social reformer who gave theory of utilitarianism (doctrine of hedonism), founder of positivism and expounded principle of utility in his "Limits of Jurisprudence defined", published in 1945.

[36]Rosoce Pound (1870-1964), belonged to social school of thought, a prolific writer and propounded theory of social engineering, interest theory.

[37]Hans Kelsen(1881-1973), an American jurist, legal philosopher, teacher and writer on International Law, formulated "Pure theory of law", belonged to the school of legal positivism.

be violated. Whole legal system derivesits validity from essence of the Constitution so that the normative order is followed properly.

Arbitration is a voluntary process which can only be done with the consent of the parties. Unlike the Austin's[38] theory which included the issue of command to the society coupled with the element of fear called the psychologized. It is based on de-psychologized command in which the element of fear is missing, and individual feels a sense of self-imposed obligation to follow the code of conduct. This theory of de-psychologized command was seen in Kelsen's theory where it is not because of the command given by the sovereign and due to the fear created by that. The command here is a de-psychologized command that is without fear. Therefore, the arbitration referred under section 89 of the Code of Civil Procedure, 1908 imposes self-obligation upon the parties to bind by the arbitral award without the element of fear.

The existence of numerous normative communities in a diverse and multifaceted world makes the existence of a unique fundamental test of law and a unique source of law, near impossible. Both state and non-state actors have the responsibility of regulating important aspects of business and non-business endeavours. Arbitration Agreements for arbitration are an exemplary reservoir of inter-party normativity and is mainly a subject of the contract law. Constant arbitration practices supported by contributions from a diverse range of national and transnational sources have led to the emergence of procedural norms which clearly regulate the conduct of arbitration. These are followed by the members of the arbitration community who are guided by these norms in their behaviour and conduct. Arbitration institutions, associations and councils, departments of law firms specialising in arbitration, commercial organisations and chambers have proved to be major storehouses of these procedural norms which are followed by members of arbitration community and give their assent to be guided by them in their conduct and behaviour.

Normativity can be identified only when the arbitration community members give their assent to the transnational rules which shall guide their conduct.The incremental growth of harmonised arbitration practices and standards have led to the emergence of a common ground of settled assumptions with respect to the conduct of arbitration. Furthermore, certain aspects of arbitration are so well established that they have generated expectations of their compliance amongst the lawyers practicing arbitration. Norms in arbitration practice far from being an accidental development have rather originated from sound legal principles like that of fair process, requiring that contending parties are entitled to equal treatment, having the opportunity to present their respective case and that the arbitral process proceeds without unnecessary delays. Thus, the normative potency of the arbitration community is strengthened by the legal principle of fair process.

Critics however argue that the normativity of arbitration is lacking in its coercive powers in ensuring enforcement and execution of the outcomes of the international tribunals inclusive of procedural orders and awards. Moreover, it is further argued that the fear of being tarnished as 'recalcitrant parties' is the major motivating factor ensuring the compliance of parties with the arbitral awards. International corporations view international arbitration as the fundamental avenue for resolving disputes and their awards are perceived as authoritative pronouncements. These pronouncements are seen as norms, informally (without

[38]John Austin (1790-1859), belonged to the natural school of law, defined jurisprudence as the philosophy of positive law thereby stated law as commands of sovereign with the element of sanction.

domestic judicial intervention) regulating international trade groups. This has led to a marked shift of the spotlight, from 'enforceability' to 'compliance' and from 'coercion' to 'normative persuasion.'

The pluralistic world of today is witness to the mutual co-existence of state and non-state communities with overlapping jurisdictions. The arbitration's claims of autonomy thus reject enmity and isolation and promotes co-existence and co-operation with nation states.[39]According to the theory of analytical naturalism as proposed by the Hart[40], in a society the prime concern of an individual is that he has to peacefully survive in the society, and such survival is not possible unless a minimum content of morality and human reasoning is incorporated in the law. Hart did not suggest that law is morality rather the law is an independent instrument but within law, the elements of morality shall be incorporated. The idea of peaceful society with the element of morality can best be achieved by peaceful settlement through Arbitration which incorporates Principle of Natural Justice as the guiding principle.

Henry Maine[41] talks about the transformation of the society from the static stage to progressive stage. As the society progresses, the law evolves and as a result an individual evolves with the passage of time. Earlier in a static society, individual would have got rights and obligations on the basis of existing practices but in a progressive society, new mechanisms of developing law will take place, new methods of creation of law or development of law will take place. Law will now develop from the methods of equity, legal fiction and legislation. In Arbitration, by and large, codification of old practices and addition of new things have taken place for balancing the interests of an individual to serve the ends of justice which is evident by the various amendments taken place in the Arbitration Act from the very beginning of its incorporation in 1940 to the present Arbitration and Conciliation Act, 1996 along with the 2015 and 2018 amendments.

