Research Monograph
On

Alternative Dispute Resolution in Bangladesh: Problems and Prospects

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Submitted To:

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LETTER OF SUBMISSION

January 5, 2023

To
Md Deedarul Islam
Bhuiyan, Assistant
professor & Head of
Department of law at
Sonargaon University

Subject: Submission of Research on, **"Alternative Dispute Resolution in Bangladesh: Problems and Prospects."**

Dear Sir,

I am a grateful to you for the submission of the Research on ‒Alternative Dispute Resolution in Bangladesh: Problems and Prospects‖ that has been prepared as an integral part of LL.M. requirement.

In this topic this is very important to find out the real prospect and problems of the Alternative Dispute Resolution. As a result; I got the opportunity to prepare research on the above topic. While preparing this research I read many journal, Article and research paper. It was a great learning experience for me.

I hope you would find this paper up to your expectation. I would be grateful to receive your suggestions and comments regarding this.

Thank You

Yours Sincerely,

(**Md Joshim Haque)**
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Student Declaration

Hereby I declared that the work presented in this research paper has been carried out by me and has not been previously submitted to any other institute. The work I have presented does not breach any copyright.

(**Md Joshim Haque)**

I'd : LLM 2201025019

Supervisor Certificate

This is to certify that the work presented in this dissertation is based on the work, carried out by the author herself under my supervision in Department of Law, Sonargaon University.

It is also certifying that the work presented here is original and suitable for submission as the style and contents, for fulfillment of LL.M. program.

(**Md Deedarul Islam Bhuiyan)**

Assistant professor & head of the department of law at Sonargaon University

Dedication

I hereby dedicated this research paper to my beloved father and mother whose relentless support and sacrifice helped me to come to this stage.

(Md Joshim Haque)
ID No: LLM2201025019

Acknowledgement

"In the name of Allah, the Beneficent, the Merciful."

First and foremost, I would like to thank the almighty for making enough courageous to prepare this research, no noble achievement can be achieve by an individual research depends on the contribution of number of people specially their thoughtful guidance and suggestions to complete this research.

I would like to give my heartiest gratitude our respected course teacher on ‗Legal Research and Writing' to my honorable teacher **Md Deedarul Islam Bhuiyan** who helped me about the Research.

At last I would like to thanks my friends for their help.

I am indeed thanks to everyone who inspired me to write this Research paper.

Thank You

(**Md Joshim Haque)**
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List of Abbreviations

AC	- Appeal Cases (Law Reports)
AD	- Appellate Division
ADR	- Alternative Dispute Resolution
ADRO	- Alternative Dispute Resolution Organization
AIR	- All Indian Reports
ALRC	- Australian Law Reform Commission
ART	- Article
BD	- Bangladesh
BLAST	- Bangladesh Legal Aid and Services Trust
BLD	- Bangladesh Legal Decision
Cal.	- Calcutta
CrPC	- Code of Criminal Procedure
DLR	- Dhaka Law Reports
HCD	- High Court Division
JATI	- Judicial Administrative Training Institute
NGO	- Non-Government Organization
PLD	- Pakistan Legal Decision
SC	- Supreme Court
UP	- Union Parisad

Abstract

These Alternative Dispute Resolution (ADR) modalities are considered as less likely to fuel the parental conflicts, more likely to induce the parties to resolve their conflicts in an amicable manner preserving the future relationship between the parties and reducing cost, delay and loss of energy to a significant extent. Following the considerable advantages of ADR almost every county of the world has introduced ADR system in its justice delivery system which has paved the way to the promotion of access to justice indiscriminately for all. This paper is an attempt to provide a comprehensive idea about obstacles in the way of access to justice in our legal system and by analyzing the different mechanisms of ADR and court and non-court based practices of those modalities under different legislations of Bangladesh, to show the fairness, efficiency and effectiveness of ADR towards the promotion of access to justice and to provide some recommendations for the complete success of ADR towards the effective, non-discriminative, speedy and easy access to justice for all either rich or poor, literate or illiterate, male or female and elite or lower class.

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CHAPTER-ONE

INTRODUCTION

1.1 Introductory:

The age old adage Justice delayed justice denied, has untold significance for meeting the ends of justice. Delayed justice is the means of inflicting injustice through process of law. Speedy disposal of case is an important condition of ends of justice. Prolonged delay makes the litigants enormously impatient. Hence the very objective of justice is vitiated. Justice, it has been stated, is a concept that has been mooted since the Sumerians, so far as recorder history is concerned. About 2050 B.C., Urnammu, king of Ur, set out a law code intended to insure justice in the land and promote the welfare of its citizens. Because these were pragmatic people not inclined to discourse on a high level abstraction, the laws contained themselves to protection of the weak against the economically string, the first against corruption, the ignorant against the knowledgeable, and to assuring punishment to perpetrators of physical harm. "It is what every law code since has sought to accomplish; and it implicitly contains an absolute concept of justice against which conduct can be measured."[1]

Our legal system bears testimony to the remnants of the British laws. Our adversarial system is mostly responsible for the delay in civil cases. Not only Bangladesh but also developed countries like USA, UK, Canada and Australia also suffer from this problem.[2]

Delay in Civil procedure is a policy concern in many jurisdictions. Little evidence is available on the causes of such delay. However we present aversion of spire's (1992) bargaining model of litigation and derive directly a functional form for the conditional probability of case settlement. We then estimate this and test predictions about the effects of legal costs and uncertainty over damages and liability on the conditional probability of settlement using data from negligence claims against several NHS trusts. Our results provide a direct test of the model and shed light on the causes of settlement delay in England.

[1] *'Earl Murphy, "The report of law commission India" on structure and jurisdiction of the higher judiciary" 1999.P(10-11)*

[2] *P.C.Rao. "Alternatives to litigation in India" Universal Law Publishing Co. Pvtm. Ltd2006.p.(24-32).*

1.2 Statement of the Problems:

In recent years in Bangladesh there has been renewed emphasis on the Alternative Dispute Resolution schemes as a means to avoid the use of contested hearings in the formal litigation and to ensure the most fundamental right of access to justice for all in an easy way. These Alternative Dispute Resolution (ADR) modalities are considered as less likely to fuel the parental conflicts, more likely to induce the parties to resolve their conflicts in an amicable manner preserving the future relationship between the parties and reducing cost, delay and loss of energy to a significant extent. Following the considerable advantages of ADR almost every county of the world has introduced ADR system in its justice delivery system which has paved the way to the promotion of access to justice indiscriminately for all. This paper is an attempt to provide a comprehensive idea about obstacles in the way of access to justice in our legal system and by analyzing the different mechanisms of ADR and court and non-court based practices of those modalities under different legislations of Bangladesh, to show the fairness, efficiency and effectiveness of ADR towards the promotion of access to justice and to provide some recommendations for the complete success of ADR towards the effective, non-discriminative, speedy and easy access to justice for all either rich or poor, literate or illiterate, male or female and elite or lower class.

1.3 Objective of the Study:

1. To reduce the unnecessary delay from civil and criminal litigation.
2. To suggest the recommendations which with necessary modifications in the light of the circumstances prevailing in our society, would best meet our judicial needs?
3. The factors responsible for delay in the disposal of cases.
4. The attitude of the litigant public and lawyers towards the disposal of cases.
5. The ways and means to ensure exercise of continuous check over the disposal of cases.
6. The measures, the useful adoption of which would remove duplication in court proceedings.
7. The enlargement of the jurisdiction of courts to try cases summarily and
8. The ways and means by which competent legal aid could be brought within the means of poor litigants.

1.4 Literature Review

The ADR represents one of the most challenging concepts of the law of Bangladesh. The ADR system is a concept which is capable of different interpretations by different people. In preparing the research I have collected the information from various journals, reports, magazine, books, and case reference and the newspapers as well. I always found the new problems regarding ADR system. If we want to give solution over any particular matter first of all we should find out the problems and the reasons for the creation of such problem, then it would be easier for us to solve the problems in the easiest manner. I have so much interest to prepare this research regarding ADR system.

1.5 Research Methodology:

There is no single or universal approach to legal research methodologies. The legal research may be of combination of methods for interpreting and applying legally relevant information. There are several approaches to research methodologies such as analytical, inter disciplinary, comparative and historical. For better understanding the thesis and good work of this research mainly I follow the analytical approach. This methodology is a train and significant investigation of the principles and fact of any subject. This method is a systematic enquire that provide information to guide legal research. It also and important to gain reliable and valid knowledge and to explore the relationship between theory and practices When I am going to prefer the research I have followed some strategies. I have taken reference from books, journal, and internet. I have visited more than place for the collection of instruments related with this research. But I have not found sufficient reference in City University library. Research reports and publications of various organizations working with the delay of civil procedure in Bangladesh, journals, reports, booklets, newsletters, photographs, and newspaper clippings have been reviewed. Existing information have also been extracted from various aspects to enable readers to understand this national issue relating to this topic from various perspectives. Several key informants have been interviewed to add additional perspective on the unnecessary delay. Some similar trials conducted throughout the world have been given as reference.

