Sonargaon University (SU)

Research Monograph
On
"Effective Implementation of ADR in the Civil Justice System of Bangladesh: A Critical Analysis"

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of LL.B
Department of Law, Sonargaon University (SU).

Submitted By

Iffat Fahamida Taki
ID No: LLB-1903018035
Department of Law
Faculty of Arts and Humanities
Sonargaon University (SU)

Supervised By

Sharmin Jahan Runa
Assistant Professor
Department of Law
Faculty of Arts and Humanities
Sonargaon University (SU)

Date of Submission: 05.09.2023

Certification by the Research Supervisor

This is to certify that the research paper titled **"Effective Implementation of ADR in the Civil Justice System of Bangladesh: A Critical Analysis"** submitted in fulfillment of the requirements for the award of the undergraduate degree in **LL.B** from **Sonargaon University**, Student ID**: LLB-1903018035** under my active supervision and guidance and that no part of this paper has been submitted for the award of degree and that the work has not been published in legal or popular magazines.

Sharmin Jahan Runa
Assistant Professor
Department of Law
Faculty of Arts and Humanities
Sonargaon University (SU)

Declaration

I, **Iffat Fahamida Taki** a student of **LL.B** under the Department of Law, at **Sonargaon University**. Hereby solemnly declare that the presented research paper has been performed by me and the research paper has not been submitted anywhere. I declare that this has been carried out by me and the same has not previously been submitted to any other University/ College/ Organization/ for any academic qualification/ certificate/ diploma degree.

_____

Iffat Fahamida Taki
ID No: LLB-1903018035
Department of Law
Faculty of Arts and Humanities
Sonargaon University (SU)

Letter of Transmittal

Sharmin Jahan Runa
Assistant Professor
Department of Law
Sonargaon University.

Subject: Submission of Research Monograph.

Dear Madam,

It is a gratification for me to submit the Research Dissertation on **"Effective Implementation of ADR in the Civil Justice System of Bangladesh: A Critical Analysis"** While doing this Dissertation, I have tried my level best to keep the required standard. I hope this dissertation will fulfill your expectations and make you happy and satisfied. I hope that you would be kind enough to go through this dissertation for evaluation.

I am always available for any clarification of any part of this dissertation at your convenience.

Thanking you

Iffat Fahamida Taki
ID No: LLB-1903018035
Department of Law
Faculty of Arts and Humanities
Sonargaon University (SU)

Abstract

Alternative Dispute Resolution (ADR) has long played a significant role in the legal system of Bangladesh, particularly in the Civil Justice System. Before 2012, there was no mandatory provision regarding the settlement of disputes through mediation in the Code of Civil Procedure, 1908 (CPC). Mediation was an optional process to conduct civil proceedings under the Code of Civil Procedure (Amendment) Act, 2003. Since 2012, mediation has been mandatory in all civil suits and appeals. The main objectives behind this were to reduce the backlog of civil suits, relieve the pressure on the subordinate courts, and ensure access to justice for everyone in an amicable manner. However, the outcomes of this amendment have yet to meet the ADR goals. Currently, it is quite apparent that the subordinate courts of Bangladesh are overloaded with millions of pending civil suits and criminal cases. At the same time, ADR has not yet been well developed in the criminal justice system of Bangladesh. Alternative Dispute Resolution is thus the finest option available in our country for achieving justice for everybody. There are several shortcomings in the ADR mechanism of Bangladesh, such as the CPC does not provide any specific guidelines for the mediators, though mediation has been made compulsory it. This paper examines some notable legal constraints on the way to ensure the effective implementation of ADR and offers some observations on ensuring access to justice for all population groups in Bangladesh.

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Chapter-1

Introduction

1.1 Meaning of 'Alternative':

The meaning of the term 'Alternative' in this context of ADR is not clear. Specifically, it is not clear whether the 'Element' is to be considered an 'Alternative'.

For questions like: 'to what is 'Alternative' dispute resolution an alternative', Karl Mackie has very sensible stated: 'What is alternative depends on what is traditional'.[1] In most Western countries this would mean the court structure and rules of civil procedure. In other words; it is an alternative to litigation. ADR is a response to (barriers or problems) formality, complexity, inadequacies, and expenses of the ordinary courts. For some, it is also a search for legal solutions to the problem of mass litigation.[2] Yet, it can also be an 'Alternative' both to allowing a dispute to drop and to resorting to violence, as is usually the case in traditional societies. Furthermore, for our purposes, ADR may be viewed as 'Appropriate' rather than 'Alternative'. [3]while the court adjudication approach is sometimes inappropriate for e-commerce, ADR can offer more appropriate procedures.

1.2 Meaning of the term 'Dispute':

Although everyone is familiar with the term "dispute," it is nonetheless helpful to think about the types of disagreements and the situations in which they occur. Conflicts between persons are the source of disputes. A disagreement, albeit not always a quarrel, arises when a remark made by one person is refuted by another. A disagreement only develops into a dispute when one or both parties refuse to accept its implications and demand that it be addressed. This can apply to utterances, but it most frequently relates to allegations that are made against another individual in a legal or social setting.

The definition of a dispute may appear superfluous at first sight. Everyone knows the meaning of a dispute and one may presume that one will recognize a dispute when one sees it. However, in

[1] Mackie, Karl J., A handbook of dispute resolution: ADR in action. Routledge, London, 1991. P.28 Jose Edgardo Munoz Lopez 17

[2]Redfem, A., and Hunter, M., Law, and practice of international commercial arbitration, Sweet & Maxwell, London, 1991. P.23

[3] Brown, Henry J. ADR: Principles and Practice. Sweet & Maxwell, London, 1993.P.12

actual practice the existence of a dispute may be in doubt and may itself be disputed. At times, the existence of a dispute is denied to contest the jurisdiction of an international court or tribunal.

The existing definitions have done little to clarify questions that arise in this context. Black's Law Dictionary circumscribes 'Dispute' as a conflict or controversy, esp. one that has given rise to a particular lawsuit.[4]

1.3 Meaning of 'Resolution':

Oxford Dictionary defines resolution a 'The action of solving a problem or contentious matter."

