Sonargaon University (SU)

Research Monograph

On

"Application of ADR in Family Court: A Critical Analysis Under Legal Framework and Practice in Bangladesh"

Research Monograph Submitted for the partial fulfillment of the award of the degree

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LL.M (Master)

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Submitted To

Sharmin Jahan Runa

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Letter of Transmittal

To

Sharmin Jahan Runa

Assistant Professor & Head

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Subject: Submission of Research Monograph on ‘‘**Application of ADR in Family Court: A Critical Analysis Under Legal Framework and Practice in Bangladesh”**

Dear Sir,

This is a great pleasure to submit the Research Monograph on **“Application of ADR in Family Court: A Critical Analysis Under Legal Framework and Practice in Bangladesh”** as a partial requirement for the fulfillment of my LL.M course under the Department of Law of the Sonargaon University (SU).

I have given due efforts to make this Research Monograph as fruitful one and to make it as informative as possible. I hope that this paper will not be the formality of academic course completion rather it will be a source of information for other purpose on this topic.

Yours sincerely

.....

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Declaration

I do hereby declare that the Research Monograph Title **"Application of ADR in Family Court: A Critical Analysis Under Legal Framework and Practice in Bangladesh"** prepared solely by me and which has been submitted to the department of Law, Sonargaon University (SU) for achieving the LL.M (Master) Degree. This is an original work of nine. No part of this research, in any way of or in from, has been submitted to any University or Institution for any Degree, Diploma or for other similar purposes.

.....

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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 (SU).

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.

.....

Sharmin Jahan Runa

Assistant Professor & Head

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Acknowledgement

***In the name of Allah, the Beneficent, the Merciful".** Praise by Allah & thanks to Allah for patronizing me to finish this Research Monograph. I am very happy to finish it. It is a great Research of my life. It is a long cherished hope of my life to become a great lawyer. That's why I have admitted in the Department of Law in Sonargaon University (SU) to fulfill my dream. But through my whole study life in this field, I did not get much more opportunities to examine and show my knowledge and skill in this wide field. Lastly I have got a great chance to make my study meaningful when I got the chance to prepare a Research Monograph on **Application of ADR in Family Court: A Critical Analysis Under Legal Framework and Practice in Bangladesh.**

I acknowledge my grateful to respected course teacher **Sharmin Jahan Runa** for instructing me how to prepare a Research Monograph and his famous Books lectures on this subject help me to complete my task sincerely.

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Thank you

Shayela Akter

ABSTRACT

It is a great opportunity for me to write about this subject like ‘‘**Application of ADR in Family Court: A Critical Analysis Under Legal Framework and Practice in Bangladesh**’’ Whether Alternative Dispute Resolution is appropriate procedure to solve dispute in Family Court of Bangladesh.’’ 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 Family Court on easy way. Alternative Dispute Resolution (ADR) in Family Court 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 dissertation 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 legislation's 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 in Family Court towards the effective, on discriminative, speedy and easy access to justice for all either rich or poor, literate or illiterate, male or female and elite or lower class.

Keywords: ADR, Family Court, Case Study, Bangladesh.

TERMS OF ABBREVIATION

ADR	(Alternative Dispute Resolution
BDR	(Better Dispute Resolution)
BVC	(Bar Vocational Course)
CPC	(The code of civil procedure)
EDR	(Enhanced Dispute Resolution)
ISDLS	(Study and Development of Legal Systems)
JADR	(Judicially Assisted Dispute Resolution)
IDR	(Innovative Dispute Resolution)
ODR	(Online Dispute Resolution)

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Chapter One
General Introduction

1.1 Introduction

Alternative dispute resolution or ADR is an umbrella term used to describe a variety of methods for resolving disputes outside of traditional methods such as litigation. Sometimes the "A" in ADR is defined as "appropriate" rather than "alternative" as a way of indicating that ADR relates to finding the most fitting way to resolve disputes. Sometimes there is no "A" used and simply the phrase "dispute resolution" is used, as a way to indicate that all approaches to dispute resolution are potentially considered.[1] Whichever way the acronym is spelled out - alternative, appropriate, or just dispute resolution - the concept of ADR is based on expanding the tools available for resolving disputes.[2]

Beyond a simple grouping of approaches, ADR also is conceived of as an idea, a philosophy. For many proponents of ADR, using different approaches to conflict resolution has a meaning or a larger goal. For example, there are those who see the use of ADR as part of the effort to bring peace to the world or heal a damaged community. Many prize the potential for results of ADR processes that go beyond what a court can order. There are others who see it as a way to improve the equality of parties in dispute. Yet others value the potential economies of ADR processes for courts, parties and society. Certainly not all participants in ADR or even those who develop ADR programs would consciously avow such lofty concepts, but there is generally some under girding, though often unarticulated, set of beliefs, for any ADR effort.[3]

The Muslim family laws ordinance 1961, and the Muslim family laws rules 1961 this two is most sensitive law for the Muslim people. To solve the dispute arising out of this law is batter to solve outside the court. Because there are many personal and internal matter are involve in this family dispute. ADR give batter solution then court in this family matter.[4] Bangladesh, one of the poorest countries in the world, hosts an estimated population of

[1] Justice K M. Hasan, "A Report on Meditation in The Family Courts : Bangladesh Experience"(2001)) <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JusticeHasan.p df> accessed 1 May 2019 /
[2] *Ibid*
[3] *Ibid*
[4] <http://www.abanet.org/dispute/draftbrochure.pdf> accessed 2 May 2019

133.3 million, of which 33.7 per cent are reported as living below the national poverty line. Apart from evident deficiencies in food, housing, health care, education and job opportunities, endemic poverty of millions of Bangladeshis is manifest in their fundamental and legal rights which is precipitated by their lack of access to institutions established for the enforcement of those rights.[5]

Bangladesh judiciary is dead-locked in a various circle of delays and backlogs. Backlog of cases is a function of frustrating delay in the adjudicative process which is eating away our judiciary. While delay in judicial process causes backlog, swelling backlog, on its part puts tremendous pressure on current case; and vice versa. This process goes on endlessly with no apparent remedy in view; present rate of disposal of cases and accumulation of backlogs is alarming of justice, rule of law and economic development of the country.[6] But in recent year certain objective and subject factors have so combined as to lead our judiciary to a situation where its demerits are overpowering the merits, manifesting in crippling backlogs and delays. Delayed justice reduces even the winner of the litigation, for its costs in terms of time, money; energy and human emotion are too high.

Above conditions exits in a long win-loose battle where the parties fight in a 'do or die' manner with no or little perspective of any consensual settlement move coming from any corner which could steer the dispute to win-win resolution. Consequence frustration, desperation and costs become too clear the procedural blockages of our civil justice system, but with no apparent degree of success.[7] Before it is too late, innovation approaches are needed to live up to the uphill tasks of reconstructing our judiciary with refreshing vision. Refreshing version would be Alternative Dispute Resolution (that may apply shortly as ADR in next).

With the growth of civilization ADR as being the alternative to adjudicatory process of dispute resolution has acquired much importance. ADR is often designed as alternative to litigation, thereby including arbitration as a form of ADR. On the other side party because arbitration has become as well established as litigation, and partly because of the

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5 Sumaiya Kabir, 'Alternative Dispute Resolution: How It works in Bangladesh', *The Dhaka University Studies*, part-F, vol. 15(1), (June 2004), p. 59.

6 [www.AlternativeDisputeResolutionbyEarlyJudicialsystem.com I last visited on 23-5-2016]

7 *Ibid.*, p. 330.

increasing tendency ADR as alternative to litigation, arbitration and all other forms of adjudication.[8]

In practice the role of ADR in Bangladesh is not completely new. The non-government organizations are practicing ADR for a very long period. Recently in 2004 the Government of Bangladesh has amended the Code of Civil Procedure to include ADR process within the court system. The courts of Bangladesh are exercising ADR process under a World Bank Project. The litigation changes were intended to build on the success of the family law courts, better the bar, to promote early settlement of cases and reduce the backlog in the court.

According to former secretary general International Center for Alternative Dispute Resolution, Me.P.C.Rao, "the ADR procedure consist of negotiation, conciliation, mediation, arbitration and any arrangement of hybrid procedures, including mediation and last offer arbitration, mini trial, med-arb and neutral evolution."[9]

ADR - "A process of dispute settlement outside the formal judicial system where the parties represent themselves personally or through their representatives and try to resolve the dispute through a process of mutual compromise."