1.6 Scope and Limitations:

- The main constraint of the study is lacking information on these issues.
- Currently, ADR related cases are not available.
- I cannot directly interview the ADR related problem person or any public body.
- The major problem of the study was time limitation. For an analytical purpose adequate time is required. But I was not given adequate time to prepare such an in-depth study.
- Such a study was carried out by me for the first time. So inexperience is one of the main factors that constituted the limitation of the study.
- The most important limitation not permission for using Library in my University all time.
- Mainly I have to depend on internet.

1.7 Chapter Frame Work:

A research needs methodology which reveals how the researcher is going to achieve his/her objectives of the stipulated study states, as a systematic study, research methodology deals primarily with the approaches and techniques as how to undertake a research without being biased and prejudiced. It offers a bunch of tactical approaches and logical skills to observe, record, interpret and infer on matters under study.

Collected data have been validated through cross-checking with the responses of the various respondents**.** Primary data collected through questionnaire and interview have been compared with secondary data. Simple arithmetic calculation has been used to analyze data.

Data have been presented through computer generated graphs, charts and tables using Microsoft Office tools.

1.8 Conclusion:

The attempt to settle a legal dispute through active participation of a third party (mediator) who works to find points of agreement and make those in conflict agree on a fair result. Mediation differs from arbitration in which the third party (arbitrator) acts much like a judge but in an out-of-court less formal setting but does not actively participate in the discussion.

Mediation has become very common in trying to resolve domestic relations disputes (divorce, child custody, visitation), and is often ordered by the judge in such cases. Mediation also has become more frequent in contract and civil damage cases. There are professional mediators,

or lawyers who do some mediation for substantial fees, but the financial cost is less than fighting the matter out in court and may achieve early settlement and an end to anxiety. However, mediation does not always result in a settlement.[3]

[3]*Md. Abdul Halim, , "ADR in Bangladesh: Issue and Challenges", (CCB Foundation, Dhaka, Bangladesh. 2010*

CHAPTER-TWO

CONCEPT OF ADR

2.1 Introduction:

Alternative Dispute Resolution (ADR) is an alternative route for reaching a speedier and less-expensive mode of settlement of disputes. It includes mediation, settlement of disputes, arbitration and other ways that are voluntary and not compulsory.[4]Most countries of the world have adopted ADR mechanism and achieved tremendous success in reducing backlog and increasing access to justice for the poor. The concept of ADR was first inserted in Section, 10(3) and 13(1) of the Family Court Ordinance of 1985, wherein there is provision for compromise or reconciliation even before pronouncement of judgment. However, there was no implementation of these provisions until a special pilot project was taken on ―Mediation as a measure of ADR‖ in June, 2000, under the supervision of the then chief justice of Bangladesh. Under that project, three assistant judge‘s courts of Dhaka were specified as exclusive Family Courts for the purpose of mediation.[5]At that time, a circular was issued from the High Court Division of the Supreme Court providing credit of two trials for one successful mediation in a family dispute and the credit of one trial for two unsuccessful mediations. This circular inspired the Family Court judges to give more efforts to mediation in Family Court cases, achieving success in disputes resolution through ―Mediation‖ in the family courts.

2.2 Origin of ADR

ADR is nothing new. This informal quasi judiciary system is as old civilization. Different forms of ADR have been in existence for thousands of years. The firm Arbitration (a form of ADR) Act was passed in 1698 under William III. This was an Act for rendering the award of arbitrators more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others. In 1854, Common Law Procedure Art expressly empowered courts to remit an award for reconsideration by the arbitrators. It aim empowered courts to stay (stop) an action in court if the parties had agreed m take the dispute to arbitration. Effectively, the Arbitration Act 1440 gifted a number of modem steps to be taken to agree disputes between the parties: the parties appoint arbitrators court may also appoint arbitrators if the parties fail to do so; decide the disputes informally, make an award, or settle the dispute by mediation, compromise or any other mama; court pass a decree in tams of the award d found the decision was made properly, and Arbitration Tribunal shall be competent

[4]*Dr. Ansur All Khan, "An Introduction to Alternative Dispute Resolution, (Dhaka, Bangladesh., 2007)*
[5]*Sumaiya Khair, Legal Empowerment for the Poor and disadvantaged: Strategies, achievement and Challenges(2008)*

m appoint expert or legal advisor to submit report to at an specified question or assessor for assisting it on technical matters. Later in Arbitration Act 1950, there was a consolidation of the Arbitration Aces 1889 and 1934. It included the power of a court to stay actions where there was an applicable arbitration agreement. In addition the Arbitration An 1975 gave effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In 1976 Professor frank Sander said in his book Varieties of Dispute Processing‘, in future, not simply a courthouse but a dispute resolution center or a multi-door courthouse where disputants would be screened and channeled m a variety of dispute resolution processes such an mediation, arbitration, fact-finding malpractice screening panel, superior court, or an ombudsman.

In 1976 in Bangladesh, Gram Adalat law was passed under the auspices of Union Parishad to settle minor criminal and civil law suits. The law house bestowed an UP Chairman or Gram Adalat Chairman with power of a third claw magistrate. The court is comprised of 5 members including the Chairman, 2 General members and 2 members selected by the complainant and defender. The judgment of the court will be validated with unanimous support or by majority of 4:1. No one came, raise any question regarding the legality of the verdict.

The Arbitration Act 1979 dealt principally with regulating the courts‘ powers to review arbitration awards and to determine any question of law arising in the course of arbitration.

In 1980, the then Government of Bangladesh had passed a bill for introducing the office of an ombudsman to meet a constitutional binding; following the same last year, the Government has adopted a policy of introducing ombudsman sector-wise and has already set up a Tax Ombudsman.

In 1981, considering expenses and delays in disposal of cases through the legal system of India. a judgment was made by the Supreme Court of India in the case _Guru Nanak Foundation vs. We Rattan Singh & Sons, AIR 1481 SC 2075′ saying, Interminable, time-consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, leas formal, more effective and seedy for resolution of disputes avoiding procedural claptrap and this led them to

In 1982, Richard Abel summarizes the political ambiguity that imbues the history of ADR in The Politics of Informal Justice': Yet if the goals of informal justice arc contradictory, and if it is incapable of realizing them because of contradictions inherent in advanced capitalism, in formalism should not simplistically be repudiated as merely an evil to be resisted, or be dismissed as a marginal phenomenon that can safely be ignored. It is advocated by reformers

and embraced by disputants precisely because it expresses values that deservedly elicit broad allegiance: the preference for harmony over conflict, for mechanisms that offer equal access to the many rather than unequal privilege to the few, that operate quickly and cheaply, that permit all citizens to participate in decision making rather than limiting authority to –Professionals; that are familiar rather than esoteric, and that strive for and achieve substantive justice rather than frustrating it in the name of form.

In 1982, Former Chief Justice W. Burger of the United States Supreme Court asked, Is not there a Better Way? In the annual report on the stale of the judiciary to the American Bar Association. Chief Justice Burger‘s plea to the legal profession to consider their traditional role as healers of human conflict and utilize more fully the negotiation and arbitration processes followed on the heels of various initiatives in the United States examining alternatives to court adjudication[6].

2.3 What is ADR?

Alternative Dispute Resolution (ADR) is a collection of processes used for the purpose of resolving conflict or disputes informally and confidentially. ADR provides alternatives to traditional processes, such as grievances and complaints; however, it does not displace those traditional processes. The ADR Office is a resource available to all CDC and ATSDR employees. The ADR Office is a resource when you need advice about how to deal directly with a concern, you are uncertain about taking a problem through other established channels, are not sure who to talk with about a problem or concern, want an informal, no escalating approach, need a fresh, impartial perspective, want to discuss strategies or possible options for resolving a concern and if you want to maintain the greatest possible flexibility in how to approach a concern or simply need a sounding board[7].

According to Glossary Law Dictionary- –The term ‗ADR‘ describes, a number of methods used to resolve disputes out of court, including negotiation, concilia.ion, mediation and the many types of arbitration. The common denominator of all ADR methods is that they are faster, less formalistic, cheaper and often less adversarial than a court trial.‖

[6] *Md. Akhtaruuzzaman ,Concept and Laws on "Alternative Dispute Resolution and Legal Aid ",1st Edition, 2007, page38*

[7]*Md. Abdul Halim, , "ADR in Bangladesh: Issue and Challenges", (CCB Foundation, Dhaka, Bangladesh. 2010)*

2.4 Different types of ADR in Bangladesh:

SumaiyaKhair suggests that there are three streams of ADR in Bangladesh[8]:

- Extra- judicial or community based ADR (informal);
- ADR in Quasi-formal systems; and
- ADR in formal legal system.

All these ADR modes have been discussed in different chapters in this book with their merits and demerits.

Formal ADR in different laws are shown in the diagram below:

- Code of Civil Procedure (sec. 89A, 89B, 89C

- Muslim Family Laws Ordinance 1961 (sec. 7, 8)
- ArtharinAdalatAin, 2003 (sec. 21, 22)
- Negotiation,Conciliation, Arbitration (sec. 210 of the Labour Code, 2006)
  - Pre-Litigation
  - Part of litigation

2.5 Informal ADR in Bangladesh:

Informal ADR in Bangladesh includes traditional shalish and NGO modified Shalish. Quasi-formal ADR includes village court and Board of Conciliation have originated from the informal shalish system and this is why they all have been shown in the following single diagram.