Explaining the meaning of resolution, in the arena of conflict research, demands a discussion of several terms that refer to different ways of dealing with conflict.[5]

1.4 Meaning of ADR:

The term "Alternative Dispute Resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes or judicial processes. In other words, when disputes between parties are resolved through means whichare alternative to formal litigation, this is called alternative dispute resolution. ADR is a process which may be freestanding (non-judicial) or court annexed (judicial), binding or non-binding, formal or informal, mandatory or voluntary in nature. It is to be emphasized that the term 'ADR' is misleading in a sense that it is not always alternative to formal litigation and very often it is a part of litigation particularly for those ADR processes which are court-connected. Professor Thomas J. Stipanowich states that the name ADR is an outmoded acronym that survives as a matter of convenience only.[6]

Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom.[7]

[4] B.A. Garner (ed.), Black's Law Dictionary (1991)
[5] Spangler, Brad. "Settlement, Resolution, Management, and Transformation: An Explanation of Terms." Beyond Intractability.Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder, Sep, 2003
[6] Thomas J. Stipanowich, ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution", Journal of Empirical Legal Studies, Volume 1, Issue 3, 843-912, November 2004 at page 845.
[7] https://www.law.cornell.edu/wex/alternative_dispute_resolution

Alternative dispute resolution (ADR), or external dispute resolution (EDR), typically denotes a wide range of dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation: a collective term for the ways that parties can settle disputes, with the help of a third party.8 However, ADR is also increasingly being adopted as a tool to help settle disputes alongside the court system itself.9

Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried (indeed the European Mediation Directive (2008) expressly contemplates so-called "compulsory" mediation; this means that attendance is compulsory, not that settlement must be reached through mediation).10 Additionally, parties to merger and acquisition transactions are increasingly turning to ADR to resolve post-acquisition disputes.11

Alternative Dispute Resolution (ADR) is a non-adversarial method of dispute resolution that is used instead of formal court adjudication. This process also includes a broad range of court-oriented initiatives, which are intended to facilitate a more effective administration of justice and to help in reducing delays in the disposal of cases. ADR includes mediation, arbitration, conciliation, early neutral evaluation, negotiation, non-binding arbitration, and mandatory mediation etc.12

[8] Australian Securities and Investments Commission - Complaints resolution schemes Archived 6 January 2009 at the Wayback Machine. Asic.gov.au. Retrieved on 14 July 2013.
[9]J. Pirie, Andrew (2000). Alternative dispute resolution: skills, science, and the law. Toronto, Ontario: Irwin Law. p. 5. ISBN 9781459313477.
[10]"DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL". Official Journal of the European Union. 21 May 2008.
[11] Litvak, Jeff; Miller, Brent. "Using Due Diligence and Alternative Dispute Resolutions to Resolve Post-Acquisition Disputes". Transaction Advisors. ISSN 2329-9134. Archived from the original on 23 July 2015.
[12]Alternative Dispute Resolution in Bangladesh: Challenges and Prospect, Dr. A.B.M. MahmudulHoque, page-48

Chapter-2

The Basic Concept of ADR

2.1 Object of ADR:

The ADR practitioner's guide spells out how ADR can serve different objectives. It explains that ADR systems may be designed to meet a wide variety of different goals. Some of these goals are directly related to improving the administration of justice and the rule of law. Some, however, are related to other development objectives, such as economic restructuring, or the management of tensions and conflicts in communities. Efficient dispute resolution procedures may be critical to economic development objectives where court delay or corruption inhibits foreign investment and economic restructuring.[13]

The age-old complaints lodged against lawyers and the legal process have gained an amplified resonance inthe contemporary world community. The common conception is that judges and lawyers, the procedural rigor of justice and substantive incantation of legality, lay Jury, and technical experts hurt more than they help. The recourse to legal actors and proceedings is costly, emotionally debilitating, and potentially counterproductive. It is to mean that now it is common knowledge that the existing justice system is not able to cope with the ever-increasing burden of civil and criminal litigation. The problem is not of a load alone. The deficiency lies in the adversarial nature of the judicial process which is time consuming and more often procedure oriented. There is growing awareness that in the bulk of cases court action is not an appropriate recourse for seeking justice.

Judicial process is set in motion by the action of an aggrieved party. Each part case is presented before the judge by the advocators, who are expert in court craft, in straight jacket of rules of procedure and substantive law. The Judge perceived the dispute (or the issue involved) in the backdrop of known legal concepts, sifts evidence to arrive at the truth, hears arguments to determine as to how logically the parties stand in terms of applicable legal concepts and pronounce his verdict accordingly. The parties are bound by the verdict, at the peril of legal sanctions, if disobeyed. Represented by lawyers (especially in developed countries) the parties are kept at a distance not only from the judge but also) from each other. The end result is a win lose litigation. Thus, the dispute is liquidated and justice done or that is what is professed. But the difference between the parties continue to subsist, the competing interest of the parties remain unsolved, interpersonal relationship of the parties becomes more hardened. The adversarial court does not aim at resolution of

[13]Halim, Md. Abdul, ADR in Bangladesh: Issue and Challenges, 14th Edition (November, 2020) CCB Foundation. P.63

competing claims of members of the society. It aims at upholding the one and rejecting the other, leaving the conflict between the parties unsolved. Thus, apart from the fact that recourse to justice through the court system is time-consuming and inaccessible due to mounting arrears, the judicial process itself is not oriented for the adjudicating upon rights –liability relationships created under legal regimes pertaining to Page | 18 modern science and high technology because the subjective matter of the disputes arising from such relationship can be better understood in terms of scientific and technological concepts though disputesare stated in terms of usual legal concepts. In its philosophical perception, the ADR process is considered to bea model in which the dispute resolution process is qualitatively distinct from the judicial process. It is a processwhere disputes are settled with the assistance of a neutral third party generally of parties own choice: wherethe neutral is generally familiar with the nature of the dispute and the context in which such a dispute normally arises; where the proceeding is informal, devoid of procedural technicalities and are conducted, by and large, in the manner agreed by the parties; where the dispute is resolved expeditiously and with fewer expenses: where a decision-making process aims at substantial justice, keeping in view the interests involved and the contextual realities. In substance, the ADR process aims at rendering justice in the form and content that not only resolves the dispute but tends to resolve the conflict in the relationship of the parties that has given rise to that dispute.[14]

2.2 Nature of ADR:

Alternative dispute resolution literally means to solve the dispute in alternative ways. It is the technique of dispute settlement outside of the government judicial process or court and to solve the disputes by mutual understanding of the contesting parties. ADR is an extra-judicial exercise that supports the judicial system to resolve through alternative ways. It is a win-win process with less expense and within a short period. As to the view of Justice Mustafa Kamal, "it is a non-formal settlement of legal and judicial dispute as a means of disposing of cases quickly and inexpensively.[15]

According to the Former Secretary General of the International Center Fr. Alternative Dispute Resolution

P.C. Rao said-

Alternative Dispute Resolution is a constructive management of setting disputes in contemporary Bangladesh as well as across the world. It is being exercises that community-based dispute are resolved by negotiation, conciliation, mediation and arbitration, and other mechanisms.