1.2 Scope and objective of the study

The specific objective of the study can be illustrated as follows:

1. To identify the way of settling disputes in relative to "Family Court"settlement alternatives.
2. To show the challenges to remove long backlog of court cases through initiating theADR in familyprocess as a statutory binding procedure.

1.3 Research Question

Application of ADR in Family Court: A Critical Analysis Under Legal Framework and Practice in Bangladesh?

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[8] [http://ruchichowdhury.tripod.com/a_possible_way_out_of_backlog_in_our_judiciary.htm; I last visited in 24.5.2016]

[9] Alamgir Muhmmad Serajuddin,'Judicial Activism and Family law in Bangladesh' *Asiatic Society Journals of Law*, vol. 3 (June 2010). p. 62.

1.4 Methodology of the study

This is a document review type of study based on available information. It is exploratory in nature and based on qualitative approach. Survey method for collecting data and information are also used in this study. The key information were taken from the Internet and many books, journal also. Statutory law also followed to complete the topic of alternative dispute resolution. Secondary sources as well as quantities method will be applied to analyze the information to write this study.This study mainly relied on secondary data published in research studies. Social responses are also been used for identifying problems and solutions for this study.

1.5 Limitation of the study

This study was greatly held back as there is massive lacking of information on this issue. Information was inadequate. Especially the government agencies like lower court; statistics has a lack of tendency to update information regularly and still using the conventional or manual system for information storing and supply. These are a great malfunctioning and contradiction among supplied data from govt. agencies. On the other hand they are not interested for sharing their information related that is necessary for this research work.

1.6 Literature Review

I have read ADR a mechanism to get quick justice system and cheapest way written by **Md. Rustom Ali,** ADR in conciliation choice. The literature review was based on both secondary and primary sources. While data collected through questionnaire survey have been used as primary sources; books, journals and other published works have been adopted as secondary sources. There are various writers discussed on dissolution of Muslim Marriage in various ways, like- **Samad, Md. Atickus,** A Text Book on ADR & Legal Aid discussed about historical background of ADR in Bangladesh, Mechanism, advantage and disadvantage of ADR, History of foreign country. **KhairSumaiya**, Legal Empowerment for the Poor & the Disadvantage: Strategies Achievements and Challenges and concept of ADR, different types of ADR in BD. **Halim Md Abdul**, ADR in Bangladesh: Issues and Challenges discussed Access to Justice ADR, ADR Concept and Types, Hybrid ARE Modes, History of ADR Process, ADR under different laws.

This book writer **Obaidul Huq Chowdhury**,[10] book contains different aspects of Family Courts Ordinance 1985.This book discuss very brief**. Dr. Jamila A. Chowdhury** Women's Access to Justice in Bangladesh through ADR in Family Disputes; It writes down the section of the Family Courts Ordinance 1985 and analyze with some case reference.

The above writers discussed Md. **Khairul Islam (Dec 2015)[11]** the study concentrates on the Court Based Alternative Dispute Resolution (ADR) as a special form of ADR in Bangladesh.**David H.(2011)[12]** Explained the background of Alternative dispute resolution (ADR) refers to techniques used to resolve conflicts without going to the courtroom **Professor A. A. M. Moniruzzaman,[13]** This book analyzes the historical base of Muslim family laws. It did not give the clear concept of the family court law. but all of this books the topics ADR is not clear. So, I have lot of work about ADR.

1.7 Chapter Outline

The projected structure \ chapter outline of this dissertation will be as following:

Chapter 1: General Introduction.Introduction.Scope and objective of the study1.3 Research Question,Methodology of the study, Limitation of the study, Literature Review, Chapter Outline.

Chapter 2: General Concept on ADR,Introduction

Definition of ADR ,Object of the ADR ,Advantages of ADR ,Disadvantages of ADR

ADR in Bangladesh ,Conclusion .

Chapter 3: Alternative Dispute Resolution in Bangladesh.Different types of ADR in Bangladesh, Formal ADR in Bangladesh, Informal ADR in Bangladesh, Some problem of ADR in our country, Conclusion.

Chapter 4: Laws and Practice Regarding ADR in Family Court.Introduction ,Modes of dispute resolution ADR in Family Matters ,ADR under Muslim Family Laws ordinance 1961,The ADR mechanism under the family courts ordinance, 1985, The purposes of

[10] Obaudull Huq Chowdhury , *Hand book of Muslim Family Laws*, (6th edn, Eshraul Haque Chawdhury 2012) pages 18-80

[11] Md. Khairul Islam, "Critical Review of the Court Based ADR in Bangladesh: Prospects and Challenges" (2015) <http://www.iosrjournals.org/iosr-jhss/papers/Vol20-issue12/Version4/F0201244555.pdf> accessed on 9 May 2019

[12] David H, "Earlyapology, mediation, and arbitration in the medical arena" (2011) <https://www.researchgate.net/publication/263040092_David_H_2011_Keynote_Overcoming_the_gender_gap_in_math_science_and_technology_A_21st_century_view_In_AN_Nosike_S_Nelasco_NS_Oguzor_LM_Csorba_JO_Opara_SM_Alredaisy_eds_Proceedings_of_the_1st_Technology> accessed on 8 May 2019

[13] Professor A. A. M, Moniruzzaman, *Islamic Jurisprudence and Muslim Ain*, (2nd edn, Shams Publication 2002) pages 20-40

dispute resolution Of ADR in Family Issues, ,Importance of ADR in family court of Bangladesh,Relevant cases relating ADR in Bangladesh , Conclusion .

Chapter 5: Findings and Recommendations.Finding, Recommendations, Suggestion for ADR to make more effective, Concluding Remark.

Chapter-Two

General Concept on Alternative Dispute Resolution (ADR)

2.1 Definition of ADR

For hundreds of years clients, judges, and lawyers have complained about the cost, inefficiency, acrimony, and risk of litigation. Everyone involved with civil litigation realizes its harmful side effects, but until recently no one has done much about it. The time for change is upon us.

Historically, lawyers were trained exclusively in the adversarial method. The adversarial system of jurisprudence is based on the concept that justice will emerge best if competing parties, represented by lawyers, present their admittedly biased version of a case to a judge or jury. The evidence is then subjected to the vital process of cross-examination in which each side has the opportunity to expose the flaws in an opponent's position. In fact, the system works quite well in some cases, particularly when cost and relationships between opponents is not a major concern. In many cases, however, the cost of litigation is prohibitive, the fighting and acrimony inherent in the process destroys relationships that otherwise could be preserved, and the complexity of litigation has caused overloaded court caseloads and major delays.[14]

ADR is flourishing through the world because it has proven itself, in multiple ways, to be a better way to resolve disputes. The search for efficient and better ways to resolve disputes, and the art of managing conflicts, are as old as humanity itself, yet it has only been within the last thirty years or so that ADR as a movement has begun to embraced enthusiastically by the legal system.[15] Prof. Dr. Mizanur Rahman in his article *Alternative Dispute Resolution* commented that, 'these are based on the strong belief that laws are not appropriate way to regulate daily life and hence should only play a secondary role'.[16] ADR is not a new process for resolving a civil suit in our system of civil adjudication. Resolutions are based on principles and terms those are determined to be equitable for

[14] http://www.abanet.org/dispute/draftbrochure.pdf

[15] Naima Haider, 'Dispute Settlement Mechanisms in International Contracts' Bangladesh Journal of Law. vol. 7 (1&2) (2003) p. 25.