2.6 Significance of ADR:

There are some potential significanceof ADR. Such as:

i. **Save Time:** A dispute often can be settled or decided much sooner with ADR; often in a matter of months, even weeks, while bringing a lawsuit to trial can take a year or more.

[8]*Sumaiya Khair, Legal Empowerment for the Poor and disadvantaged: Strategies, achievement and Challenges(2008)*

ii. **Save Money:** When cases are resolved earlier through ADR, the parties may save some of the money they would have spent on attorney fees, court costs, and experts‘ fees.‘

iii. **Increase 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.

iv. **Preserve 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.

v. **Increase 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 parties‘ overall satisfaction with both the dispute resolution process and the outcome.

Improve 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.

Because of these potential advantages, it is worth considering using ADR early in a lawsuit or even before you file a lawsuit,

2.7 Conclusion:

A. D. R. means Alternative Dispute Resolution, mostly applied to civil cases. When a civil case is instituted in a court of competent jurisdiction, the scenario usually is, that a long time is taken to serve the process, the defendants beat the law and submit their written statement/s after a long delay beyond the permissible statutory period of two months, lawyers and judges

do not take any interest in screening out a false and frivolous case at the first hearing of the case under Order X CPC (in fact no such first hearing takes place), they seldom try to shorten the disputed questions of fact and law by application of Orders XI and XII of the CPC and mostly ignore the elaborate procedure of discovery, interrogatories, notice to produce etc. contained in those Orders, the issues of a case are seldom framed following the Code of Civil Procedure, the case takes several years to reach a settlement date and on the date of positive hearing half a dozen or more ready cases are fixed for hearing, resulting in the hearing of none. In the meantime years roll by, presiding judge of a single case is transferred a number of times, witnesses of a single case may be heard by more than one presiding judge, arguments are listened to may be by another presiding judge and judgment may be delivered by a presiding judge who had had no connection with the case ever before. Our legal system has thus been rendered uncaring, non-accountable and formalistic. It delivers formal justice and it is oblivious of the sufferings and woos of litigants, of their waste of money, time and energy and of their engagement in unproductive activities, sometimes for decades. When they win a case the result is much worse than winning it[9]. When they lose a case they lose not only the subject matter of the dispute, but also a good part of their fortune. Execution proceedings then re-starts a fresh litigation between the parties or even their successors which may take years or decades to come to a conclusion and which may end up with no real or positive benefit to the decree-holder plaintiff. This is the experience of a common litigant in Bangladesh. Added to this inherent and in-built delay and expenses, corruption and often terrorism at almost each stage of litigation is eating into the vitals of the justice delivery system.

Early Neutral Evaluation‖ for the same reasons described therein.

[9]*Dr. Ansur All Khan, "An Introduction to Alternative Dispute Resolution, (Dhaka, Bangladesh, 2007)*

CHAPTER-THREE

DIFFERENT FORMS OF ADR

There are different forms of ADR in Bangladesh. The main forms are briefly stated below:

3.1 Arbitration:

Arbitration is an adjudicatory dispute resolute resolution process in which one or more arbitrators delivers judgment on the merits after an expedited, adversarial hearing, in which each party has the opportunity to present proofs and arguments. Arbitration is a private process by which the parties to a dispute submit their differences to the judgment of an impartial person or group appointed by mutual consent or statutory provision. Arbitration is procedurally less formal than court adjudication; procedural rules and substantive law may be set by the parties.

After the hearing, the arbitrator issues an award. Some awards simply announce the decision, and others give reasons. The arbitration process may be binding or non- binding. When arbitration is binding, the decision is final, can be enforced by a court. When arbitration is non-binding, the arbitrator‘s award is advisory and can be final only if accepted by the parties.[10]

3.2 Mediation:

Mediation is a voluntary and informal process in which the disputing parties select a neutral third party to assist them in reaching a mutually acceptable settlement. Unlike a judge or arbitrator, the mediator has no power to impose a solution on the disputants; instead, the mediator assists them in shaping solutions to meet their interests.[11] The role of mediator and the mediation process may vary significantly, depending no the type of dispute and mediator‘s approach. Mediators can employ a wide-range of techniques, e.g. assist parties to communicate effectively and to develop a co-operative, problem-solving attitude, identify parties underlying interests; identify and narrow down issues; transmit messages between parties; explore possible options for agreement and the consequences of non-settlement. In mediation the parties have the opportunity to describe the issues, discus their interests, understanding, and feelings, provide each other with information and explore ideas for the resolution of the dispute.

3.3 How does mediation differ from arbitration?

Arbitration is different from mediation because the neutral arbitration has the authority to make a decision about the dispute. The arbitration process is similar to a trial in that the

[10] *Ibid*
[11] *Ibid*

parties make opening statements and present evidence to the arbitrator. Compared to traditional trials, arbitration can usually be completed more quickly and it is less formal. For example, often the parties do not have to follow laws of evidence and, in some cases the arbitrator is not to apply the governing law.[12]

3.4 Conciliation:

Conciliation is a type of mediation whereby the disputing parties use a neutral third party, a conciliator, who meets the parties separately in an attempt to resolve their differences. Conciliation differs from mediation the goal is to conciliate, most of the time by seeking concessions. In conciliation the parties seldom, if ever, actually face each other across the table in the presence of the conciliator, instead a conciliator meets with the parties separately. Such form of conciliation is called shuttle diplomacy.[13]

Mediation and conciliation systems are very similar in that they interject a third person between the disputants, either to mediate a specific dispute or to reconcile their relationship. Mediators and conciliators may simply facilitate communication, or may help direct and structure a settlement, but they do not have the authority to decide or rule on a settlement.[14]

[12] *Ibid*
[13] *Ibid*
[14] *Ibid*

The salient features of deference in techniques are as below:

Mode	Distinctive features
Negotiation	* on third party * bargaining between the parties
Mediation	* mediator must be present before the disputing parties * mediator cannot impose his decision
Conciliation	* conciliation meets parties separately and tries his best to bring solution for both the parties * conciliator cannot impose his decision
Arbitration	* arbitration has authority to impose a decision to the parties

Table 1

3.5 Negotiation:

Negotiation is the most common form of alternative dispute resolution. Negotiation is face to face discussion between the parties with a view to reaching an amicable settlement. It is the process by which the parties voluntary seek a mutually acceptable agreement to resolve their common dispute. Compared with process involving third parties, generally negotiation allows the disputants themselves to control the process and the solution. In other words, negotiation system creates a structure to encourage and facilitate direct settlement between parties to a dispute, without the intervention of a third party[15]. The disputing parties may be represented by attorneys in negotiation. Negotiation is different from mediation in that there is no neutral third party may or individual to assist the parties to negotiate. However, sometimes a third party may involve a negotiation and when a third party is involved, he usually breaks the ice and brings the parties to the negotiation table and then withdraws from the negotiation process. Bargaining is a common feature of the negotiation process. This feature also makes it different from mediation and arbitration.

3.6 Mini-trial:

The mini-trial, a development in ADR, is finding it‘s in resolving large-scale disputes involving complex questions of mixed law and fact, such as product liability, massive construction, and anti-trust cases. In a mini-trail, each party present its case as in a regular trial, but with the notable difference that the case is tried by the parties themselves, and the presentations are dramatically abbreviated.

[15] *Ibid*

In a mini-trail, lawyers and experts present a condensed version of the case to top management of both parties. Often, a neutral adviser-sometimes an expert in the subject area sits with management and conducts the hearing. After these presentations, top management representative by now more aware of the strengths and unable to do so, they often ask for the neutral adviser‘s best as to the probable outcome of the case. They then resume negotiations.

The key to the success of this approach is the presence of both side‘s top officials and the exchange of information that place during the mini-trial. Too often, pre-litigation work has insulated top management from the true strengths and weaknesses of their cases. Mini-trial presentations allow them to see the dispute as it would appear to an outsider and set the stage for a co-operative settlement.[16]

[16] *Ibid*

CHAPTER-FOUR

EXISTING LEGISLATIONS ADOPTING ADR

4.1 Introduction:

Mediation is a nonbinding process in which parties to a dispute work with an impartial third party ("neutral" or "mediator") who helps them to reach a settlement. The mediator does not decide the case but rather facilitates a consensual agreement among the parties to the dispute. Except under some court-mandated programs, mediation is a consensual effort: both parties must agree to it. It often is employed after it becomes apparent that direct negotiation between adversaries will not resolve the dispute efficiently.

Perhaps the most attractive aspect of mediation is that it can be tailored to suit the needs of each individual dispute. The mediator can play a low-key and conciliatory role, or take on a more proactive role by making suggestions and probing for convergent interests. The parties can also decide to convert the mediation into an arbitration proceeding, granting the mediator the power to issue a binding decision.