[14]Eshetu.Tefera&MulugetaGetu Alternative Dispute Resolution: Teaching Material P.17-18
[15] Md. Aktaruzzaman, Concept and Law on ADR and Legal Aid, 2nd ed., (Dhaka, Shabdakoli Printers, 2008), P.9

The ADR procedure consist of negotiation, conciliation, mediation, arbitration and an array of hybrid procedures, including mediation and last offer arbitration, mini-trial, med-arb and neutral evaluation.[16]

2.3 Nature of ADR and Its Jurisprudence:

Many supportive measures are necessary to ensure the success of the ADR method. One of these is thought establishing and strengthening a suitable infrastructure and proper processes.

The ADR dispute resolution process is qualitatively distinct from the judicial process. Under the former disputes are settled with the assistance of a neutral third person generally of the party's own choice. These persons are mostly familiar not only with the nature of such disputes by also the context in which such disputes normally arise. Proceedings are informal, by and large, free from procedural technicalities, and are conducted generally in the manner agreed to by the parties the result is that the dispute is resolved expeditiously and with less expense. Moreover, the confidentiality of the subject matter of the dispute is maintained and the decision-making process aimsat effecting substantial justice, keeping in view the interests involved and the contextual realities.[17]

The objective of the ADR process is to render justice in the form and content which not only resolvesthe dispute by attempts to resolve the source of the conflict that gave rise to the dispute in the first place. Not only the symptoms, thus but root causes of the discord are also attended to.

The pace of industrialization and the fast emergence of corporate sector in the urban societies universally increased the workload in the conventional courts and the need for special expertise to ensure coping with this overwhelming workload. This has as a matter of fact compelled the legal professionals, members of bench, law teachers and corporate leader to search for new methods for speedy resolution of financial, commercial and investment disputes. Proverbial “court delays”, high cost of litigation and pendency of large number of cases in ordinary courts are important factors in building up momentum for adoption of ADR as an alternative or a substitute to the court litigation. ADR officers’ certain special advantages, such as:

[16] P.C Rao, ‘Alternative Dispute Resolution in India’, P.C Rao ed. ADR: What it is and How it works, (Delhi: Universal Law Publishing Co. Pvt. Ltd, 2002), P-25

[17] ADR System was also practiced in ancient Greece and Rome.

A. Speed: "Quick resolution of dispute, though flexible procedure, which is cost-efficient and brings about greater amity and understanding between litigant parties, which is not possible in adversarial courtroom battles".[18]
B. Relief to Courts: "ADR mechanism offers significant relief to the courts. It increases access to justice for people who cannot or will not use the court system to resolve conflicts in culturally appropriate ways;[19]
C. Better Remedies: That "It offers a wide range of remedies to solve the dispute in hand".
D. Courts Views on ADR: The courts in Pakistan have now started the adoption of the ADR. Justice Syed Asghar Haider for example, while referring to amicable resolution of disputes observed in the case of Mueen-Un-Din and Others Vs. Administrator General of Auqaf, Pakistan, Islamabad and another observe".[20]

2.4 Advantages of ADR:

Alternative dispute resolution (ADR) procedures offer several advantages:

A single procedure. Through ADR, the parties can agree to resolve in a single procedure a dispute involving intellectual property that is protected in several different countries, thereby avoidingthe expense and complexity of multi-jurisdictional litigation, and the risk of inconsistent results.

Party autonomy. Because of its private nature, ADR allows parties to exercise greater control over the way their dispute is resolved than would be the case in court litigation. Incontrast to court litigation, the parties themselves may select the most appropriate decision-makersfor their dispute. In addition, they may choose the applicable law, place, and language of the proceedings. Increased party autonomy can also result in a faster process, as parties are free to devise the most efficient procedures for their dispute. This can result in material cost savings.

Neutrality. ADR can be neutral to the law, language, and institutional culture of the parties, thereby avoiding any home court advantage that one of the parties may enjoy in court-based litigation, where familiarity with the applicable law and local processes can offer significant strategic advantages.

[18] I. Chaudhree, ADR in Pakistan available at, hips://www.supremecourt.gov.pk/ijc/articles/7/10.pdf(2011)
[19] Ibid

[20] PLD2007Lahore583

Confidentiality. ADR proceedings are private. Accordingly, the parties can agree to keep the proceedings and any results confidential. This allows them to focus on the merits of the dispute without concern about its public impact and may be of special importance where commercial reputations and trade secrets are involved.

Finality of Awards. Unlike court decisions, which can generally be contested through one or more rounds of litigation, arbitral awards are not normally subject to appeal.

Enforceability of Awards. The United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the New York Convention, generally provides for the recognition of arbitral awards on par with domestic court judgments without review of the merits. This greatly facilitates the enforcement of awards across borders.[21]

2.5 Disadvantages of ADR:

There is no guaranteed resolution:

The alternative resolution process does not always lead to a resolution. This means that the parties could invest time and money in trying to resolve the dispute out of court and still end up having to proceed with litigation and trial before a judge and jury.

Decisions are final:

With few exceptions such as fraud, the decision of a neutral arbitration cannot be appealed against. On the other hand, decisions of a court usually can be appealed on a variety of legal grounds.

Limit on Awards:

There is no equivalent of s.66 of the Arbitration Act 1996 (which provides that an award made by the tribunal under an arbitration agreement may be enforced in the same manner as a judgment or order of the court to the same effect) enabling ADR awards to be enforced as if theywere court judgment. However, the awards are not so easily enforceable. Arbitrations mostly resolve disputes that involve money. They cannot issue orders compelling one party to do something, or refrain from doing something; hence, they cannot give injunctions.

[21]https://www.wipo.int/amc/en/center/advantages.html

Facts may not be fully disclosed:

Because there is no equivalent of disclosure in arbitration as in litigation, there is a risk that the parties may resolve a dispute without knowing all the facts, which may lead to a wrong decision. For example, most businessmen, however, believe that a quick decision is better than wasting time and money on a dispute to get a correct decision.