[16] Mizanur Rahman. 'Alternative Dispute Resolution' (Human Rights Summer School Manual, 2007) p. 148.

each particular case rather than uniformly applied legal standards.[17] Each case is decided by a third party or negotiated between disputants themselves, based on principles and terms those seem equitable in the particular case, rather than on uniformly applied legal standards. ADR systems cannot be expected to established legal precedent or implement changes in legal or social norms.[18] Flexibility and discretion should prevail in ADR processes even when simplicity may demand detail complexity. ADR must be free of the procedural stuff of certainty and predictability to perform its opposite role in the administration of justice through dual systems.[19]

In view of that ADR has come as an injection of consensual system into adversarial system to get rid of fear of delay or costs. ADR is thus playing a role to resolve the cases in low cost and time. People are getting more interest to settle the dispute through ADR. A sea change has occurred in the field of civil dispute resolution in resolving dispute through mediation.[20]

There is no law that exclusively deals with ADR but its reference in some laws put it on solid ground from which we can reasonably infer its recognition as a form of resolving legal dispute. Therefore, ADR is also the part of rule of law and statute law where judges and lawyers are being engaged for amicable settlement. ADR proceedings are being a court directed proceeding, whether the litigants go for ADR system or adversarial system, they can apply their will. So as the rule of law means the supremacy of law and ensuring the application of natural justice. The nature of ADR is not hostile to the rule of law and ultimately provides justice by the parties' consensual consent. "It urges that those who advocate the use of ADR as part of international rule of law projects have instinctively and naturally recognized that ADR can potentially be supportive of justice in ways that litigation cannot afford thereof".[21]

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17 [http://www.asiaticsociety.org.bd/journals/June_2010/contents/03_Alamgir%20Muhammad%20Serajuddin.htm, Last visited on 29/05/2016].

18 *Ibid.*, p. 21.

19 [http://www.c-s-p.org/Flyers/978-1-4438-2733-1-sample.pdf, Last visited on 22/05/2016].

20 Mohammad Rustam Ali, '*ADR a mechanism to get quick justice in easy and cheapest way*' 1st Ed. (Dhaka: Shajib Law Books, 2009) p. 17.

21 [http://www.banglapedia.org/httpdocs/HT/J_0127.HTM, Last visited on 23/05/2016].

Nature of the cases solved through Alternative Dispute Resolution (ADR)

Legislation on ADR permits ADR on the following matters: All kinds of civil suits under the Code of Civil Procedure;

i. Criminal Cases mentioned in the schedule, solution of which are possible through compromise, with the permission of the court;
ii. Disputes under the Family Law (dower, custody of the child, maintenance, restitution of conjugal life etc.);
iii. Land dispute (especially regarding Baina Nama for sale or partition suit, because where the suit is complicated and both the parties have documents and chance of success.);
iv. Disputes regarding house rent;
v. Commercial dispute (where there is a dispute settlement clause in itself the parties prefer to resolve the dispute through arbitrator of their choice, instead of seeking court's help.);
vi. Dispute that comes under the provisions of Artha Rin Adalat Ain 2003.
vii. Some cases under the Dispute Settlement (City Corporation Area) Board Law, 2004, Act no.XII of 2004.

One thing must keep in mind that the issues mentioned above are not dealt with by the court. In few cases the court are empowered to use ADR and in some it has authority to permit individuals to settle the conflict through ADR. In reality most of the family suits resolved by the court using ADR. That is though the number of ADR cases have been increased it is yet to address all the issues which are capable of being resolved through ADR.[22]

Sophisticated parties, particularly corporations that may experience a great deal of litigation, now realize the huge costs involved in the adversarial process. To reduce time, money, and exposure to a litigious atmosphere, people are looking for alternatives to the traditional approach. The purpose of this chapter is to help business decision makers understand the current status of alternatives to litigation. In the modern civil litigation

[22] Shima Zaman, Chandra Mandal, Sayed Masud Reza and Dalal, Polash Kumar. *Existing ADR framework in Bangladesh*, Human Rights: sixty years after UDHR, ed Mizanur Rahman (Dhaka: Summer School Manual by ELCOP and palal prokashoni, 2008), p. 265.

environment, the knowledgeable decision maker can and must insist on using options that have the potential to reduce some of the present problems of litigation.[23]

Alternative Dispute Resolution (ADR) has interested a great deal of observation as a method of loss both the financial and sentimental costs of litigation. It appears that simply moving cases from the courts, and away from the adversarial process, allows some cases to be resolved accelerated and to the greater contentment of the parties.[24]

Dispute arises when interest of more than one-person conflict with each other[25]. Disputes are a reality of life. In order to resolve this universal problem, different countries have introduced various methods in their legal system in the form of Alternative Dispute Resolution (ADR), which is not meant to be a replacement for judgment but a completing mechanism to reduce the work-load or pressure on the courts. Sit does not also mean that the use of ADR is in some way 'second-best' to going to court.[26] Mr. Justice Mustafa Kamal said that the ADR thus: "The freshness of ADR is the motive behind its interest. The purpose of alternative dispute resolution is not to alternative consensual disposal for adversarial disposal or to abolish or disappoint informal.[27]

The specific term Alternative Dispute Resolution (ADR) is a real, useful and traditional way of outside court justice system, saves time and money, uses general common sense of the common people of the society with the direction of the experts, respects society beliefs & values, acts to preserve peace and conformity among the parties, resolves disputes with support of neutral persons, involves with a limit of processes like negotiation, mediation, arbitration, conciliation, ombudsman or even malpractice screening panel as appropriate; and creates an innovative measure in legal profession for better usefulness of the over-all justice delivery system.[28]

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[23] Md Akhteruszanian, *'Concept and Laws on Alternative Dispute Resolution and Legal Aid*, (3rdedn, Shams Publication 2007) pages 15-30

[24] Md. Abdul Halim, *ADR in Bangladesh: Issue and Challenges*, (1st edn, CCB Foundation, Dhaka, Bangladesh 2010) pages 10-30

[25] Book on ADR by SK. Golam Mahbub

[26] *Ibid*

[27] Mustafa kamal; paper read at Third working session of the conference of Alternative Dispute Resolution. New Delhi and High Court in Bombay on 20th and 21st November 2004

[28] http://bila-bd.com/link%20pages/research_view.php? rid=1

Mr. Justice Mustafa Kamal, Former Chief Justice of Bangladesh described ADR in a workshop,[29] as: 'The newness of ADR is the purpose behind its adoption. The purpose of alternative dispute resolution is not a substitute consensual disposal for adversarial disposal or to abolish or discourage informal mediation or arbitration outside the courts, but to make alternative dispute resolution a part and parcel of the formal legal system, preserving the trial court's statutory authority and jurisdiction to try the case should ADR fail'.[30]

ADR today shower into two main categories: court-annexed options and community-based dispute resolution mechanisms. Court-annexed ADR includes mediation/ settlement— the fresh system where a neutral third party assists disputants in reaching a mutually acceptable solution—as well as transform of early neutral evaluation, a short jury trial, a mini-trial, and other techniques. Supporters argue that such methods decrease the cost and time of litigation, improving access to justice and reducing court backlog, while at the same time preserving important social relationships for disputants.[31]

2.3 Object of the ADR

Object of ADR to solved the dispute outside the court and reduce huge number of the case from the court system. The causes of backlog and delay in our country are systemic and profound. The legal system's failing to offer the necessary discipline at different period of trial of cases allows dilatory practice to protract the case life. As a result, the current backlog and lateness problem in our country has reached such a proportion that it effectively denies the rights of citizens to remedy their grievance.

Alternative Dispute Resolution (ADR) has attracted a great deal of attention as a method of reducing both the financial and sentimental costs of litigation. It appears that simply moving cases from the courts, and away from the adversarial process, allows some cases to be resolved quicker and to the greater satisfaction of the parties.