4.2 ADR Mechanism in Existing Laws of Bangladesh:

□ The Civil Procedure Code, 1908

1. Mediation u/s 89A
2. Arbitration u/s 89B.

□ Muslim Family Laws Ordinance, 1961

3. Polygamy u/s 6
4. Divorce u/s 7
5. Maintenance u/s 9

□ Family Court Ordinance,1985

1. Pre-trial Proceeding u/s 10
2. Post-trial Proceeding u/s 13

□ ArthaRinAdalatAin, 2003

1. Settlement Conference u/s 21
2. Mediation u/s 22

□ Gram AdalatAin, 2006 [Totally]

□ The Conciliation of Disputes (Municipal) Board Act, 2004 [Totally]

□ The Arbitration Act, 2001 [Totally]

□ The Labor Code, 2006

1. Negotiation u/s 210(1, 2, 4)
2. Conciliation u/s 210(6)
3. Arbitration u/s 210(16)[17]

4.3 ADR In Civil Litigation

In Family Court Suits under the Family Court Ordinance, 1985 section 10 provides a pre-trial hearing of a suit within thirty days of filing written statement by the defendant has been incorporated. The Family Court shall endeavor to effect a compromise or reconciliation between the parties, and if no compromise is reached then the Court shall proceed with the trial of the suit. It is reported, a good number of suits are being compromised by the parties at this stage and the litigants are now enjoying the fruits of introducing the system.

In ArthaRinAdalat Suits under theArthaRinAdalatAin 2003, there are provisions for settlement disputes through settlement conferences at the pretrial stage as well as after the trial of the suit. It is provided in section 24 that if the parties agree to resolve the dispute through mediation, the Adalat shall stay further proceedings of the suit and refer the matter to the lawyers of the parties or in the absence of lawyers to the parties. The Adalat may also authorize the local officers of the Financial Institutions by issuing necessary orders under section 24 for effecting mediation if they want to resolute their disputes under section 21 and 22. If any conciliation is reached between the parties an agreement incorporating the terms of settlement shall have to be signed by the parties. The ArthaRinAdalat shall pass necessary order on the basis of such agreement. No appeal or revision lies against such order. Section 45 enjoins the parties to resolve their disputes at any stage of the proceedings notwithstanding anything contained in sections 21 and 22. We have noticed that the parties are now trying to dispose of their disputes even at the execution stage of the proceedings.[18]

Alternative" dispute resolution is usually considered to be alternative to litigation. It also can be used as a colloquialism for allowing a dispute to drop or as an alternative to violence. In recent years there has been more discussion about taking a systems approach in order to offer different kinds of options to people who are in conflict, and to foster "appropriate" dispute resolution.

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[17] *Dr. M. Zahir, Delay in Court & Court Management,2nd Edition, Bangladesh Institute of Law and International Affairs, 1988 page.85*

[18] *ADR in Civil Litigation, http://www.banglajol.info/index.php/IIUCS/article/download/20405/14120*

A non-governmental organization (NGO) is a legally constituted organization created by natural orlegal persons that operates independently from any government. In the cases in which NGOs are funded totally or partially by governments, the NGO maintains its non-governmental status by excluding government representatives from membership in the organization. The term "non-governmental organization" has no generally agreed legal definition. In many jurisdictions, these types of organization are called "civil society organizations" or referred to by other names. Bangladesh has been perhaps the most important hearth on the globe fornon-governmental organizations. So estimates place the number of NGOs in Bangladesh in excess of 20,000.[19]

Actually ADR is a process of resolving disputes outside the ordinary judicial process & it is well known that, the process of ADR is mainly regulated by the non-governmental organization (NGO). So the Laws pertaining to ADR in Bangladesh:

4.4 Different Forms of ADR and Their Application in Civil Justice System:

ADR is a means of resolving dispute which is an alternative to going to the court. It may be any one of the two forms either determinative or elective, all mechanisms of ADR fall within these two forms.

Determinative ADR is any non-court process which will determine the outcome of the dispute. It involves a third party, whether an arbitrator or an adjudicator or an expert acting as a determinative capacity. Elective ADR is that which facilitates discussion, which usually turns into negotiations which does not produce any judgment or finding which is binding on the parties.31 The various modalities of ADR, Conciliation, Mediation, Settlement Conference, Arbitration, Mini-trial, Negotiation, Appellate ADR, Village court, Board of Conciliation and Traditional Salish32 which are practiced in Bangladesh can be classified under the following three categories –

1. Formal/judicial ADR
2. Quasi-formal/statutory ADR
3. Informal /Non-formal ADR

[19] *Article by Sultan Md. Wohid on Daily Star 20.02.2009*

4.5 Formal /judicial ADR

This form of ADR indicates those processes of dispute resolution which have been enumerated in the statutes and conducted either by the court or by the third person upon the reference of the court. ADR processes in the formal ways are conducted by the following Statutes of Bangladesh

- **Code of Civil Procedure, 1908**

For the first time in our legal system the provision with regard to ADR has been introduced by amending the Code of Civil Procedure. In chapter V of ArthaRinAdalatAin, the provisions of ADR have also been incorporated. Surely, this concept is a denovo in our civil justice delivery system. Now ADR has come within the domain of civil procedure code.By the recently enacted sections 89A/89B of CPC, the ADR system (mediation and arbitration) has been introduced, the two terms _mediation‘ and _arbitration‘. Section 89A lays down that except in a suit under the ArthaRinAdalatAin, 1990 (Act. no 4 of 1990)

After filing of written statement, if all the contesting parties are in attendance in the court in person or by their respective pleaders, the court many by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit or refer the dispute or disputes in the suit to the engaged pleaders of the parties, or the party or parties, where no pleader or pleaders have been engaged, or to a mediator form the panel as may be prepared by the District Judge under subsection 10, for undertaking efforts for settlement through mediation. Similarly, the term _settlement conference‘ has been used to denote mediation process in the part V of ArthaRinAdalat. The provisions have been made in this regard that the court can mediate the suit matter after filing the written statement by the defendant or defendants, by adjourning the subsequent procedures of the suit. The government by amending the Code of Civil Procedure expands the avenue for shalishi. By The Code of Civil Procedure (Amendment) Act, 2003 two new sections were incorporated (section 89A, 89B) in the code. It empowers the court to solve the matter through mediation or conciliation before the beginning of the trial except case under ArthaRinAdalatAin. However there remain some limitations too, it will not exempt the disputant parties from the appearance before the court. This law is only relating to the pending cases,

The Civil Procedure Code (Amendment) Act, 2002 has been enacted to introduce Alternative Dispute Resolution (ADR) system for early and consensual disposal of civil suits. Section 89A and 89B have been inserted to allow parties to settle their disputes in suits, through mediation or arbitration. In the mediation procedure, the court may take initiative to settle the

dispute in the suit by itself or by making reference to independent mediators. Under section 89B parties will be allowed to withdraw pending suits and have those settled through arbitration. The provisions have been made effective from 1st July 2003.

ADR system is gaining popularity. This procedure will help to reduce the huge backlogs of civil cases in courts. Public confidence in the judiciary will thereby increase. Access to justice will be expanded. The provisions will also help develop a new culture of consensual settlement of disputes doing away with the existing adversarial procedure. It will help protect and preserve cohesion and fraternity in society. Of the mediator here the advocate or any other person may be hired for mediation.[20]

- **ArthaRinAdalatAin, 2003**

In our legal system, money lent by financial institutions/banks to individuals, private limited companies, public limited companies, corporations, partnership firms, societies, co-operatives, proprietorship firms etc. when due for default, is realized through money suits, suits for foreclosure, mortgage by instituting the same to competent civil courts. The civil courts were burdened with other businesses and such suits of banks consumed time for disposing of. The delay caused made the bank sector suffer for non-realization of dues in time and the bankers gathered bitter experience in realizing the same. To remove this difficulty, the government enacted a special piece of legislation named –The ArthaRinAdalatAin, 1990″ which had gone under some changes by way of amendments since its inception. The law brought changes to a great extent in the administration of justice delivery system for regulating those suits but it failed to fulfil the expectation of the legislators/bankers to recover the dues expeditiously from the defaulters. The thinkers on the subject gave second thoughts to frame a new law and ultimately the legislature passed –The ArthaRinAdalatAin, 2003″ (hereinafter Adalat) by repealing the earlier one.The law came into force on 1st May 2003 except sections 46/47 which came into operation on 1st May 2004. Within a short span of time, the law has gone under an amendment by the ArthaRinAdalat (Amendment) Ain, 2004 which reflects weak draft of the law.

I have been working as a Judge of the Adalat for more than two years. I have taken no pain to apply the laws during my business hours but at the same time I have seen that

[20] *Different forms of ADR, http://a-z-az.blogspot.com/2011/12/alternative-dispute-resolution-adr.html*

some provisions of the laws are acting as barriers in discharging my responsibilities. I shall make an endeavor to focus on those and other allied subjects in this writing.

There is no such legal provision in the Environment Court Act, 2000 like the present one. Therefore section 4 (4) and section 4 (10) should be omitted, and the provisions if so omitted, there would be no practical difficulty to appoint the Joint District Judges to the Adalat like the Environmental Courts.

Section 19 has provided provisions for setting aside the ex parte decree but it does not make any provision for notifying the plaintiff bank like Order 9 Rule 13 of the Code of Civil Procedure 1908. As a result, the plaintiff remains ignorant about restoration of the suit. This anomaly should be removed by inserting appropriate provision. Section 20 of the law has given finality to the order, judgment and decree of the Adalat. In spite of that the defaulter(s)/borrower(s) is/are challenging the same in the writ jurisdiction of the High Court Division under Article 102 of the Constitution of the People‘s Republic of Bangladesh and obtaining stay orders from the High Court Division.