ADR is not for all cases:

Alternative dispute resolution is not appropriate where a client needs an injunction, where there is no dispute to resolve, and where the client needs a ruling on a point of law.[22]

[22] https://lawdit.co.uk/readingroom/adr-disadvantages

Chapter-3

Historical Development of ADR in Bangladesh

3.1 History of ADR:

ADR has been around for all time. The interesting thing is that smaller societies tend to work on a mutual concession and compromise basis to solve disputes. ADR appears to have existed in the oldest legal system that of Hammurabi in Babylon (present Iraq) Certainly it was used in ancient Greece where the mediator was called 'proxenetas'. Roman law recognized mediation which it was known by a variety of names. As society and individual problems become more complex, the legal formality of the court becomes more important. "Arbitration International" has offered ADR services since 1892.[23]

Although mediation goes back hundreds of years, alternative dispute resolution has grown rapidly in the United States since the political and civil conflicts of the 1960s. the introduction of new laws protecting individual rights, as well as less tolerance for discrimination and injustice, led more people to file lawsuits to settle conflicts.[24]

For example, the Civil Rights Act of 1964 outlawed "discrimination in employment or public accommodations based on race, sex, or national origin." Laws such as this gave people new grounds for seeking compensation for ill-treatment. At the same time, the women's movement and the environmental movements were growing as well, leading to another host of court cases. The result of all these changes was a significant increase in the number of lawsuits being filed in U.S. Courts. Eventually, the system became overloaded with cases, resulting in long delays and sometimes procedural errors. Processes like mediation and arbitration soon became popular ways

[23] This history is drawn from several source including Stephen B. Goldberg, Frank E.A Sander, Nancy H. Rogers, Dispute Resolution: Negotiation, Mediation and Other Processes (2nd ed., Little Brown and Co., New York: 1992), pp. 3-12; and Elizabeth Plapinger and Donna Stienstra, ADR and settlements in the Federal District Court: A sourcebook for Judges and Lawyers (Federal Judicial Center and CPR Institute for Dispute Resolution: 1996), pp. 3-13.

[24] Stephen B. Goldberg and others, Dispute Resolution, 3rd ed. (Boston: Little, Brown and Company, 2012). ,<http://www.beyondintractability.org/bksum/Goldberg-dispute>.

to deal with a variety of medication and arbitration soon became popular ways to deal with a variety of conflicts, because they helped relieve pressure on the overburdened court system.[25]

Dispute resolution outside of courts is not new; societies worldwide have long used non-judicial, indigenous methods to resolve conflicts. What is new is the extensive promotion and proliferation of ADR models, wider use of court-connected ADR, and the increasing use of ADR as a tool to realize goals broader than the settlement of specific disputes.

The ADR movement in the United States was launched in the 1970s, beginning as a social movement to resolve community-wide civil rights disputes through mediation, and as a legal movement to address increased delay and expense in mediation, and as a legal movement to address increased delay and expense in litigation arising from an overcrowded court system. Ever since, the legal ADR movement in the United States has grown rapidly and has evolved from experimentation to institutionalization with the support of the American Bar Association, Academics, Courts, the U.S. Congress, and state governments. For example, in response to the 1990 Civil Justice Reform Act requiring all U.S. federal district courts to develop a plan to reduce cost and delay in civil litigation, most district courts have authorized or established some form of ADR.

3.2 Development of ADR:

The concept of ADR is not a new phenomenon. For centuries, societies have been developing informal and non-adversarial processes for resolving disputes. Archaeologists have discovered evidence of the use of ADR processes in the ancient civilizations of Egypt, Mesopotamia, and Assyria.[26] Furthermore, it can be argued that many of the modern methods of ADR are not modern alternatives, but merely a return to earlier ways of dealing with such disputesin traditional societies. The court system itself was an alternative dispute resolution process, in the sense that it superseded older forms of dispute resolution, including trial by battle and trial by ordeal. This section will look at some of the more relevant periods in the development of ADR.

[25] Brad Spangler, "Alternative Dispute Resolution (ADR)." Beyond Intractability.Eds. Guy Burgess and Heidi Burgess.Conflict Information Consortium, University of Colorado, Boulder.Posted: June 2003 at www.beyondintractability.org/essay/adr.

[26] Nelson, Adapting ADR to Different Cultures (Dec. 15, 2001). Online article is available at,http://www.gowlings..com/resources/publications.asp?pubid=776.

3.3 History of ADR in Bangladesh

Bangladesh has an age-old history of Alternative Dispute Resolution (ADR). The term "Alternative Dispute Resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms, that fall short of, or are alternative to, full-scale court proceedings. It is applied in different situations in different ways, both formally and informally. The village people usually prefer settling disputes amongst themselves and do not appreciate any intervention from other villages. They relate this intervention to the loss of face for themselves and the image of their village. With the gradual breakdown of the more traditional values of the social fabric, the traditional system of resolving disputes now stands virtually extinct and has been replaced by police cases, legal procedures, and other methods.

The community sometimes takes a leading role in resolving local disputes. In Bangladesh, these are popularly known as Shalish and Mimangsha. These are usually undertaken through mediation, negotiation, and reconciliation. In the Shalish or Mimangsha, the community leaders delve deep into the root cause/s in the presence of both parties, hear the viewpoints of disputants, and try to find a solution agreeable to the parties concerned. Resolving disputes through community initiatives with the above tools is commonly known as Alternative Dispute Resolution.

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 their increased uses. In the traditional system, disputes are resolved within the village. However, depending on the intensity of the dispute or the gravity of the situation, neighboring villages are also sometimes involved. During the British period, in 1870, the Panchayat system was introduced to manage and rule 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 RinShalishi Board to keep peasants free from the Mahazons and the moneylenders and also to avoid clashes. Later, the Family Court Ordinance of 1961 and the Village Court Act of 1976 were introduced and authority was vested in 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 the UP chairman, members, and representatives from concerned parties. Under the Village Court Act of 1976, the village court can try property disputes valued not exceeding Tk. 5,000. The village court has also the 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 obstacles and allows them to defend their position without any outside assistance or lawyer. It is also less cumbersome and less expensive

However, this system has some disadvantages, such as the court decisions are sometimes biased and the members of the court may or may not have adequate knowledge and experience to conduct trial procedures. The present Union-Parishad is the first tier in the hierarchy of local bodies in Bangladesh and has a mandate to settle disputes of the local people through Shalish. The decision of the Shalish is binding to the parties. In the process, the village elite is also involved. Major cases are not settled locally. Political influences are very frequent and often biased in the Shalish. Today, many NGOs are quite successfully involved in mediation between disputants. Still, many disputes are not mediated nor are local people acquainted with the ADR system. [27]

[27] http://www.msrblog.com/arts/law/evolution-process-adr-bangladesh.html

Chapter- 4

Different types of ADR

4.1 Mediation:

Mediation is the ancient art of peace-making. It is an honorable process of the settlement of disputes between two persons, between warring nations, between litigants, between labor and management, and disputes between general people. Of the several ADR processes, mediation seemsto be the most widely used one. In *Hurst v. Leeming case*[28]---Honorable Supreme Court opined that "Mediation is not in law compulsory. It is at the heart of today's civil justice system, and anyunjustified failure to give proper attention to the opportunities afforded by mediation affords a realistic prospect of resolution of dispute, there must be anticipated a real possibility that adverseconsequences may be attracted". It has been most usefully employed to smooth out serious disagreements that threaten the rupture of established relations, such as those between husbandsand wives, among associates and friends, and partners in common endeavors. In amediation procedure, a neutral intermediary, the mediator, helps the parties to reach a mutually satisfactory settlement of their dispute.