[29] Organized by the British Council on 7th and 8th March 2004
[30] *Ibid*
[31] http://bila-bd.com/link%20pages/research_view.php? rid=1

2.4 Advantages of ADR

There are some potential advantages of using ADR. Such as:

1. Save time: A dispute often can be settled or decided much sooner with ADR, often in a matter, even weeks, while bringing a lawsuit to trial can take a year or more[32]

2. **Save money:** In case of ADR parties save money because parties do not pay court fees, expert fees, attorney fees[33]

3. Preserve Relationship: ADR can be a less adversarial and hostile way to resolve a dispute,

4. Increase satisfaction: In a trial, there is typically a winner and a loser. But in a ADR both parties are win and achieve their real goal[34]

2.5 Disadvantages of ADR

THE disadvantages of ADR are given below:

1. **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.
2. **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.
3. **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.[35]
4. **Enforceability** - Most forms of ADR are not legally binding, making any award difficult to enforce.
5. **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.[36]
6. **No guaranteed resolution-** There is no guaranteed resolution. With the exception of arbitration, alternative dispute resolution processes do not always lead to a resolution. [37]

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[32] *Why ADR*Dhaka:Law Care Bangladesh,2012 Accessed On 24.1.2015
[33] *Ibid*
[34] *Supra note*-11
[35] Sumaiya Khair, "*Legal Empowerment for the Poor and disadvantaged: Strategies, achievement and Challenges"* (1st edn, The Dhaka University Press Limited UPL 2008) pages 18-33
[36] *Ibid*

2.6 ADR in Bangladesh

In Bangladesh there are many laws for end the dispute outside the court. The government of Bangladesh wants to make settle the dispute outside the court.For that reason they passed many laws, which make end the suit outside the court.[38]

These laws are given below. ADR under

1. The Muslim Family Laws Ordinance, 1961;
2. The Family Courts Ordinance, 1985; Section 10 before taking evidence ,Section 13 after taking evidence ,
3. The Code of Civil Procedure, 1908;Section 89A Mediation ,Section 89B Arbitration ,Section 89C Mediation in Appeal,
4. The Code of Criminal Procedure, 1908;
5. The ArthaRinAdalatAin, 2003;Section 21 Settlement Conference ,Section 22 Arbitration ,
6. The Arbitration Act, 2001;
7. The Bangladesh Labour Act, 2006;
8. The Conciliation of Dispute (Municipal Area) Board Act, 2004;
9. The Village Court Act, 2006.

Alternative dispute resolution (ADR) includes dispute resolution method and procedure that decline outside of the government judicial system. Despite historic resistance to ADR by both parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In information, whatever courts now claim some parties to support to ADR of few type, generally mediation, before approving the parties cases to be tried. The growing popularity of ADR can be narrated by the rising caseload of primary courts, the perception that ADR imposes less expense than litigation, a preference for secretly, and the intention of few parties to have large control above the selection of the separate or individuals who desire decide their dispute.

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[37] Metropolis The Bangladesh Today, source <http://www.Metropolish2O%2020The'20Bangladesh%2OToday.htm> accessed on 28.12.08.

[38] Md Akhteruszanian , "*Concept and Laws on Alternative Dispute Resolution and Legal Aid*" (3rdedn, Shams Publication 2007)

Chapter Three

Alternative Dispute Resolution in Bangladesh

3.1 Different types of ADR in Bangladesh

Sumaiya Khair suggests that there are three streams of ADR in Bangladesh.

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

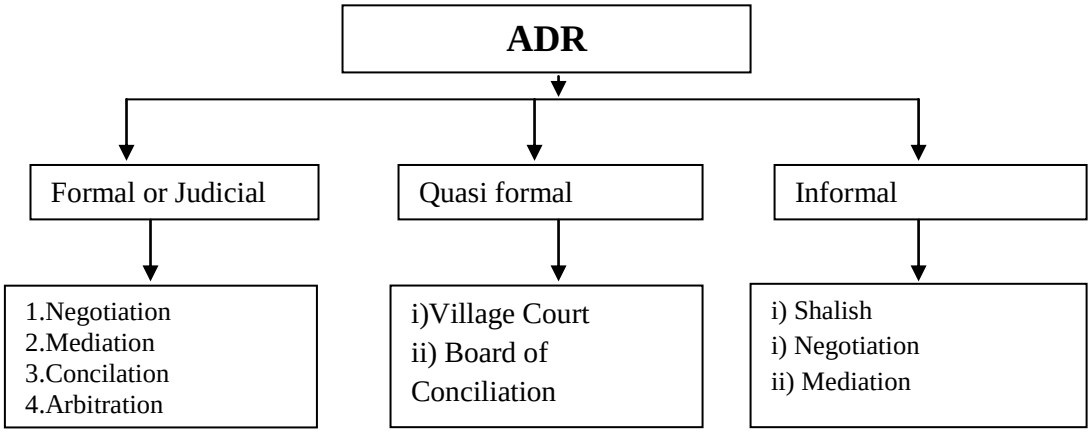
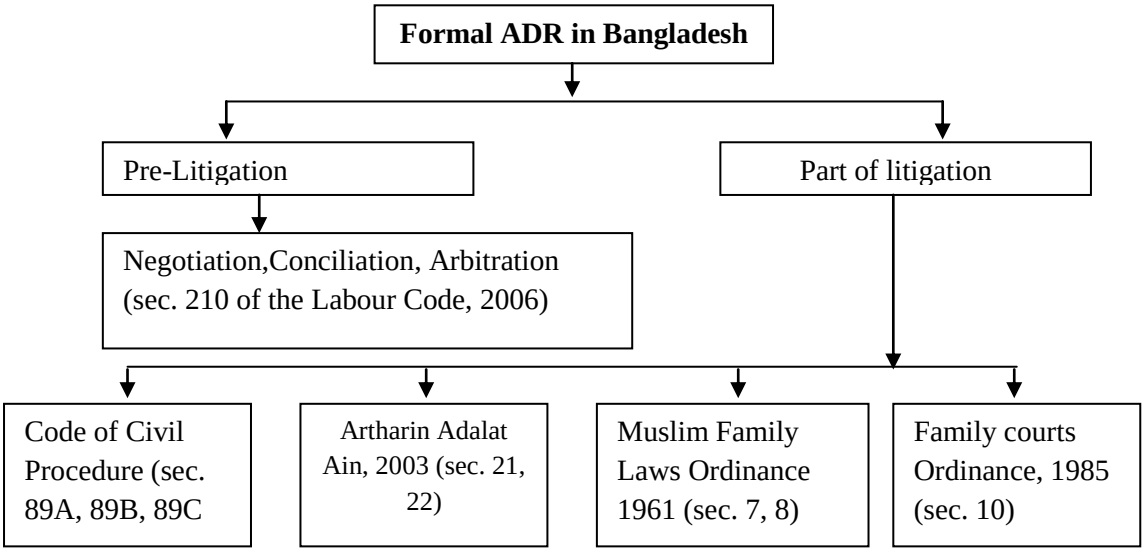


Fig: Classification of ADR[39]

3.2 Formal ADR in Bangladesh

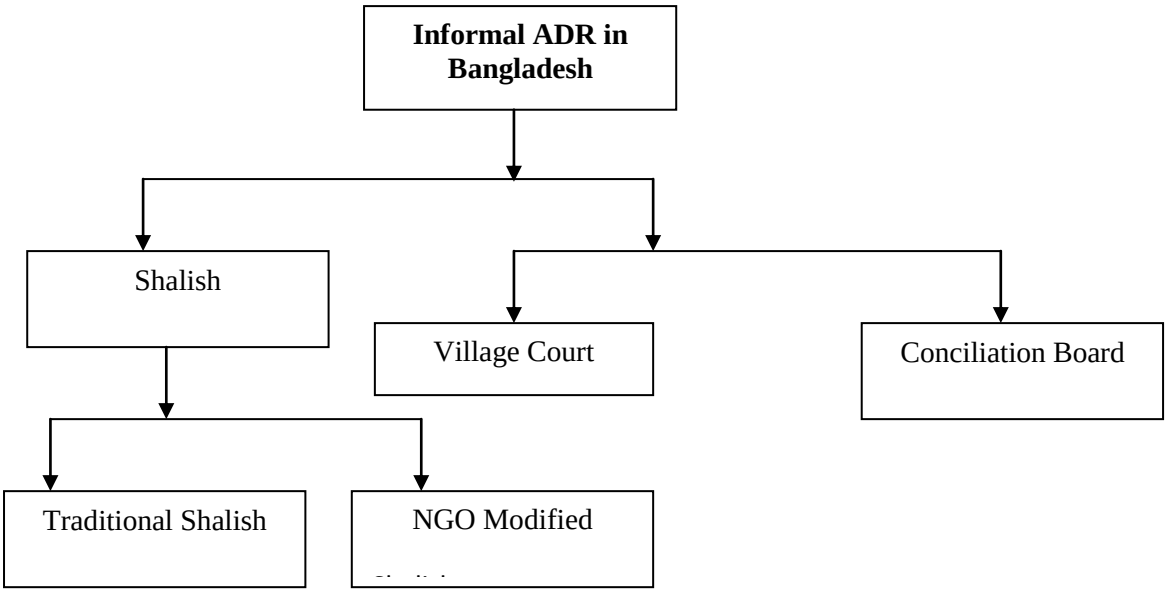
All these ADR modes have been discussed in different chapters in this book with their merits and demerits. Formal ADR in different laws are shown in the diagram below:[40]



[39] Halim, A. *ADR in Bangladesh: issue and Challenge*. Dhaka:(CCB Foundation.)
Zaman, A. " *Alternative Dispute Resolution concept and law and legal aid Law*." Dhaka
[40]http://www.abanet.org/dispute/draftbrochure.pdf

3.3 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 has originated from the informal shalishsystem and this is why they all have been shown in the following single diagram.[41]



3.4 Some problem of ADR in our country

1. Injustice
2. Lack of Knowledge.
3. ADR Procedure does not codify as others procedural Law.
4. Lack impartial third party facilitator – The third party neutral, the mediator, is the person who makes the entire process work. As long as there is a neutral facilitator, the parties can trust that they have some safety and are not being abused by an interested party. All of these programs work because the mediator in them is known to either be neutral or supportive of the parties and not an involved party.
5. Third party who protects the integrity of the proceedings.
6. Good faith from the participants.
7. The presence of the parties.
8. An appropriate site or venue.