In a recent discussion on ‒Money Loan Court Act 2003‖ organized by the Association of Bankers, Bangladesh (ABB), the Governor of Bangladesh Bank asked the banks to take special measures to recover bad loans as the defaulters filed 1,768 writ petitions in the High Court for such loans amounting to Tk 6445 core. He told that the banks cannot recover the loans due to stay orders from the court, and asked the monitoring cells of banks to take up these issues seriously and hire efficient lawyers to move the cases of loan default. The Daily Star dated June 2, 2006). It is observed from regular business of court that the banks have been refraining from taking any step against the stay orders in writ petitions. It is seen that the banks let them (the defaulters) do the same with consent. This attitude of the bank should be changed and effective steps should be taken to face the legal battle with the defaulters.

Apart from the aforementioned barriers, the law has been playing a very vital role in realizing the loan from the defaulter(s). Its achievement in loan recovery has been so immense that the scenario of defaulting loan has improved significantly with number of pending ArthaRin Suits reducing with expectancy rate. The loan defaulting culture would further be reduced if the barriers can be removed as soon as possible.[21]

[21] *Ibid*

- **Family Courts Ordinance, 1985:**

Generally disputes relating to property, family matter i.e. distribution of property, dissolution of marriage, maintenance, guardianship could be dealt by shalish. The Family Courts Ordinance, 1985 speaks for the settlement of dispute through conciliation inside the Court before the formal proceeding of the trial started. The court may initiate a pretrial hearing to settle the disputes relating to dissolution of marriage, maintenance, and dower, restitution of conjugal rights as well as guardianship and custody of children. Besides, the Muslim Family Laws Ordinance 1961 empowers the Union Parishad to form an Arbitration Council for reconciliation between the parties wishing to dissolve their marital tie through Talaq and to deal with the polygamy.

- **ADR in family court:**

If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: for Allah hath full knowledge, and is acquainted with all things.

Settlement of Dispute through Mediation in family court is started in Dhaka Judge Court from 2000. Then, it was expanded in different cities and districts. Family Court Ordinance 1985 in its section 10 and 13 is said about the Mediation process. The procedure provides in family court is-

i) When the written statement is filed, the Family Court shall fix a date ordinarily of not more than thirty days for a pre-trial hearing of the suit.

ii) On the date fixed for pre-trial hearing, the Court shall examine the plaint, the written statement and documents filed by the parties and shall also, if it so deems fit, hear the parties.

iii) At the pre-trial hearing, the Court shall ascertain the points at issue between the parties and attempt to affect a compromise or reconciliation between the parties, if this be possible.

iv) Then where a dispute is settled by compromise or conciliation, the Court shall pass a decree or give decision in the suit in terms of the compromise or conciliation agreed to between the parties.

v) If no compromise or reconciliation is possible, the Court shall frame the issues in the suit and fix a date ordinarily of not more than thirty days for recording evidence.

vi) After the close of evidence of all parties, the Family Court shall make another effort to effect a compromise or reconciliation between the parties.

vii) If such compromise or reconciliation is not possible, the Court shall

Pronounce judgment and, on such judgment either at once or on some future day not beyond seven days of which due notice shall be given to the parties or their agents or advocates, a decree shall follow.[22]

- **ADR in Hindu Marriage:**

Section 23(2) of the **Hindu Marriage Act, 1955** mandates the duty on the court that before granting relief under this Act, the Court shall in the first instance; make an endeavor to bring about reconciliation between the parties, where it is possible according to nature and circumstances of the case. For the purpose of reconciliation the Court may adjourn the proceeding for a reasonable period and refer the matter to person nominated by court or parties with the direction to report to the court as to the result of the reconciliation. [Section 23(3) of the Act].[23]

4.6 Quasi-formal ADR

Where the application, jurisdictions and modes of ADR are regulated Efficiency and Effectiveness of Alternative Dispute Resolution Schemes towards the Promotion of Access to Justice in Bangladesh.

- **ADR in Environmental Disputes:**

Environmental problems are among the most complex and challenging areas of conflict in our modern world. They can include important elements such as science, sociology, economics, history and culture, property rights and legal or regulatory constraints. They can involve private individuals, the general public, multiple regulatory jurisdictions and special interests. They may include elements that have some unknown consequences and require an assessment of risks based on incomplete information. They may occur in areas where previous practices have already had detrimental effects. Any new decisions now may make things worse. It is important to remember that new decisions may also mitigate previous errors and improve the

[22] *ibid*

[23] *Solution of Disputes Regarding Hindu Marriage, http://www.samajkantha.com/index.php/en/en-open-discussion-news/59-shalish-mediation-in-rural-bangladesh*

overall situation. When environmental disputes (or any disputes for that matter) rise to the level of public concern, they may be emotionally charged and push stakeholders toward rigid postures making it more difficult to negotiate.

However, it is important to recognize that relying solely on regulatory regimes and legal actions to protect the environment have often proven to be only marginally effective because these approaches often forgo the opportunity for holistic problem solving. ADR takes a broader perspective on environmental systems and functions which are not constrained to a single parcel of land or a particular project.

As an example, the problem of parcel based approaches to environmental problems became a major element of consideration in the TPEAC process. Prior to TPEAC, regulatory agencies expressed a strong preference for "on-site" (same parcel) mitigation of wetland impacts for transportation projects. Usually, a formula was employed to establish a ratio of newly created compensatory wetland for natural wetlands destroyed or compromised. Typical ratios were 5 to 1 or 8 to 1. The assumption was these created wetlands were not as effective and therefore required larger mitigated acreages to approximate the environmental functions of the natural ones. In truth, the created wetlands often never achieved many of these functions. In TPEAC, a new strategy of watershed mitigation was developed.

This approach required that the wetland systems and functions of the full watershed be inventoried and opportunities for mitigation be prioritized based on their overall value to the watershed. This allowed transportation planners and regulatory agencies to select mitigation strategies that maximized the desired functions impacted by the project. It often resulted in restoring previously compromised natural wetlands that achieved full environmental function quickly and provided mitigation for much broader segments of the overall watershed.

Many of these issues can be dealt with more effectively when all appropriate stakeholders participate jointly in the process. Many problems of ignorance or omission can be thereby avoided. In addition, ‒one size fits all‖ regulatory approaches may fail to take into consideration important local needs and aspirations that can be included in an ADR process. It is important to formulate a step by step process that relies on the same procedures and strategies that are common to other mediation processes and for the mediator to be prepared to serve in facilitation and coordination roles to allow the process to move forward effectively. Complexity and human nature do not make these processes particularly efficient, but a deliberate incremental

process can result in manageable goals that are achievable and produce better environmental outcomes and comprehensive durable agreements.[24]

- **Adr In Gram O ShalishAin:**

In order to resolve disputes between the contending parties, an impartial third party mediates shalish. The concept has significant civil and legal importance as it helps to restore community harmony formally and informally. Since shalish vivifies the dynamics of rural power structure of Bangladesh, it has enormous theoretical implications. First, it stabilizes socio-political livelihood and class-conflict in small community context. When social conflicts, disintegration, violence and terrorism, and chaos erupt in community; shalish appears to supplement and substitute immediate legal needs of the community. Second, shalish is a strong means to establish community solidarity, social bondage and reciprocal coexistence.

As well, shalish is a traditional democratic mode of conflict resolution. The ‗Banglapedia' defines shalish as a social system for informal adjudication of petty disputes both civil and criminal, by local notables, such as matbars (leaders) or shalishkars (adjudicators). Two types of adjudication have been in place in rural Bangladesh from days of antiquity, these were shalish and extension of the state's judicial arm into the rural areas through specific legislation.

Normally, the process of a particular shalish starts with interrogating the disputants to ascertain the facts. Then the shalishkars offer their solutions, and seek the opinions of disputants before; finally, they come to a decision.

Although this procedure is found to be uniform throughout the country, there are local variations depending on local customs and tradition. Shalish is supposed to lead to conciliation between the contesting parties. But, in the context of Bangladesh's rural social structure, shalish seems to have more often than not been used as an appendage of the existing rural power structure, sometimes, of religious bigotry.

[24]*Environmental Disputes, http://www.theinternationaljournal.org/ojs/index.php%3Fjournal% 3Dtij%26page% 3Darticle%26op%3Dview*

Shalish is meant to be a medium for out-of-court settlement of petty quarrels or disputes in the rural society. This conventional system of mediation is deeply rooted within the history, culture and humanities of Bangladesh.

Shalish organizations in Bangladesh and elsewhere in the subcontinent are usually practiced through the Gram (Village) Panchayets—the lowest tier of local government. The Panchayet-led shalish has been a popular medium of dispute resolution in the rural areas of Bangladesh over centuries. The Gram Panchayet functions to resolve or to mediate disputes between the villagers of different religions, castes and occupations. To some extent, the Panchayet exercises power as like as a judicature.