Concept of Mediation:

Mediation is a process by which a third party brings together the opposing groups not only to iron out the differences between them but also to find an answer to problems or specified proposals and offer alternative suggestions. It takes place at the invitation, or at least with the consent, of both parties. It encourages the parties to decide without any force or orders from the mediator. At the end of the range mediation means simply getting the parties to talk to each otheruntil they reach a settlement.

Definition of Mediation:

Black's Law Dictionary defines mediation as a private dispute resolution process in which a neutral third party, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties.

[28](2002) EWHC P. 1051. (2003) 1 Lloyd's Rep. P. 379

American Arbitration Association (AAA) defines mediation as a process under which the parties submit their dispute to an impartial person, the mediator, who may suggest ways of resolving the dispute but may not impose a settlement on the parties.

4.2 Arbitration:

Arbitration is the main Alternative Dispute Resolution System. Parties who have a dispute with each other submit that dispute to another impartial person called an arbitrator whom ten decides it afterjudicially hearing both sides is Arbitration.

The arbitrator resolves all disputes as to the facts and law. The arbitrator's decision is both final and binding and there is no appeal from his decision. Almost all business transactions and employments carry arbitration clauses. As a method of settling disputes, it is gaining more and more importance today. In M/S Guru Nanak Foundation V. M/S Rattan Singh & Sons case[29]--- Honorable Supreme Court opined that "Interminable, the consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for-resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940". Therefore, it is of no surprise that arbitration is coming of age as a preferred method for deciding disputes.

Definition of Arbitration:

At its core, arbitration is a form of dispute resolution. Arbitration is the private, judicial determination of a dispute, by an independent third party.

Arbitration is defined in **Encyclopedia Britannica** as "A means of settlement of disputes or differences by the decision not of regular and ordinary courts of law out of persons who are called arbitrations and are appointed by the parties or with their actual of constructive consent."

Black's Law Dictionary defines arbitration thus, "An arrangement of taking and abiding by the judgment of selected persons in some disputed matters, instead of carrying to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation."

[29] AIR1981 SC 2075

4.3 Definition of Conciliation:

Conciliation is a procedure by which a conciliator prompts the parties to formulate proposals for the settlement of a dispute following an investigation of the facts by the conciliator and attempts by himto reconcile the opposing contentions. The conciliator may indicate the strong and weak points ofdisputants' cases and the consequence of a failure to settle, but he will not generally make a recommendation for settlement.

In **P. Ramanatha Ayer's Law Lexicon**, conciliation means, "The process of bringing opposite parties or individuals into harmony."

The Encyclopedia of Social Science defines conciliation as "Somewhat diplomatic procedure which endeavors to settle a controversy by assisting parties to reach a voluntary agreement and the ultimate decision is made by the parties themselves with the help of conciliation."

4.4 Negotiation:

The process most commonly used by disputants to resolve a dispute is negotiation. Negotiation means a non-binding procedure in which discussions between the parties are initiated without the intervention of any third party to arrive at a negotiated settlement of the dispute. Negotiation is a non-binding procedure involving direct interaction of the disputing parties wherein a party approaches the other with the offer of a negotiated settlement based on anobjective assessment of each other's position. It is always better to talk about the problems betweendisputants themselves so that they can find a solution that meets their own needs and interests. Strictly speaking, negotiation does not fall in the concept of ADR because it is a bipartite processand does not involve a third party to facilitate or promote the settlement, whereas ADR conceptually involves a third party to facilitate the resolution of disputes by settlement. Negotiation is therefore superior even to ADR because it enables the parties to iron out their differences and disputes by face-to-face direct discussions.

Meaning of Negotiation:

In Simplest terms, negotiation is a discussion between two or more disputants who are trying to work out a solution to their problem. This interpersonal or inter-group process can occur at a personal level, as well as at a corporate or international (diplomatic) level. Negotiations typically take place because the parties wish to create something new that neither could do on his or her own, or resolve a problem conflict, or interest between them and think they can use some form

of influence to get a better deal, rather than simply taking what the other side will voluntarily give them. They prefer to search for agreement rather than fight openly, give in, or break off contract.

According to P.C. Rao, Secretary General of ICADR, "Negotiation means a non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute."

The Pepperdine University of USA has developed an explanatory definition for negotiation: "Negotiation is a communication process used to put deals together or resolve conflicts. It is a voluntary, non-binding process in which the parties control the outcome as well as the procedures by which they will agree. Because most parties place very few limitations on the negotiation process. It allows for a wide range of possible solutions maximizing the possibility of jointgains.[30]

4.5 Distinction between Arbitration, Conciliation and Negotiation:

a. **Arbitration** is a binding process where the disputes are submitted for adjudication according to the agreement by an arbitral tribunal which decides by awards. **Conciliation** is a non-binding procedure in which an impartial third party, the conciliator,assists the parties in a dispute in reaching a mutually satisfactory and agreed settlement ofthe dispute.

   Negotiation is a non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute.

b. In case of **arbitration** a prior "agreement in writing" in the contract or separate agreement in writing to submit disputes to arbitration which have arisen or which may arise in the futureis necessary and both the parties are bound by the agreement.

   However, **conciliation** can be initiated without any prior agreement and relates generally to disputes which have already arisen. In conciliation, one party may invite in writing and the other party may or may not accept the same.

[30] Instate for Dispute Resolution, Pepperdine University (USA), Mediation: The art of facilitating the settlement.

In **negotiation,** there is no need for a written agreement. It can be started after the disputearises.

c. In **arbitration**, the arbitrator does not merely assist in the resolution of a dispute but he alsoarbitrates and resolves the dispute by making an award.

   But in **conciliation**, the conciliator, generally, assists the parties in their attempt to reach an amicable settlement of their dispute.

   In **negotiation** there will be no negotiator, a third party and the parties themselves resolve the dispute.

d. In **arbitration** the parties have to submit the written statements and other evidential documents and the information given by a party is subject to scrutiny by the other party.

   But in **conciliation**, the factual information shall be kept confidential and shall not disclose such information.

   In **negotiation**, as both the parties sit together to negotiate they can openly discuss the issues and convince each other as there is no third party to intervene.

e. In **arbitration**, an award is made and signed by the arbitrator and is not merely a settlement agreement but it is an authentication settlement and the award should be implemented as a judgment.