The concept of 'Organic theory' of Herbert Spencer[42] also fits well for the development of commercial arbitration. According to the theory, the society undergoes several internal processes, and these processes affect the legal system. There is a mutual link between the law and society. The growing idea of property amongst the individuals in the society leads to the conflict of their interests and there is always a possibility to arbitrate the matter and resolve it at the very first stage. This social jurisprudence has developed because the idea of State had gradually changed from being a law and order state to a Welfare State. In the past times, a lot many social revolutions had taken place and there had been always a quest to find out some new mechanisms to organize the society, among which Arbitration finds a noble place.

VII. CONCLUSION

[39]Stavros L. Brekoulakis, "International Arbitration Scholarship and The Concept of Arbitration Law"36 *Fordham International Law Journal* (2013).

[40]Herbert Lionel Adolphus Hart (1907-1992), conceives law as a social phenomenon, can only be understood and explained by reference to the actual social practices of a community.

[41]Henry Maine(1822-1888), British jurist, historiananthropologist, pioneered the study of comparative law, notably primitive law and anthropological jurisprudence.

[42]Herbert Spencer (1820-1903), sociologist and influencer of the structural functionalist perspective, one of the principle proponents of the evolutionary theory in the mid-nineteenth century, his synthetic philosophy, political thought primarily for the defense of natural rights was popular.

It is a well-established fact today that the justice system in India is over-burdened with a huge backlog of cases. This has hampered its ability to meet out justice expeditiously which is a worrisome sign for any country but more so for a vibrant democracy. What is more worrisome is that this problem is not new, but this problem is as old as our laws. The Constitution of India in its introductory preamble itself talks of high-sounding noble principles such as those of justice which includes social, economic, and political justice. But what use will these high-sounding phrases be of when the very access to justice is uneasy and the traditional process of achieving justice is abhorred by all for its inability to deliver speedy justice? As the adage goes- Justice delayed is Justice denied!Thus, there is an urgent need more than ever to strengthen the alternative dispute resolution (ADR) mechanisms in the country so as to deliver quality justice expeditiously out of court settlement. Adoption of such systems would not only be beneficial for the parties involved but it would also help in the better governance of the country.

One such ADR mechanism is that of arbitration. In simple terms arbitration refers to the dispute resolution method in which parties refer their dispute to a mutually appointed arbitrator who acts as a neutral judge in resolving the dispute between the parties by giving out an award which is binding on both parties. It is an informal mechanism as opposed to the formal litigation process and ensures cost efficient and easy access to justice. The concept of arbitration is not new to humans rather it has existed since ancient times. In earlier times people used to refer their disputes with neighbours to their tribal chiefs. In tracing the history of arbitration, King Solomon's famous 'Split the Baby' story is an oft quoted example for arbitration for it displays the principles which stand to be the hallmarks of arbitration. These include the mutual appointment of a wise third party who acts as a neutral party in resolving disputes in a swift, flexible, and fair manner. Moreover, it also showed that neither of the party has a say in hampering the discretion of the arbitrator in marking the probabilities of outcome based on which the arbitrator delivers the final award.

Arbitration is not only recognised with in the domestic realm but is also prevalent in the international arena. Today, all standard forms of contract be it national or international do contain an arbitration clause. This is so because arbitration is highly popular for its commitment to neutrality and mutuality. This is further supplemented by various other advantages of arbitration for ensuring a responsive, inclusive, participatory, and representative decision-making at all levels which leads to a win-win situation for both the parties and parties too feel comfortable in dealing with their differences, unlike they do in traditional judicial system. Moreover, the concept of arbitration is jurisprudentially sound for it satisfies Bentham's theory of 'Maximum Gains with Minimal Pain' and Pounds theory of 'Balancing of Interest'. Arbitration law with the application of neutral transnational rules helps in ensuring equal access to justice for all at the national and international levels, thereby complying with the 16thSDG (Peace, Justice and Strong Institutions) under the 'United Nations 2030 Agenda for Sustainable Development'.

An efficient dispute resolution mechanism maintains social harmony and makes the legal system one of the most prestigious organs of the state. Thus, swift disposal of cases is extremely important for India to safeguard the socio-economic and cultural rights of citizens. As the conventional courts are finding it difficult to achieve this, the application of Alternative Dispute Resolution mechanisms, especially arbitration have the requisite potential for its actualisation.One must also never forget that the legitimacy of the justice system of India is based on the trust of the people. However, access to speedy and cost-effective justice cannot be termed as mere expectations for having such access to justice is a

human right which all humans are entitled to by birth. If the people lose faith in the system, then not only will the system lose its legitimacy, but the entire country might plunge into chaos. Thus, speedy and cost-effective justice is a necessity and strengthening of the ADR mechanism is the undisputed need of the hour.