During the ancient period, the panchayet was usually nominated by the king or elected by the people of respective villages. The esteemed members of the Village Panchayet were responsible for the distribution of land among the villagers and tax collection.

As Gram Panchayet is considered to be a community-based initiative of dispute mitigation, there are no written rules or standards for conduction of shalish. Therefore, mode of shalish management differs from one region to another and one religion to the other. Usually the legal notion of shalish differs from its popular notion. Mukerjee, (1970) describes—

It is not fixed set of written rules or it solely an instrument of power. Law is living, social, institution for _authoritative decision-making‘. These decisions regulate the reciprocal interests of individuals, institutions, and the State, and coordinate their efforts towards a common goal…there has long been a notion in the mind of common man that law exists in the form of _rules‘ in the statute book. This conception of law is, however, not adequate; because, knowledge of these rules cannot ensure a knowledge of the law, which must take into account the judicial pronouncements upon them.

The relationship between law and shalish has remained yet a disintegrated phenomenon in Bangladesh local administration system. Shalish sometime recreates

confusion and controversy that lead to conflict and contradictions with the domestic law. The United States State Department Report 2002 writes,

In January 2001, the High Court ruled illegal all fatwas, or expert opinions on Islamic law. Fatwas can include the decision as to when a holiday is to begin based upon the sighting of the moon, or an opinion on a religious issue. Fatwas also commonly deal with marriage and divorce or mete out punishments for perceived moral transgressions. Islam dictates that only those Muftis (religious scholars) who have expertise in Islamic law are authorized to declare a fatwa.

However, in practice village religious leaders sometimes make declarations in individual cases, calling the declaration a fatwa. Sometimes this results in extrajudicial punishments, often against women for their perceived moral transgressions. While the court‘s intention was to end the extrajudicial enforcement of fatwas or other declarations by religious leaders, the ruling declared all fatwas illegal, and resulted in violent public protests (see Section III). Several weeks later, the Appellate Court stayed the High Court‘s ruling.

To ensure the welfare of the state, it is necessary to ensure the contribution of law in regulating reciprocal interests of individuals, groups and the state and in coordinating common efforts for the realization of common goals, i.e., peace, justice and development.[25]

- **Arbitration Law in Bangladesh:**

Bangladesh has enacted the Arbitration Act 2001 (the Act). It came into force on 10 April 2001, repealing the Arbitration (Protocol and Convention) Act 1937 and the Arbitration Act 1940, legacies of the British Raj in India. The new Act was again amended in 2004 in certain respects. Such legislative steps were urgent in the face of increasing foreign investment in Bangladesh in various sectors, especially in natural gas and power, and the ever-growing export trade with the rest of the world. The Act consolidates the law relating to both domestic and international commercial arbitration. It thus creates a single and unified legal regime for arbitration in

[25]*Gram O ShalishAin, http://www.usaid.gov/our_work/democray_and_governance_publications/pdfs/ pnacp335. pdf.accessed on 04/05/2015*

Bangladesh. Although the new Act is principally based on the UNCITRAL Model Law, it is a patchwork quilt as some unique provisions are derived from the Indian Arbitration and Conciliation Act 1996 and some from the English Arbitration Act 1996.

In Bangladesh, the present law of arbitration is contained mainly in the Arbitration Act, 1940, there being separate Acts dealing with the enforcement of foreign awards. There are also stray provisions as to arbitration, scattered in special Acts. Three types of arbitration are contemplated by the Arbitration Act of 1940, namely (i) Arbitration in the course of a suit, (ii) Arbitration with the intervention of the court, and (iii) Arbitration otherwise than in the course of a suit and without the intervention of the court in practice, the last category attracts the maximum number of cases.Under the Act of 1940, an arbitration agreement must be in writing, though it need not be registered. This also amounts to an ‒arbitration agreement‖ for the purposes of the Arbitration Act, 1940. Once an arbitration agreement is entered into for submitting future differences to arbitration, it is not, necessary to obtain the fresh consent of all the parties for a reference to ole of NGOs in Implementing ADR mechanism in Bangladesh is to be marked.[26]

- **The Muslim Family Laws Ordinance 1961:**

To make the divorce effective the husband after pronouncement of talaq shall send a notice as soon as possible to the chairman and a copy of it will also be sent to the wife. From the date of receiving the notice of talaq within 30 days the chairman shall constitute an arbitration council which shall take all necessary steps for reconciliation between the parties. A talaq will not be effective until the expiration of ninety days from the day on which the notice was delivered to the chairman or if the wife is pregnant after the pregnancy ends, whichever period is longer. In what form either Ahsan or HasanorBidaatform, the talaq is pronounced it will be deemed as a single talaq in ahsanform, so husband can revoke the talaq anytime either expressly or impliedly I.e. to kiss her or consummate with her or touch her etc or after ninety days by remarry if it is not for third time. The failure of husband to give notice to the chairman is deemed to be revocation of talaq. In Abdul Aziz vs. ReziaKhatoon, it was held the non-compliance with section 7(1) makes talaq legally ineffective.Where wife exercise the delegated right that is talaq-e-tawfez, she must also follow the procedure

[26] *Ibid*

of section 7.This healthy provision on conciliation has been incorporated in the Muslim Family Laws Ordinance 1961 to prevent the separation between husband and wife which is the result of pronouncement of talaq that usually occurs on sudden anger of husband. For taking additional wife or to get adequate or equitable maintenance, the party must apply before the chairman who will constitute the arbitration council which will decide these matters in informal and amicable way without following the procedure of courts.[27]

- **The Conciliation of Dispute (Municipal areas) Board Act, 2004:**

The Municipal Board consisting of five members chaired by the chairman of the municipal area has exclusive jurisdiction without some exceptions in cases mentioned in the Schedules as per Section 4(1).52 In the proceeding of the Municipal Board, CPC, Cr. P.C and the Evidence Act will not be applied53 and no party can engage any advocate in such proceeding54 The Act is entirely on conciliation and within its framework that the decision of the conciliation board is mandatory, but right to appeal is open.[28]

- **ADR in Labor Dispute:**

The spectrum of labor dispute cover a wide ranging issues including disagreement between the employer and the worker or worker and worker on point of service condition, wages, working condition, compensation etc.

Generally a labor dispute may be divided into two categories, namely: individual dispute and industrial dispute. When a worker raises a dispute in his individual capacity, then it is popularly known as individual dispute.

According to the Labor Act, 2006, there are mainly two types of dispute settlement mechanisms: ADR and adjudication by the courts. The Act lays down various non-adjudicatory mechanisms including participation committee (bipartite), conciliator and arbitrator and adjudicatory (judicial) authorities'which include Labor Court and Labor Appellate Tribunal.

[27] *Ibid*

[28] *Ibid*

Individual disputes are mainly settled by labor courts or labor appellate tribunals, while industrial disputes are pre-dominantly resolved by bipartite negotiation and conciliation. Bipartite negotiation and conciliation are the two important methods of settlement of industrial disputes because they provide grounds for amicable settlement of disputes in a free and unfettered environment.

- **Bipartite Negotiation**

Bipartite negotiation is recognized as the best method for the settlement of industrial disputes and maintaining industrial relations in a better way, because it helps develop harmonious relationship between the management and workers.Bipartite negotiation takes place between the employers and their employees over job-related affairs. The employees are usually represented by their elected representative known as collective bargaining agents (CBAs), while the employers are allowed to participate in collective bargaining themselves or through their representative.But bipartite negotiation cannot always protect the interests of the worker or operate as an effective dispute resolution mechanisms for various reasons such as unfavorable and authoritarian attitude of management towards trade unionism, bribing trade union leaders, lack of experience and leadership skill in trade union officers, interference of the government and the ruling party in the settlement of industrial dispute, multiplicity of trade unions having political rivalries, and inefficiency in applying bargaining techniques.Conciliation in industrial dispute becomes necessary mainly when the settlement of disputes fail at the bipartite negotiation level. The practice of conciliation is compulsory in Bangladesh in the sense that neither the workers nor the employers can go for direct industrial action (i. e. strike and lock-out) without first going through Section 2(62) of the Labor Act, 2006 defines _Industrial Dispute' thus, means any dispute or difference between employers and employers or between employers and worker or between worker and worker, which is connected with the employment or non-employment or the terms of employment or the conditions of work of any person.[29]

4.7 Informal /Non- formal ADR

Disputes are also resolved through alternative methods at the community level in both civil and criminal matters by non-judicial body, which may be described as informal ADR. Different NGOs (i.e.Madaripur Legal Aid Association (MLAA), Bangladesh Legal Aid and

[29] *Ibid*

Services Trust (BLAST), AinOShalish Kendra (ASK) and BanchteShekha(BS)etc) are involved in the dispute resolutions at the community level.

4.8 Other Legislative Provisions relating to ADR:

1. Sec. 28 of The Contract Act 1872, regarding arbitration.
2. Sec. 21 of The Specific Relief Act 1877, regarding arbitration.
3. Sec. 76 of The Bank Companies Act 1991.
4. Sec. 6 of TheParbattoChattagramBirodNispoti Commission Ain 2001.