   In **conciliation**, a settlement agreement any by made by the parties themselves with the assistance of the conciliator and the conciliator shall authenticate the settlement agreement andit is implemented like the implementation of award.

   In **negotiation**, the parties settle the issues themselves and there may be written or oral agreement they are implemented by the parties immediately by themselves.[31]

[31]Alternative Dispute Resolution in Bangladesh: Challenges and Prospect, Dr. A.B.M. Mahmudul Hoque, page-97-98

Chapter-5

Importance and Salient Features of ADR

5.1 Why ADR is Important for Bangladesh?

Bangladesh's judiciary is deadlocked in a vicious circle of delays and backlogs. According to a report of the Law Commission, till 31st December 2014, more than 2.6 million cases were pending in district courts. The present rate of disposal of cases and accumulation of backlogs is alarming for justice, the rule of law, and the economic development of the country. Despite the best efforts and full utilization of manpower, it is not easy to combat such an alarming backlog situation without taking recourse to Alternative Dispute Resolution (ADR). In such circumstances, the ADR system has been introduced within the formal justice system to minimize inordinate delays and to reduce undue litigation costs. In Bangladesh, we find practices of ADR in three different forums i.e. formal (e.g. Family Court), Quasi-formal (e.g. Village Court), and informal (e.g.village Shalish). At present, several statutes in Bangladesh have implemented a judicial practice of ADR through mediation, conciliation, and arbitration.

The most notable ADR within the formal justice system is the one introduced to ordinary civil courts in 2003 by the amendment of the Code of Civil Procedure (CPC), 1908. Though previously ADR was in practice in some special civil courts, sections 89A, and 89B were inserted by this amendment to incorporate the systems of mediation and arbitration of civil disputes that lie before the court. This amendment gives the option to the court to mediate between parties or refer the disputeto the pleader or the parties themselves (where no leaders have been engaged) or to the mediatorfrom the panel to be prepared by the District Judges. In 2006, the CPC was further amended to insert a section discussing the provision of conducting ADR (mediation) during appeal. Despite theeffort, the scheme did not work well; there was an option for the court to decide whether the dispute should be referred for mediation. Therefore, there is an exigent need for further amendments that would make ADR mandatory.

In 2012 the CPC was again amended to replace the word ‘may’ with ‘shall’ in sections 89A and 89C to make mediation mandatory in both pre-trial and appellate stages in every civil litigation and sections 89D and 89E were newly added. Section 89D provides special provision for mediation when the contesting parties to a suit or of an appeal applied for mediation started before

the amendment of 2012. Section 89E provides for the application and commencement of the provisions of section 89A and 89C in the following words- 'the provision of section 89A or 89C shall be applied to such area, and commenced on such date as the government may by notification in the official Gazette, fix'. However, the government has not yet issued any Gazette notification fixing thedate and specifying the area for its application. As a result, ADR has not been started yet in the ordinary civil courts of Bangladesh after an era of introducing the provisions in the CPC.

Mediation under the CPC is a flexible, informal, non-binding, confidential, non-adversarial, and consensual dispute resolution process in which a third-party mediator shall facilitate a compromise to parties' disputes. After the appointment of a mediator by the parties or by the court, mediation work must be completed within 60+30 days from the date of appointment of a mediator. The court shall pass a decree/order according to the terms of the compromise within 7 days from the date of getting the report of the mediator. a If a mediation attempt undertaken by the court fails, the same Judge shall nothear the suit subsequently.

The introduction of a compulsory mediation system in ordinary civil courts is a positive step not only in reducing the huge number of pending cases but it has also a healthy impact on the societyand social relations of the litigants. Now we are waiting for the government's initiative to start full-fledged ADR in the ordinary civil courts of Bangladesh. At last, the famous words of Abraham Lincon emphasizing the deep significance of ADR may be recalled. He said- "Discourage litigation; persuade your neighbors to compromise, whenever you can; point out to them the nominal winneris often a real loser, in fees, expenses, and waste of time."[32]

Chief Justice Burger explained the need very persuasively:

"The obligation of our profession is or has long been thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that produce an acceptable result in the shortest possible time, with the least expense, and with a minimum of stress on the participants. That is what justice is all about."[33]

[32]https://bdlawdigest.org/adr-in-civil-justice-system-in-bangladesh.html
[33] Burger, Isn't There a Better way, 68 A.B.A.J. 274 (March 1982)

5.2 Salient Feature of the ADR

- The Ordinance does not define compromise or reconciliation. However, compromise or reconciliation is mandatory within the procedural obligations of the court (Sections 10 & 13).
- The Family Court's jurisdictions include:
  a. Dissolution of marriage;
  b. Restitution of conjugal rights;
  c. Dower;
  d. Maintenance;
  e. Guardianship or Custody of Children (Section 5).
- The respective court acts as a conciliator in case of a compromise or reconciliation attempt. Parties to the conflict participate in such reconciliation along with their leaders. Unlike the provisions contained in Section 89a, CPC disputes before the court are not referred to the pleader's attempt to affect a compromise (Section 13). The trial can be held in camera (Section 1.1)
- After the filing of the written statement at the pretrial hearing, the court shall examine the plaint, the written statement, and other documents. It shall ascertain points at issue and it shall attempt to reach a compromise between the parties (Section 10). At the close of the evidence, the court shall take another attempt to effect a compromise (Section 13). The trial can be held on camera (Section 11).
- If the dispute is settled amicably, the court shall pass a compromise decree. If the reconciliation or compromise is not possible, it shall pronounce a judgment.
- The decision of the court in terms of compromise or conciliation is tagged as a compromise decree without any appeal.[34]

[34]Alternative Dispute Resolution in Bangladesh: Challenges and Prospect, Dr. A.B.M. Mahmudul Hoque, page-152

Chapter-6

ADR in Family Courts

6.1 Discussion on ADR under Family Courts Ordinance:

The practice of ADR in family disputes was first recognized by the Muslim Family Laws Ordinance 1961 (MFLO). MFLO dealt with family disputes relating to Muslim couples and among couples from other religions.

As a consequence of the shortcomings under MFLO, and to close the vacuum of dealing with family disputes relating to all citizens of the country irrespective of religion, the Family Courts Ordinance 1985 (hereinafter mentioned as FCO0 was promulgated to establish family courts with exclusive jurisdiction all over Bangladesh except for three hill districts.[35]

6.2 Subject Matters of ADR in Family Courts:

Subject to the provisions of MFLO, and by Section 5 of the Family Courts Ordinance 1985, Family Courts have jurisdiction over five issues and this is:

a. Dissolution of marriage;
b. Restitution of conjugal life;
c. Dower;
d. Maintenance and
e. Guardianship and custody of children.