[41] *Ibid*

The court, by adjourning the hearing mediate in order to settle of dispute or disputes in the suit, or

Refer the dispute or disputes in the said suit to the engaged pleaders of the parties, or to the party or parties, where no pleader or pleaders have been or parties, where no pleader or pleaders have been or parties, where no pleader or Refer to a mediator from the panel as may be prepared by the District Judge under sub-section (10) or any other person for undertaking efforts for settlement through mediation.[42] Provided that, nothing in this sub-section shall be deemed to prohibit appointment or more than one person to act as mediator or a person holding an office of profit in the service of the Republic shall not be eligible for appointment as mediator.

Within ten days from the date of reference under sub- section (1), the parties shall inform the Court in waiting as to whether they have agreed to try to settle she dispute or disputes in the suit by mediation and whom they have appointed as mediator, family which the reference under sub-section (10) will stand cancelled and the suit shall be proceeded with for hearing by the Court; and should the parties in from the Court about their agreement to try to settle the dispute or disputes in the suit through mediation and appointment of mediator as aforesaid, the mediation shall be concluded within 60 (sixty) days from the day on which the Court is so informed, unless the Court of its own motion or upon a joint prayer of the parties, extends the time for a further period of not exceeding 30 (thirty) days.[43]

The proceedings of mediation under this section shall be confidential and any communication made, evidence adduced, admission, statement or comment made and conversation held between the parties, their pleaders, representatives and the mediator, shall be deemed privileged and shall not be referred to and admissible un evidence in any subsequent hearing of the same suit or any other proceeding.[44] Sub-section (9) when a mediation initiative led by the Court itself fails to resolve the dispute or disputes in the suit, the same Court shall not hear the suit, if the Court continues to be presided by the same judge who led the mediation initiative; and in that instance, the suit shall be heard by another Court of competent jurisdiction.

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[42] *The Code of Civil Procedure Amendment Act, 2003*, s. 89A (3).

[43] *Ibid.,* s. 89A (4).

[44] *Ibid*., s. 89A (8).

It has already been mentioned that there are a number of different voluntary ADR processes. Some processes are better suited to the needs of some cases or litigants than others. Adjudication, arbitration, mediation, negotiation are all mechanisms for resolving and settling disputes or as described by Carnevale& Pruitt "dealing with opposing preferences".[45] Marian Liebmann explains that in general, dispute settlement processes range from the least intervention (negotiation) to the most intervention (litigation).ADR techniques have been used successfully in a variety of disputes involving individuals, small and large businesses, government, and the general public. Various types of ADR processes are available depending on the nature of the dispute. Many types of conflict often lend themselves to an alternative and informal method of dispute resolution.

[45] Carnevale, P. J & Pruitt, D, Negotiation and mediation: annual Review of Psychology,43,531-582(1992)

Chapter Four

Laws and Practice Regarding ADR in Family Court

All matters relating to family laws are given due focus stressing on the humane aspects. Problems relating to marriage, divorce, dower, maintenance, custody of child, inheritance etc. are solved through negotiation, arbitration, conciliation proceedings, and in the last resort, by applying to the family court. There are a considerable number of cases dealing with expatriate Bangladeshi families. The Firm has expertise and experience on matters relating to Bangladeshi minorities residing overseas.[46]

4.1 Modes of dispute resolution ADR in Family Matters

Generally we can initiate dispute resolution in two ways:

- By peaceful means,
- By use of form.

The first implies using alternative Wave such as dialogue, negotiation or third party intervention instead of using force or aggressive a measures to resolve a dispute.[47]

The second implies that a powerful third party uses forces, not necessarily physical force, but aggressive persuasion to create social or structural pressure and influence on the parties to resolve existing disputes. The third party might have some interest, but not on the dispute itself. The third party works as a pressure factor and may not be neutral. However it is not uncommon for disputes resolved this way to reemerge in the future.[48]

4.2 ADR under Muslim Family Laws ordinance 1961

The Muslim Family Laws Ordinance, 1961 provided equal opportunity to women to dissolve marriages extra-judicially (without the intervention of the court). It sponsored the idea of reconciliation in the case of divorce by either spouse in accordance with the spirit of the Quran and Sunna. The Chairmen (elected member) of the City Corporation or Union Parishads(Administrative council at local level) are empowered to affect the

[46] http://www.sahmedassociates.com/practice.html
[47] *Family laws Ordinance* -1985 sec. 63
[48] Session on '*Mediation on Family Disputes'* as resource person in 26th Foundation training course for the newly appointed Assistant Judges conducted under Judicial Administration Training Institute, Dhaka; April 2013.

procedure of reconciliation before the disputants after its process is initiated by service of notice. The purpose of notice of talaqto be served upon the Chairmen of Union Parisadand the wife is to prevent hasty dissolution of marriage or offer a second chance to the disputants, which is beneficial to both the parties in the event reconciliation is effected. When the due service of notice is satisfactorily established the talaqin the event of failure of reconciliation becomes effective after the expiry of 90 days from the date of service of notice under section 7 of the Muslim Family Laws Ordinance, l961 Section 7 introduced a single method of dissolving marriages and considered all talaqby the husband as single revocable talaq[49]. Section 8 provided that the wife, who wished to dissolve her marriage, could follow the procedural law in the same way as the husband.

This was affirmed in the judgment in HefzurRhaman's case in which the judgment of the court was given by Mr. Justice Mustafa Kamal:[50]

When a divorce proceeds from the husband, it is called talaq, when effected by mutual consent, it is called Khula or Mubara'at, according as the terms are. The Muslim Family Laws Ordinance, 1961 has given statutory recognition to a wife's .right of divorce (Talaq-i-tafwez) in exercise of her delegated power to divorce, as also to dissolution of marriage otherwise than by talaq. There are different modes of talaqaccording as the pronouncement of talaqis by husband. In the case of Talaq Ahsan (most proper), a single pronouncement is made during a tuhr(period between menstruation) followed by abstinence from the sexual intercourse up to three following menstruations, at the end of which talaqbecomes absolute. In the case of Talaqtasan(proper), three pronouncements are made during successive tuhrs, there being no sexual intercourse during any of the following three tuhrs. In the case of Talak-ul-bidaator Talak-i-badai(which is popularly called Bain talaqin Bangladesh), either three pronouncements are made during a single tuhrsin one sentence or three separate sentences or a single pronouncement is made during a tuhrsclearly indicating an intention to dissolve the marriage irrevocably. This from of talaqis not recognized by the Shafiand ShiaSchools of thought, but the Muslim

[49] *Parveen Sultana (Mosanisnat) vs Md Enamul Haque*, 7 MLR 2002 (HC) Vol- Mustafa kamal; paper read at Third working session of *the conference of Alternative Dispute Resolution*. New Delhi and High Court in Bombay on 20th and 21st November 2004 WI, 451.
[50] *Ibid*

Family Laws Ordinance, 1961 recognizes "pronouncement of talaqin any form whatsoever"[51]

The procedure makes it incumbent upon the husband to send notice of talaqto the Chairman of the Union Parishad.The Chairman must take all steps necessary to bring about reconciliation between the spouses. The divorce will, if not revoked earlier expressly or by conduct (as a result of reconciliation brought about by the Union Parishador otherwise) be effective only after the expiry of ninety days from the date of the notice, or if the wife is pregnant after the pregnancy ends, whichever period is longer. If and when a divorce becomes effective, the parties may remarry each other without intervening marriage, i.e., hila except in the case of a third divorce. Section 7(3) if the Ordinance provides that talaqwill not be effective until the expiry of 90 days from the receipt of notice by the Chairman. Failure on the part of the husband to give notice or his abstention from giving notice to Chairman connected should perhaps be deemed, in view of section 7, as if he has revoked the pronouncement of talaq.[52]

4.3 The ADR mechanism under the family courts ordinance, 1985

According to section-5 of the Family Courts Ordinance, 1985 we know that the Jurisdiction of the Muslim Family Courts. Muslim Family Laws deals with the family matter of like Divorce, Talaq, Maintenance, Restitution of Conjugal Rights, Dower Guardianship and Child Custody etc.