4.9 Conclusion:

Delay in civil suits is a very big problem in our country. The main cause of delay is outdated laws, corruption, political cause, separation of judiciary, low quality of judges and court staff, lack of indignation, ineffective law enforcement authority, shortage of manpower, lack of legal awareness, social acceptance of justice delivered, influence of money and power etc. We must recover from this problem law commission in Bangladesh can make [30]report for avoid delay in civil suits. ADR can doing a great role to avoid delay in Bangladesh. ADR can make a great role to avoid delay in civil suits. ADR means is a system of shalish or arbitration by which delay in civil suits can be removed.[31]

[30] *Ibid*

[31]*EsratAzim, "Principles of Civil Litigation",1st Edition, Universal Books,2008, Page No.89-91*

CHAPTER-FIVE

PROSPECTS AND IMPEDIMENT OF ADR MECHANISM IN CRIMINAL LITIGATIONS

5..1Prospects of ADR in Criminal Cases in Bangladesh:

The opportunity of ADR in Criminal Cases can be increased by enlarging the scope of Section 345 of the Code of Criminal Procedure carefully. It would eliminate the various malpractices now resorted to be the parties to put an end to criminal proceedings pending in the Courts in which a non-compoundable offence has, in fact, been compounded out of court.

In Criminal Jurisdiction, thousands of cases filed under section 138 of the Negotiable Instrument Act, 1881 which are not compoundable. But in this case, ADR system may be very much effective and the Complainants will be benefited. A considerable number of cases filed under section 385 of the Penal Code are pending in the Courts of Session for years together. These types of cases are suitable for compromise through Court if necessary amendment be made in the procedural laws. ADR system can also be introduced to confirm juvenile justice under the Children Act, 1974. This system can also be effective for the trial of environmental cases under the Environmental laws. To preserve Human Rights it is necessary to introduce ADR system in Criminal Justice delivery system. In the case **of *Md. Joynal and others v. Rustam Ali and others***[32], Supreme Court encourages compromise in criminal cases. Establishment of ADR training institute and allocation of fund is another requirement for introducing ADR in Criminal Justice. For the success of this system, mass awareness should be built. The policy of the legislature adopted in section 345 of code of criminal procedure is that in the case of certain minor offences, where the interests of the public are not vitally affected, the complainant should be permitted to come to compromise with the party whom he complains.[33]

ADR is effected when:[34]

a. Backlog of cases impairs court effectiveness.
b. Complex procedures Impair court effectiveness.
c. The poor cannot afford the cost and fees of the courts.
d. Small informal systems can better reach geographically dispersed population.

ADR can support a mission to reform the court system in several ways. ADR can be used by the judiciary to test and demonstrate new procedures that might later be extended to or integrated with existing court procedures. ADR systems can be created as an option within the judicial system, either associated with the courts as a way of managing existing caseloads, or separate from the courts to provide dispute resolution for conflicts or constituencies not well served by the courts. ADR can provide streamlined procedures to accelerate case disposition. In some

[32] *[36 DLR (AD) 240]*

[33] *Harvard omen's Law Journal 15 (1992) page,272*

[34] *Supra note 4,page-193*

cases, these procedures may serve as models that can later be incorporated into formal court procedures. If so, court-annexed ADR may turn out to be a catalyst for more extensive court reform.

Benefits of plea bargaining[35]

Benefit of plea bargaining is so immense. When we look into the conceptual aspect of plea bargaining, the notion comes in our mind is that, well now the back logging in courts will be reduced and justice can be delivered quickly and efficiently. But when we check the reason as to why the criminals go for plea bargaining, then it comes to the fact that because they are able to reduce their punishment, which if they would not do quickly will make them stay in arrest for more time through litigation. Moreover, it is presumed that when an accused pleads guilty, the 'punishment of the accused gets reduced. Also the benefit which the guilty gets by plea bargaining is the reduction of the costs and time consuming trial of his case. It is also presumed that the accused gains responsibility in his favor to enter the correctional system in a frame of mind that may afford hope for rehabilitation over a shorter period of time. The object of 'Plea Bargaining' is to reduce the risk of undesirable orders for the either side. Another reason for the introducing the concept of "Plea Bargaining' is the fact that most of the criminal courts are overburdened and hence unable to dispose of the cases on merits. Criminal trial can take day, weeks, months and sometimes years while guilty pleas can be arranged in minutes. However, by observing the hoard of criminal cases in the courts Plea Bargaining galvanizes in the real life as prescriptive process not as coercion. The motto behind this is only to fasten the judgment process, which ultimately reduce the burden of courts and decrease the population of jail. Nevertheless, some cons are also associated with it. Well, on this account, I would like to say it that everything on this earth (either living or non-living) has pros and cons then there is only difference of degree.

5.2 Impediment of ADR in Criminal litigation in Bangladesh:

Bangladesh is an over populated and poor country. This society is facing different types of crime, if in Bangladesh the process of ADR in criminal litigation is exercised then the crime could be decreased from our society. ADR in criminal litigation does not set precedent, define legal norms, or nor do they promote a consistent application of legal rules.[36]As noted earlier, ADR programs are tools of equity rather than tools of law. They seek to resolve individual disputes on a case-by case basis, and may resolve similar cases in different ways if the surrounding conditions suggest that different results are fair or reasonable according to local norms. Furthermore,

[35] *Supra note 18,page-199*

[36] *Md. Zakir Hossain, Impediment of ADR in Criminal Litigation, (Volume II (2011), The Northern University journal of Law.) page-45*

ADR results are private and rarely published. As long as some other judicial mechanism exists to define, codify, and protect reasonable standards of justice, ADR programs can function well to resolve relatively minor, routine, and local disputes for which equity is a large measure of justice, and for which local and cultural norms may be more appropriate than national legal standards. These types of disputes may include family disputes, neighbor disputes, and small claims, among others. It cannot correct systemic injustice, discrimination, or violations of human rights. ADR systems often reflect the accepted norms of society. These norms may include discrimination against certain groups and populations. When this is true, ADR systems may hinder standards of group or individual rights. It does not work well in the context of extreme power imbalance between parties. These power imbalances are often the result of discriminatory norms in society, and may be reflected in ADR program results. Even when the imbalance is not a reflection of discriminatory social *norms,* most ADR systems do not include legal or procedural protections for weaker parties. A more powerful or wealthy party may press the weaker into accepting an unfair result, so that the settlement may appear consensual, but in fact result from coercion. For the same reason, ADR programs may not work well when *one* party is the government. When the program design has been able to enhance the power or status of the weaker party, ADR has been effective in conditions of discrimination or power imbalance. In Bangladesh, for example, women who have submitted cases of spousal abuse to mediation have found that the village mediation system, which includes women mediators, provides better results than the court system which is even more biased against women in these cases. In general, however, ADR programs cannot substitute for stronger formal protections of group and class rights.

ADR in criminal cases settlements does not have any educational, punitive, or deterrent effect on the population.[37] Since the results of ADR programs are not public, ADR programs are not appropriate for cases which ought to result in some form of public sanction or punishment. This is particularly true for cases involving violent and repeat offenders, such as in many cases of domestic violence. Social and individual interests may be better served by court-sanctioned punishment, such as imprisonment. It is important to note, however, that victim-offender mediation or conciliation may be useful in some cases to deal with issues unresolved by criminal process. It is inappropriate to use ADR to resolve multi-party cases in

[37] *Ibid*

which some of the parties or stakeholders do not participate.[38] This is true because the results of most ADR programs are not subject to standards of fairness other than the acceptance of all the participants. When this happens, the absent stakeholders often bear an unfair burden when the participants shift responsibility and cost to them. ADR is more able than courts to include all interested stakeholders in disputes involving issues that affect many groups, such as environmental disputes. When all interested parties cannot be brought into the process, however, ADR may not be appropriate for multi- stakeholder public or private disputes.[39]

[38] *Ibid*

[39] *Ibid*

CHAPTER-SIX

PROSPECTS & PROBLEMS

6.1 Introduction:

In most of the cases access to justice is only available to the resourceful person and powerful elite since in order to have access to justice one must have the means which includes money.6 This scenario is common in civil justice delivery system where the parties fight in a „do or die‟ manner with no or little prospect of any consensual settlement. So we have the only choice the ―Alternative Dispute Resolution‖ which can easily and quickly ensure access to justice. At present ADR is seen by many as an important part of the countries judicial framework, particularly in so far as the civil justice delivery system is concerned. ADR is a range of processes which without following adversarial and formal judicial process assists the disputants to solve their dispute in amicable way with harmony. Ex- Chief justice Mustafa Kamal described ADR as ―a non -formal settlement of legal and judicial disputes as a means of disposing of cases quickly and inexpensively‖ 7 The European Commission, in its green paper on ADR stated.ADR offer a solution to a problem of access to justice faced by the citizens in many countries due to three factors: the volume of disputes brought before the court is increasing, the proceedings are becoming lengthier and costs incurred by such proceedings are increasing. And quantity, complexity and technical obscurity of litigation also help make access to justice more difficult. As ADR is voluntary and consensual system it helps the parties to tell their own consensual system it helps the parties to tell their own story.[40]

6.2 Possible Way Outs to Overcome These Problems:

Bangladesh is not only a country which is buffeted by these problems, even the developed countries such as the United States of America, the United Kingdom, India and other countries of the world. To solve these problems USA and following its inspiration many countries including Australia, Germany, Hong Kong, New Zealand and United Kingdom have been using over the last 25 years, alternative way which is popularly known as ADR.28 The abovementioned problems are faced by the courts in our country, especially in civil justice system, but the existing legal system is unable to solve them. So initiative was taken in 1996 by Mr. Justice Mustafa kamal the then chief justice of Bangladesh to commence reforms in our legal system. Since then a co-operation has been built up with the Institute for the Study and Development of Legal Systems (ISDLS) of USA to benefit our system with the

[40] *Efficiency & Effectiveness of ADR, http://a-z-az.blogspot.com/2011/12/alternative-dispute-resolution-adr.html*

American experience in this field and to work out an appropriate mechanism for resolving problems faced by our civil courts.