Though the term 'Restitution of conjugal life' is used under Section-5 of the Family Courts Ordinance as one of the jurisdiction of the Family Court, it does not provide any definition of the terms. Therefore, until the recent development of case law on restitution of conjugal life, the courts interpreted it strictly. The earlier approach of the courts was towards the 'involuntary' restitution of conjugal rights sought by the husbands to get their wives back, despite the wife's unwillingness to go back to living together. However, in the leading case, Nelly Zaman v. Giasuddin Kahn (34 DLR 221) the court held that:

In a subsequent case, Hosneara begum V. Alhaj Md. Rezaul Karim (1991) 43 DLR (HCD) 543, it was upheld that the cruelty of conduct of the husband is a valid ground to refuse the restitution of

[35]Alternative Dispute Resolution in Bangladesh: Challenges and Prospect, Dr. A.B.M. MahmudulHoque, page-152

conjugal rights by the husband. Though the majority of women perform their household chores voluntarily, by giving a liberal interpretation of the term cruelty, the HCD of the Supreme Court asserts that in a well-off family, even compelling a wife to do domestic work can be treated as cruelty of conduct on the grounds of which a wife may refuse restitution.

Therefore, although the FCO had the jurisdiction to try cases for restitution of conjugal rights, Family Courts do not currently exercise such provisions in litigation. The reason is wife had been ordered forcefully by the court to go with her husband without her consent, any court order making such compulsion violates the fundamental rights incorporated in Articles 27 and 31 of the Constitution of Bangladesh.[36]

6.3 Judges as Mediators in Family Courts:

Under the FCO 1985, judges in the Family Court act as mediators. Unlike CPC, there is no provisionfor a panel of mediators or lawyers to act as mediators in Family Courts. Therefore, the trial judge himself acts as a mediator. Even when a mediation attempt fails, the same judge continues the trial of a case.[37]

6.4 Procedure of ADR in Family Courts:

According to section 10.1, when the written statement is filed, the Family Court shall fix a date ordinarily of not more than 30 days for a pre-trial hearing of the suit.

As further elaborated in section 10.2 on the date fixed for the pre-trial hearing the Court shall examinethe plaint, the written statement (if any), and the summary of evidence and documents filed by the parties shall also, if it so deems fit, hear the parties.

The slander provision of ADR was effectively mentioned in section 10.3, of the FCO 1985. According to this provision, at the pre-trial hearing, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation. If the parties agree to mediate, the presiding judge usually meets them in his chamber. Lawyers may or may not be

[36]Alternative Dispute Resolution in Bangladesh: Challenges and Prospect, Dr. A.B.M. Mahmudul Hoque, page-153
[37]Alternative Dispute Resolution in Bangladesh: Challenges and Prospect, Dr. A.B.M. MahmudulHoque, page-153

allowed to stay. However, as observed by Chowdhury (2011), in most of the cases, Family Court judges do not allow lawyers to stay in the mediation session.

Judges may attend several mediation sessions if parties are not able to attain a settlement in a single session. However, if parties fail to settle, the court shall resume and the same presiding judges settle the dispute following the usual trial procedure.[38]

Pre Judgment Mediation:

If a pre-trial mediation fails, a second option is given to the clients after completing the trial process and before pronouncing judgment. At this stage price to judgment, the judge shall ask parties regarding their intention to solve the dispute through mediation. Therefore, this process of family court mediation is usually termed pre-judgment mediation.

As specified in section 13 of the FCO 1985, after all parties have completed presenting evidence, the family court shall make another effort to effect a compromise or reconciliation.

One notable feather of family court mediation is that the mode of mediation practiced in family courts is mandatory because sections 10 and 13 state that a judge shall make an effort to resolve casesthrough mediation.[39]

Consequences of Mediated Agreements:

a. Part of A Decree:

   According to section 14 of FCO 1985, once parties reach a compromise agreement, the court shall pass a decree on it. Initially, many family court judges used not to pass a decree when a resolution was attained through a consensual decision by the parties. After the reformed ADR movement in 2000, all family court judges were instructed to issue a decree based on a compromise agreement.

b. No Appeal:

   Generally, under section 17 of the FCO, with some exceptions mentioned in section 17(2), parties may prefer an appeal within 30 days of their decree. Such appeal shall be made in the court of a district Judge. However, compromise decrees art not explicitly incorporated

[38]Alternative Dispute Resolution in Bangladesh: Challenges and Prospect, Dr. A.B.M. Mahmudul Hoque, page-154
[39]Alternative Dispute Resolution in Bangladesh: Challenges and Prospect, Dr. A.B.M. Mahmudul Hoque, page-154

as an exception under section 17(2). This means that such decrees may be appealable under section 17 as they are not explicitly mentioned. However, the Code of Civil Procedure, 1908 assigns meanings to words and expressions used in the Ordinance. This means that despite a compromise agreement being part of the decree under section 14, the scope of section 17 cannot be cases resolved through trial in family courts. As a result, parties of family disputes cannot proffer appeals on compromise decrees, as they have mutually agreed on it. This provision helps reduce case backlog by reducing the possibility of retaliation appeals and delays in case disposal. the possibility of an appeal for retaliation and consequent delay in the disposal of a case.[40]

6.5 Achievements of ADR Enactment in the Family Courts:

In 1985, the Family Court Ordinance was published. Sections 10, 11, and 13 of this Ordinance include provisions for mediation, an ADR method, granting the court the authority to settle conflicts between the parties. However, these rules were not regularly used by the courts until the year 2000. From 2000 to 2001, sixteen pilot courts in various regions of the nation were set up. There were posted trained judges. The family matters in those pilot courts were successfully resolved through mediation with great success. Statistics reveal that in the three years (from July 2001 to June 2004) following their inception, the pilot courts resolved 2418 family matters through mediation, accounting for nearly 35% of all ongoing family cases.[41]Whereas, before this initiative from 1985 to 2000, in fifteen years, the total money realized from about 70 Family Courts was about tk. 6.2 million and those courts disposedof less than one thousand family cases through mediation.[42]

6.6 Causes of Inadequate Practice of ADR in Family Courts:

The family pilot courts achieved immense success in settling family disputes through ADR. However, the government did not extend the activities of the family pilot court and did not make the courts permanent. Now every Assistant Judge or Senior Assistant Judge of the original jurisdiction