Without the intervening of the Court and Built in Conciliation in Family Court Proceedings:

Divorce is the most detestable thing in Islam, nevertheless these do happen and Chairmen of Union Parishadoften receive notice of divorce. The provisions of sections 7 and 8 of the Muslim Family Laws Ordinance, 1961 enable the Chairmen to make conciliation between the disputant parties without the intervention of the court. The Family Courts Ordinance, 1985 also provides for conciliation between the disputants in the midst of the court proceedings but these statutory provisions have not been so far properly understood and practiced. The intention of these statutory provisions is to maintain harmony with the spirit of Quranic sanctions relating to divorce. This article focuses on conciliation

[51] *Hefzur Rhaman's* case
[52] *Syecl Ali Newaz Gardezi Vs Lt Col Md Yusuf* (1963) 15 DLR SC.

facilities and the process of its proper utilization through the creation of right-awareness among the disputants, the Chairmen of Union Parishadand Family Court Judges.[53]

4.4 The purposes of dispute resolution Of ADR in Family Issues

The ultimate objectives, of dispute resolution are to produce amicable settlement between the conflicting parties.However the purposes can be epitomized as the following heads:[54] to diagnose the root causes of disputes, to transform actual and potential disputes into peaceful and Positive processes, to change violent behavior and hostile attitudes.

4.5 Importance of ADR in family court of Bangladesh

The civil court started mediation in non-family dispute since the 1 July 2003.a survey shows that after the introduction of the provision of mediation in the civil justice system as of 31 July 2004, 3432 non-family litigation have been disposed of by using this mechanism. In money loan cases the loan court has disposed of 13157 cases from 1 May 2003 to 31 July 2004. During this period the money loan court have realize Tk 996 crores and 5 Lakhs from the defendants and handed over the same to the plaintiffs who are mainly banks and finance institution. It is found that this realization is 10 times higher than the realization by execution cases over the last 10 years[55]. Mr. Justice Mustafa Kamal conclude that "the wind is blowing in the right direction .ADR is catching up the peoples imagination"[56].

The Muslim family laws ordinance 1961, and the Muslim family laws rules 1961 this two is most sensitive law for the Muslim people. To solve the dispute arising out of this law is batter to solve outside the court. Because there are many personal and internal matter are involve in this family dispute. ADR give batter solution then court in this family matter.[57]

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[53] Bottomley, Anne, 1984, "Resolving Family Dispute: A Critical View", Freeman, M. D. (ed.) The State, The Law and The Family: Critical Perspectives, Tranistock, London pp. 293-301

[54] Family laws Ordinance -1985 sec. 10, 13 ,14

[55] Mustafa kamal ;paper read at Third working session of the conference of Alternative Dispute Resolution. New Delhi and High Court in Bombay on 20th and 21st November 2004

[56] *Ibid*

[57] Legal content last updated: September 2006 http://www.legalaid.wa.gov.au/LAServices/aspx/default.aspx?Page=Applying/Law.xml accessed 9 May 2019

They were also told that as Family Court judges they shall have to perform mediation as and when a case is assigned to them. The cases involving family matters are first filed in the court of the Assistant judges with territorial jurisdiction. After issuance of summons, the District Judge transfers the cases to mediation court under Section 24 of the Code of Civil Procedure. Section 24 provides that the District judge on the application of the parties or of his own motion may transfer any suit for trial or disposal to any court subordinate to it and competent to try and dispose of the same.

4.6 Relevant cases relating ADR in Bangladesh

(1) *Abdul Aziz vs ReziaKhatoon*21 DLR (1969) 733.

In the case *Abdul Aziz vs ReziaKhatoon*,[58]it was held the non-compliance with the provisions of section 7(1) makes talaqlegally ineffective. However, very recently the Appellate Division of the Supreme Court of Bangladesh in apparent contradiction to section 7 of the Ordinance held:

The petitioner husband divorced his wife by swearing an affidavit before Magistrate and accordingly sent the copy thereof to the NikahRegister in whose office the divorce was registered as required under section 6 of the Act, 1974 and the marriage tie is in consequence stands dissolved and as such he wife is entitled to the payment of entire, dower, both prompt and deferred. He cannot take the advantage of his own wrong in respect of no service of notice to the Chairman as required under section 7 (1) of the Ordinance l961[59].

(2) *Muhammad Amin vs Surrava Begum1969* [60] *and Muhammad Ishaque vs Ahsan Ahmed*1975 [61]

In one case it was held that it is not necessary to inform the Chairman Union Parisad after the court has granted a decree under section 2(u) of the Act of 1939 on the basis of the option of puberty[62]. But in another case the Lahore Court of Pakistan had dealt with the question extensively and held that after the decree for dissolution has been made by the family court, that court must send a copy of the decree to the Chairman. At the same time it is necessary for the wife, in whose favor the decree is passed, to independently inform

[58] 21 DLR (1969) 733
[59] *Ibid*
[60] 1969 21 DLR 253
[61] 1975 PLD Lah 1118
[62] The Dhaka University Studies, Part-F Vol. XII (1); June-2001 p-4

the Chairman about the decree, and also to send a notice thereof to the husband. An issue rose before the honorable learned court was the effectiveness of the decree of the dissolution of the marriage after a successful reconciliation. The honorable court held that in an instance of total successful conciliation, the decree shall be deemed to have been abandoned by the wife. The conciliation will have the effect of compromise and thus avoidance of the decree. In other words the decree shall have no effect if within the specified period the reconciliation has been effected between the parties in accordance with the provisions of the Family Laws Ordinance and rules made there under[63].

The Pakistan Court of Baghdad-ul-Jahid held that as a result of the promulgation of the Muslim Family Laws Ordinance of 1961 reference to Arbitration Council has become a pre-condition for applying to a family court for dissolution of marriage by khula. It further held that khulais operative in cases where the wife has as 'fixed aversion' for the husband, in which case any amount of reconciliation would be of no use. The Ministry of Law has undertaken different measures to motivate and sensitize judges, lawyers and the litigant public about the merits and advantages of the ADR. Workshops, seminars, training programs have been organized for judges, lawyers and court support staff in the divisional headquarters and selective districts. A widely acclaimed documentary film titled "Settlement of Disputes through Mediation" has been made and shown to the participants and the stakeholders all over the country.[64]

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.

(3) *Sirin Akhter and another vs. Md Ismail,* 5 DLR (2000) (HC).

The High Court Division of the Supreme Court of Bangladesh in *Sirin Akhter and another vs. Md Ismail.*[65]

[63] The Dhaka University Studies, Part-F Vol. XII (1); June-2001 p-10
[64] *Ibid*
[65] 5 DLR (2000) (HC)

In this case it has been held:

When the husband admittedly received the notice of exercise of right of talaq-tafwezand the notice thereof was served upon the Chairman concerned, there was compliance with the requirement of law and the talaqbecame effective. Direction for restitution of conjugal rights as a consequence relief is wrong in law and is opposed to the principle embodied in article 27 and 31 of the Constitution[66].

Section-8 says "where any of the parties to marriage wishes to dissolve the marriage otherwise than by talaq", which apparently means dissolution of marriage through court, khulaand Mubara'atequally falls within the section. These forms of dissolution of marriage, particularly judicial dissolution, need careful examination in the light of section 23(2) of the Family Courts Ordinance, 1985. The provisions for mediation may be found in sections 10 and 13 and 23(3) of the Family Courts Ordinance 1985 which are to the effect: -

Ordinance 1961 will come into operation. A question may be raised in view of section 23 of Family Courts Ordinance 1985 and sections 7 and 8 of the Muslim Family Laws Ordinance 1961 concerning the time when the dissolution of marriage will be effective, is it after the expiry of 90 days from the receipt of the notice from the wife when she initially filed the suit or action; or is it after the expiry of 90 days from the receipt of the certified copy from the court?