Subsequently, in January 2000, a trip by Judge Clifford Wallace in Dhaka finalized the selection of a five member Bangladesh legal study group under the leadership of justice Mustafa kamal.29 The BLSG made a report; one of the recommendations made in the report is to initiate immediately a pilot project on mediation. On the basis of this recommendation, BLSG decided to introduce mediation in family courts and started a pilot project. 30 Under this project the Family Court acquired a great triumph which induced the lawmakers to insert this system in different laws in Bangladesh.[41]

6.3 Success of ADR in Bangladesh in Civil Litigation Perspective:

After the insertion of ADR mechanisms in the different existing laws, a great achievement in the disposal of the suits has been acquired by ADR which can be perceived from the following pictures.

1. Since the activation of ADR in the family courts the average rate of substantive disposal by compromise through mediation has gone up to 60% compared to contested decree.
2. Under the pilot project in 13 districts total number of disposal of cases by way of mediation from 2000 to 2004 is 2418 and during this time through these courts total amount of realization is Tk.77770455.
3. Under section 89A of C.P.C total 12402 cases were disposed through mediation from July 2003 to June 2006.
4. Through the ArthaRinAdalatAin total 24945 cases were solved through ADR from May 2003 to February 2006 across the country.[42]

6.4 Conclusion:

The key to success of A.D.R. in Bangladesh lies in the manner of its introduction. A.D.R. is no longer an unheard of concept of dispute resolution among judges, litigants and lawyers of Bangladesh. The Family Courts all over Bangladesh are actively engaged in A.D.R. The pilot family courts are only exclusively engaged in mediation, but other Assistant Judges, who

[41] *Alternative Dispute Resolution, http://www.banglajol.info/index.php/IIUCS/article/download/20405/14120*

[42] *Ibid*

received training in mediation, are also mediating apart from trying cases. The mediation output of all the Assistant Judges, taken together, is something to be proud of. The Ministry of Law only needs to collect maintain and update all relevant statistics in this regard. To make ADR more effective, extensive, and pro-active, coordination is needed among different agencies.

No doubt, ADR is efficient and effective towards the promotion of access to justice, yet there are some weaknesses which are the impediments to the effective ADR system which are (i) lack of knowledge and awareness among the people; (ii) inadequate roles played by the legal professionals;(iii) absence of appropriate and institutional framework; (iv) absence of trained lawyers and judges regarding mediation;(v) negative impression among the lawyers regarding ADR; (vi) non-application of ADR in old cases under section 89A;(vii) mediation and arbitration are optional under C.P.C;(viii) in criminal cases non-inclusion of certain petty offences in the compounding provisions of the C.P.C;(ix) want of separate ADR legislation;(x) deep-rooted faith and mind sets in the traditional systems; and (xi) the community based ADR mechanism is weakened by endemic corruption, partisan, conflicting local politics, illiteracy etc.

CHAPTER-SEVEN

CONCLUSION AND RECOMMENDATION

7.1 Summary of Findings:

- **Unequal Bargaining Power** - In certain situations one side is able to dominate the other, for example, employment and divorce cases, making the courts a better option for a weak party.
- **Lack of Legal Expertise** - Where a dispute involves difficult legal points a mediator or arbitrator is unlikely to have the same legal expertise and knowledge as a judge.
- **No System of Precedent** - It isn't easy to predict the outcome of a dispute decided through ADR as there is no system of precedent.
- **Enforceability** - Most forms of ADR are not legally binding, making any award difficult to enforce.
- **A Court action may still be required** - If using ADR fails to resolve the parties' dispute, court action may still be needed. This adds to the costs and delays compared to taking a dispute direct to the courts in the first place.

7.2 Recommendations:

These impediments can be removed by the implementation of the following recommendations which will enhance the access to justice through the effective ADR mechanisms:

1. Various actors like the GOB ministries, the NGOs, the local government bodies, the media and other civil society can play an important role in promoting awareness, popularity and effectiveness of the ADR mechanism in Bangladesh.
2. The judiciary both civil and criminal may play an important role towards the effectiveness of the ADR.
3. For the performance of the activities of ADR a separate institutional framework should be developed and equipped with proper decorations.
4. Separate skilled and trained mediators should be appointed only for performing mediations.
5. Separate code can be enacted for the successful ADR in Bangladesh.
6. Establishment of separate mediation courts, for both civil and criminal matters, with jurisdictions is essential for the success of ADR.
7. Family Court Model of Pre-trial hearing should be inserted in all civil suits.

8. The limitation imposed by section 23 of the ArthaRinAdalatAin2003 must be removed.

9. To acquire success through ADR the attitude of lawyers and judges must be changed.

10. Legal aid must be given to the poor litigants. For this purpose the AingotoSohayotaProdanAin2000 must be amended.

11. Establishment of a statutory body entrusted with the responsibilities of policy formulating, planning, promoting and monitoring the overall ADR system of the country.

12. Considering the nature of the dispute the fee of the mediators, arbitrators and conciliator should be determined by the statute.

13. It is bare necessary to review sec. 345 of Cr.P.C1898 and the list of compounding offences must be enlarged.

14. In criminal cases ADR is applied only in some C.R cases, so provisions should be made so that the G.R cases can also be resolved through ADR.

15) Creating awareness about ADR

16) Spreading the success story of ADR

17) Encouraging NGOs to become involved in ADR

18) Involving the Bar Associations in ADR

19) Providing training for mediators

20) Matching Government and NGO efforts.

21) A. D. R. will have a-smooth transition if it is introduced on a pilot court basis. The performances, results, reactions among pilot court judges, practicing lawyers and the litigants should be carefully monitored and recorded and suitable adjustments in the A. D. R. project should be made at each stage of extension after an exhaustive study of the experiences 15. The mediation courts should be established in every Upazila/ Thana.

7.3 Conclusion

In the field of justice, Arbitration is the most effective process to solve Delay in Civil procedure is traditionally practiced in our country as like at the same time as denying due process of law. The result is that cases are piled up in all the courts hugely day by day. Basically, the Arbitration is the best practiced in civil courts. Our civil courts are governed by the Civil Procedure Code 1908 which was enacted during the British reign. But, after the independence, the government of Bangladesh had taken an attempt to accelerate the civil procedure system. The problem of delay in litigation including arrears of cases has been engaging the attention of the Law Commission for a long time and as a result of its recommendations made from time to time, reasonably wide changes have been made in the provisions of the Code in 1983 by making an Ordinance with a view to removing the causes of delay. Before such amendment Ordinance, there was no limitation to submit the court-fees and other relevant documents. But, by this Ordinance, the parties to a suit have to submit the proper court-fees with all relevant documents Within 21 days after issue of summons and the plaintiffs have to submit all documents at the time of institution of the suit to focus on the cause of action.

On the other hand, there was no specific time for examination of the defendants/witnesses and in framing of issues before such amendment. But, after promulgation of the Ordinance, no time is be allowed for examination of the. Defendants/witnesses after 2(two) months and the court is bound to frame the issues within 15 days after examination of the defendants/witness. However, by the blessing of this Ordinance, the court is also bound to give the judgment of a case within 127 days from the framing of issues. The second appeal shall be abolished, if so decided, judge of section 115 C.P.C.

Will be changed to substitute clauses (a)-(c) of section 115 by a- single clause: 'any error of law apparent on the face of the record.

Alternatively, if second appeal is intended to be retained, the Code shall be amended to include a provision requiring the Court to record in the Order sheet the ground or grounds on which the appeal is admitted and the hearing of the appeal shall be confined to hearing on those grounds only unless leave is obtained for compelling reasons to urge other grounds. There should be no second appeal in all money suits where the value of the subject-matter in dispute is five thousand taka or less unless question of title to immovable property is involved. There shall be no remand unless the Court thinks retrial on fresh evidence is necessary. The Court shall, as far as possible, dispose of the second appeal finally, if necessary by taking re-course to the provision of section 103 C.P.C. and Order 41, rule 27 by

taking additional affidavit evidence. In dismissing second appeal under 4, rule 11, the Court may not write a formal judgment. Letters Patent appeals arising from an appellate judgment if a single Judge should be abolished and that appeals of this kind should be retained only where the judgment or order of a single Judge of the High Court has been passed in the exercise of its original jurisdiction. The District Judge should be empowered to exercise provisional jurisdiction under section 115 of the Code to dispose of revision petitions arising out of cases in which appeals from final judgment would lie to him.

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