(4) *KrishnapadaTalukder Vs GeetasreeTalukder*[14 (1994) BLD 415]

In *KrishnapadaTalukder Vs GeetasreeTalukder*[67]the question was whether a woman, Hindu by faith, could file a suit in a Family Court for maintenance against her husband. The honorable judge of the High Court Division held that "As per the provisions of the present Ordinance, all the sections of the 27 section statute have been made available for the litigants who are Muslim by faith only."

The said judgment came on 5th June 1994, and just a few days later on 25th July 1994 in *NirmalKanti Das Vs SreematiBiva Rani* [68]

[66] 5 DLR (2000) (HC) 81
[67] [14 (1994) BLD 415]
[68] [14 (1994) BLD (HCD) 467]

The High Court Division expressed diametrically opposite view. The learned judge of the High Court Division referring section 3 of the Ordinance held that the provisions of Family Courts Ordinance shall have effect notwithstanding anything contained in 'any other laws' for the time being in force. From the expression 'other laws', it appears that the Family Court Ordinance controls the Muslim Family Laws Ordinance, 1961, and not vice versa. Thus, any person professing any faith has a right to bring a suit for settlement and disposal of disputes relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. And so, a Hindu wife is entitled to bring a suit for maintenance against her husband in a Family Court.

(5) *MeherNigar Vs MdMujibur Rahman* [14 (1994) BLD (HCD) 467]

In *MeherNigar Vs MdMujibur Rahman*[69]the High Court Division corroborated the abovementioned view by holding that the Muslim Family Laws Ordinance 1961 introduced some changes in the orthodox Muslim personal laws relating to polygamy, <>talaq<> and inheritance and in order to keep those reformative provisions of the Ordinance of 1961 effective it has been provided that the provisions of Muslim Family Laws Ordinance of 1961 shall not be affected by the provisions of the Family Courts Ordinance of 1985; and section 23 of the Family Courts has specified the area not to be affected. It otherwise indicates that the provisions of the Family Courts Ordinance are applicable to other communities which constitute the populace of Bangladesh.[70]

Following such dissimilar views and decisions, the confusion regarding jurisdiction of the Family Court was natural. And such confusion continued until 1997 when a larger bench of the High Court Division of the Supreme Court in its path-finding judgment-

(6) *PochonRikssi Das Vs Khuku Rani Dasi and others 50 (1998) DLR (AD) 47*

In *PochonRikssi Das Vs Khuku Rani Dasi and others*[71]removed all the confusions. The special bench of the High Court Division comprised of three Judges upheld that "the Family Court Ordinance has not taken away any personal right of any litigant of any faith. It has just provided the forum for the enforcement of some of the rights as is evident from section 4 of the Ordinance, which provides that there shall be as many Family Courts as

[69] *Meher Nigar Vs MdMujibur Rahman*
[70] <http://www.thedailystar.net/law/2008/06/04/index.htm> number of years before the BBC findings, accessed 4 May 2019
[71] 50 (1998) DLR (AD) 47

there are Courts of Assistant Judge and the latter courts shall be the Family Courts for the purpose of this Ordinance.Moreover, the court also declared that 'Family Courts Ordinance applies to all citizens irrespective of religion'.[72]

Family courts, which have been established in the country more than twenty years ago, need not be made familiar once again. If you are not a lawyer you may not have to learn the procedure of trial in the courts. It may even not be necessary for everyone to know the jurisdiction of the courts. But you must know yourrights to be exercised through family courts. Hence, this write-up aims to make you informed about your dealings with a family court.

By the Family Courts Ordinance 1985 the Family Courts get hold of exclusive jurisdiction for expeditious settlement and disposal of disputes only in suits relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. The courts began working all over the country except in the hill districts of Rangamati, Bandarban and Khagrachhari. Soon after the court began functioning, questions were raised about whether the Family Courts would deal only with the family matters of Muslim community or of all communities. The uncertainty lasted for a long time until in 1998 a special High Court bench of the Supreme Court in a path finding judgment removed all the questions regarding family court's jurisdiction. Every lawyer and judge dealing with Family Courts are supposed to be aware of the judgment. But the common people for whose benefit the courts have been constituted seem still uninformed about the great decision relieving the justice-seekers in the Family Courts of a harming uncertainty.[73]

Practices of ADR in Bangladesh

Societies world-over have long used non-judicial, indigenous methods to resolve disputes. In Bangladesh, dispute resolution outside of courts is not new. What is new is the extensive promotion and proliferation of ADR models and its increased uses. In the traditional system, disputes are resolved within the village. However depending on the

[72] <http://www.thedailystar.net/law/2007/05/04/index.htm> accessed 5 May 2019

[73] <http://www.thedailystar.net/law/2008/06/04/index.htm number of years before the BBC findings> accessed 5 May 2019

intensity of the dispute or gravity of the situation, neighboring villages are also sometimes involved.[74]

During the British period, in 1870, the Panchayat system was introduced to manage and rules the area for its collection of revenue. The Panchayat system was used to resolve minor disputes within their area, and the major disputes were forwarded for legal procedures. In 1919, the Bengal Village Self Government Act was introduced and Union Courts were set up to resolve disputes locally. Later, the government established the Rin Salish Board to keep peasants free from the Mahazons and the moneylenders and also to avoid clashes. Later, *the Family Court Ordinance* of 1961[75] and *the Village Court Act* of 1976 were introduced and authority was vested on the Chairman of Union Parishad to try petty local cases and small crimes committed in their area and take consensual decisions. These were later strengthened in 1985 with additional power to cover women and children's rights. The village court consists of UP chairman, members and representatives from concerned parties. Under *the Village Court Act* of 1976[76], the village court can try disputes over property valued not exceeding Tk. 5,000. The village court has also power to summon a person to stand as a witness and can impose a fine of up to Tk. 500 on contempt charges.

The village court provides easy access to the local people without any obstacle and allows them to defend their position without any outside assistance or lawyer. *The Family Court Ordinance* 1985 had given jurisdiction to the trial Judge to effect reconciliation between the parties both before and after trial. And the Ordinance dealt with divorce, restitution of conjugal rights, dower, maintenance and custody of children. The Ordinance deals the concerning issues like (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) after the close of evidence of all parties, the family court shall make another effort to effect a compromise or reconciliation between the parties and (iii) 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. Section 10 and 13 of the Family Court Ordinance are notable provisions that call for mediation

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74 *Ibid.,*

75 *The Family Court Ordinance*, 1961

76 *The Village Court Act*, 1976

and arbitration by the court. Section 6, 7 and 9 of the Muslim Family Law Ordinance also talk about Arbitration Council in Union Parishad.[77]

The Salish Ain 2001 or *the Arbitration Act* 2001, a new law provides for International Commercial Arbitration between: a citizen of Bangladesh or an organization of Bangladesh versus a foreigner, foreign resident, foreign company, foreign controlled company or firm and a government of foreign State. This provision is provided in addition to the arbitration between the citizens or organizations of Bangladesh and for execution of an award of arbitration as a decree of the court. The law also extends for execution of a foreign arbitration award subject to certain conditions by a court under the provisions of the Code of Civil Procedure for execution of a decree. The parties concern will appoint their arbitrators. In case, the party fail to appoint his arbitrator for the International commercial arbitration, the Chief Justice or on his behalf any other Judge of the Supreme Court nominated by the Chief Justice shall appoint such arbitrator. Effectively, *The Arbitration Act* 2001[78] opened up the door for Bangladesh as a place for settlement of international commercial and investment disputes by arbitration.

The Code of Civil Procedure (Amendment) Act 2003 was introduced through sections 89A and 89B, especially mediation or arbitration more effective in all kinds of non-family litigations. At any time after a written statement is filed, if all the contesting parties are in attendance in the court in person or by their respective lawyers, (a) the court may mediate the dispute (b) or refer the dispute to the engaged lawyers of the parties (c) or to the parties themselves where no lawyer has been engaged (d) or to a mediator from a panel prepared by the District Judge in consultation with the President of the District Bar Association … the civil courts started mediation in non-family disputes since the 1st July, 2003. As of 31st July 2004, 3,432 non-family litigations have been disposed of by mediation. Also. The Bangladesh Parliament also passed a law under the title '*The Conciliation of Disputes (Municipal Areas) Board Act* 2004' to make sure that disputants will have opportunity of resolving their disputes, differences and conflicts with the help of their municipal representatives without going to the formal courts.

In June 2005, to comply with the Article 77 of the Constitution of the People's Republic of Bangladesh, Mr Saifur Rahman, Finance Minister of the govt of Bangladesh, in his budget for the year 2005-2006 announced the decision to establish the office of the

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77 *Ibid.,*

78 *The Arbitration Act,* 2001

Tax Ombudsman in Bangladesh. Ombudsman is also a system of ADR, and the Tax Ombudsman will investigate citizens (taxpayers) complaints against government services. In August 2005, to help materialize the Arbitration Act 2001, the '*Bangladesh Council of Arbitration* (BCA)' formulated new Rules of Arbitration under the auspices of the FBCCI, and set up a modern and efficient Arbitration Centre. Mr. Abdul Awal Mintoo, the Chairperson of the Bangladesh Council of Arbitration hoped that BCA would serve the best possible interest of both the national and international business community in settling their commercial disputes. Apart from these legal swathes, rural Bangladesh has a long tradition of doing Salish in family matters or in minor disputes. Local leaders provide an opportunity for resolving local disputes. Women and the poor particularly, favor this option of conciliation through Salish. They feel comfortable about easy access to the resolution process and are not required to pay money for it. Since the local Salish is in a relatively better position to know the real nature of the conflict, the chances of exaggeration of issues are significantly less. Salish is used in settling 60 to 70% of local disputes. Salish is still the most effective procedure for quick and useful legal redress. Salish provides a win-win situation for both the parties and entails less sufferings and cost. Salish as an informal mode should not be perceived as gratis.

The concept of ADR introduced in the civil procedure through the amendment of 2003. Since 2003 to 2010 the effectiveness of ADR in civil system has not been seen yet. Most of the lawyers and litigants do not know about the amendment of ADR. They only go for ADR when judge suggests and order of the court. In that case ADR becomes binding for the parties. Most of the time mandatory mediation unsuccessful because of the limitation of ADR.As a result judge loses his jurisdiction to try that case.

For that reason the proceedings of the case become more lengthy and litigant suffers for the delay and the number of the pending cases become increased. Most of the lawyers give the opinion that ADR in civil system increase the harassment of the litigant because lack of proper implementation ADR, lack of awareness, and lack of consciousness of the people, lawyer, and litigant.

ADR programs do not set precedent, refine legal norms, or establish broad community or national standards, nor do they promote a consistent application **of** legal rules. 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, 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. ADR may not be able to overcome power imbalances or fundamental disagreements over norms among the disputants.

ADR programs cannot correct systemic injustice, discrimination, or violations of human rights. As noted above, ADR systems often reflect the accepted norms of society. These norms may include discrimination against certain groups and populations. ADR programs do 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.

ADR settlements do not have any educational, punitive, or deterrent effect on the population. 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 and repeat offender such as domestic violence.

It is inappropriate to use ADR to resolve multi-party cases in which some of the parties or stakeholders do not participate. 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.

Chapter Five
Findings and Recommendation

5.1 Findings

The Family Courts set up to adjudicate on family matters were supposed to be specialist and exclusive courts to ensure effectiveness and at the same time privacy, where mediation or conciliation as well as other informal procedure in aid of resolution of family disputes were expected to be utilized frequently to make those regular practice of the court which could encourage the disputants to opt for these procedures to their advantage. In practice the Family Courts also has ordinary civil and even criminal jurisdiction, which tax upon the working hours of the presiding judge, who either does not feel encouraged to insist or prevail upon the disputant parties to opt for mediation or conciliation or does it mechanically due to pressure of other non-family matters. The desired specialization in disposing of family matters and the practice of mediation or conciliation during family court proceedings are waiting and the atmosphere or tradition of it is virtually non-existent. Probably social movement is necessary to motivate the disputant parties to invoke mediation or conciliation as a means to resolve family disputes.[79]

However, there are also some arguments against the concept of ADR. It is said that moving dispute resolution from the public to the private sphere, will prevent the law from developing to meet changing circumstances. Keeping information about the details of settlements out of the public domain prevents its use as a comparator and may lead to an increase in the number of claims, which are disputed. It is also possible that private settlements may not take into account the wider implications of the dispute.[80]

Critics believe that ADR encourages compromise. Compromise can be good way to settle some dispute, but it is not appropriate for others. In serious justice conflicts and cases of intolerable moral difference, compromise is simply not an option because the issues mean too much to the disputes. Another concern is that ADR settlements are private and are not in the public record or exposed to public scrutiny.

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[79] <http://www.legalaid.wa.gov.au/LAServices/aspx/default.aspx?Page=Applying/Law.xml> accessed September 2006

[80] *Ibid*

5.2 Recommendations

JUDICIARY of Bangladesh is caught in a vicious circle of delays and backlogs. Backlog of cases causes frustrating delay in the adjudicative process, which is eating away our judiciary. While delay in judicial process causes backlog, increasing backlog puts tremendous pressure on present cases and vice versa. This process goes on with no apparent remedy in view. Present rate of disposal of cases and backlog is alarming for justice, rule of law and economic development of the country.

Considering the benefits of ADR as a traditional system with modern approaches and its overall effectiveness in resolving the disputes; commercial or non-commercial; domestic or international; we must not allow justice to be delayed, to be ultimately denied; we must ensure accountability, transparency and integrity of the ultimate arbiters which must remain above reproach in the process of justice delivery system.[81]

5.3 Suggestion for ADR to make more effective

To make ADR more effective, extensive, and pro-active, coordination is needed among different agencies. Other initiatives are given below:

- Creating awareness about ADR.
- Make ADR mandatory in some specific law like (family dispute)
- Make clear about the advantage of ADR
- Spreading the success story of ADR.
- Encouraging NGOs to become involved in ADR.
- Involving the Bar Associations in ADR.
- Providing training for mediators.
- Matching Government and NGO efforts.
- Good court administration has been defined and described in many different ways. In simple terms it may be described to imply:
  i. Good record-keeping and systematic filing of the cases;
  ii. Subject wise classification of the cases;
  iii. Good monitoring so as to classify the cases on the basis of the stages they have reached;

[81] <http://ruchichowdhury.tripod.com/a_possible_way_out_of_backlog_in_our_judiciary.htm> accessed 6 May 2019

iv. To identify and to rid the docket of 'dead' or moot matters in order to prevent them from clogging the schedules;

v. monitoring and case-flow tracking in such a way as to know the status of each case, to know its procedural position, to locate documents and records more easily and to reflect everything in transparency plate.

5.4 Concluding Remark

Institutional arrangement for the availability of the system of ADR devices (conciliation, mediation, early neutral evaluation, arbitration or even judicial settlement by a non-trial judge) with proper training for the persons to provide ADR, is to be made by the judiciary in advance.[82] While recourse to ADR would be mandatory, there would be nothing like binding decision of the ADR forum. [83]But when the consensual decision by the parties is reached, court will issue necessary order for its execution. In case ADR efforts fail, the case shall go for trial.

Application of case management techniques by the trial judge envisages active participation and joint communication among the parties and their lawyers throughout the case. It requires each side to answer the requisitions, if any, made by opposing parties and additionally, imposes sanctions for non-compliance. It requires the opposing parties to identify the real controversies in the case and seek early responses from each side on question of fact and law. Thus, case management leads to a clear identification and narrowing of the legal and factual issues to be decided. To quote one authority, "The objectives of cases management are to establish judicial responsibility for the otherwise substantially party-controlled, adversarial preparations of civil cases for trial. Specifically, case management is designed to reduce dilatory, frivolous, inefficient, and protracted litigation practices and to replace party controlled litigation processes with judge-controlled, sequential steps in the life of a civil proceeding".[84]

[82] ("*Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process*"), New York University Journal of International Law and Politics, Vol. 30, Nos. 1 & 2, 1997-98, p. 62).
[83] *Ibid*
[84] *Ibid*

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