[1]Alternative Dispute Resolution in Bangladesh: Challenges and Prospect, Dr. A.B.M. MahmudulHoque, page-155
[1] SK. GolamMahbub, Alternative dispute Resolution (ADR) In Commercial Dispute: The UK & Bangladesh Perspective, above, P.10
[1]Ibid

has the power to settle the family dispute through ADR and it is observed that a few judges sit for pre-trial or post-trial mediation and their success rate is also very poor. The causes behind such unsuccessfulness are discussed below.

a. Lack of Time for Judges and Advocates:

   As the judges have to dispose of the family cases in addition to the civil case they do not getenough time to sit for mediation. Sometimes advocates also do not properly co-operate with them. As a result, the judges cannot sit for mediation.

b. Disinterestness of the Judges and Advocates:

   The majority of judges do not feel interested in convincing the parties to settle their family disputesthrough ADR. Sometimes they do not want to sit with them in their chamber for the disinvestment of the concerned advocates. In most cases, the concerned parties want to sit for settlement but lack of cooperation from the judges and advocates they cannot settle their cases through ADR.

c. Lack of Training on ADR:

   A successful mediation requires a very vital role of a mediator. A mediator should have sufficient training in mediation techniques and other related matters. But though the judges receive some training on their professional matters, they do not get any training on mediation techniques and other matters related to mediation. As a result, in a discussion in mediation, they cannot convince the parties to settle their cases amicably.[43]

6.7 ADR Under the Muslim Family Laws Ordinance, 1961:

Under this law provision for reconciliation or alternative dispute resolution through arbitration council has been provided for in three circumstances:

i. In the case of polygamy under section 6;
ii. In the case of giving *Talaq* and making it effective under section 7; and
iii. In case of failure of the husband to provide maintenance of his wife under section-9.

[43]Alternative Dispute Resolution in Bangladesh: Challenges and Prospect, Dr. A.B.M. Mahmudul Hoque, page-155-156

6.8 ADR Mechanism in the Family Courts Ordinance, 1985:

With a view to expedite the resolution of disputes related to family affairs rapidly and effectively, the Family Courts ordinance, 1985 was promulgated. Some family Courts have been established by the Ordinance and these courts has been following the ADR Procedure in dispensing the cases instituted for trial.

This Ordinance consists of 26 Sections of which, the following sections provide ADR Procedure as the trial proceedings.

Section 10: Pre-Trial Proceedings:

(1) Having filed the written statement by the defendant, the family court shall fix a date ordinarily of not more than 30 days for the pre-trail hearing of the suit.
(2) On the date fixed for the pre-trial hearing, the court shall examine the plaint, the written statement, and documents filed by the parties and shall also, if it is so deemed fit hear the parties.
(3) The Court, at this stage, shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation, if this is possible, between the parties.
(4) The Court if no compromise or reconciliation is possible shall frame the issues in the suits and fix a date for hearing evidence (which will not be more than 30 days).

Section 11: Trial in Camera:

(1) The Family Court, if it so deems fit may conduct the whole or part of the trial in camera.
(2) Both parties in the suit may request the court to conduct the proceedings of the case in camera.

Section 13: Conclusion of Trial:

(1) The family court, after the closing of evidence of all parties, shall make another effort to effect a compromise or reconciliation between the parties.
(2) If such compromise or reconciliation is not possible the court shall pronounce judgment (either at once or on some future day not beyond 7 days of which due notice shall be served to the parties or their agents or advocates) and on such judgment, a decree shall be followed.

Pre-trial Reconciliation:

Section 10 of the Ordinance provides for reconciliation. According to section 10, after the written statement is filed, the Family Court shall fix a date not more than 30 days later for a pre-trail hearing of the suit. In that pre-trial hearing, the Family Court will attempt to effect a compromise or reconciliation between the parties after examining the plaint, written statement, summary evidence, and documents under section 10(3).

After the trial, another attempt is made to effect a compromise or reconciliation between the parties before the pronouncement of the judgment (section 13). Thus the actual intention of the legislature seems to be that the Family Courts should act as conciliators and mediators for the reconciliation between the parties so that the couple may have a happy conjugallife.[44]

[44]Halim, Md. Abdul, ADR in Bangladesh: Issue and Challenges, 14th Edition(November 2020) CCB Foundation. P.125-136

Chapter-7

Implementation of ADR in the Civil Justice System of Bangladesh

7.1 Examination of the role of courts in promoting and facilitating Alternative Dispute Resolution.

The role of courts in promoting and facilitating alternative dispute resolution (ADR) is a complex and evolving one. In the past, courts were often seen as the only option for resolving disputes, and ADR was seen as a less desirable alternative. However, in recent years, there has been a growing recognition of the benefits of ADR, and courts are increasingly playing a role in promoting and facilitating its use.

There are several reasons why courts are now more supportive of ADR. First, ADR can helpto reduce the cost and time of resolving disputes. This is particularly important in cases where the parties are unable to afford the expense of litigation, or where the dispute is complex and would take a long time to resolve through the courts. Second, ADR can help to preserve relationships between the parties. This is important in cases where the parties will need to continue to work together after the dispute is resolved, such as in business or family disputes. Third, ADR can help to promote a more just and equitable resolution of disputes. This is important in cases where the parties have different levels of power or resources, or where there is a history of discrimination or oppression[46].

There are several ways in which courts can promote and facilitate ADR. First, courts can provide information about ADR to the parties. This can be done through educational programs, court websites, or by referring parties to ADR providers. Second, courts can encourage parties to consider ADR by making it a condition of filing a lawsuit. This is often done in cases where the parties are unable to agree on a mediator or arbitrator, or where the dispute is complex and would

[45] Dispute Resolution in the United States Federal Courts: Panacea or Pandemic? St. John's Law Review, Vol. 81, 2007;

[46] http:// ssrn. com/ abstract=993220.

be difficult to resolve through ADR. Third, courts can provide financial assistance to parties who want to use ADR. This can be done through grants, loans, or by waiving court fees[47].

The role of courts in promoting and facilitating ADR is an important one. By playing an active role in this process, courts can help to ensure that disputes are resolved in a fair, efficient, and cost-effective manner[48].

In addition to the above, there are several other ways in which courts can promote and facilitate ADR. For example, courts can:

* Provide training for judges and court staff on ADR.
* Develop court rules that encourage the use of ADR.
* Create ADR programs within the court system.
* Partner with ADR providers to offer ADR services to the public.

By taking these steps, courts can help to make ADR more accessible and affordable for the parties and can help to ensure that ADR is used to its full potential in resolving disputes.[49]

[47] Ibid.

[48] Ministry of Law Justice and Parliamentary Affairs.

[49] Ibid.

7.2 Identification and analysis of challenges and barriers to effective Alternative Disputes Resolution implementation.

Alternative Dispute Resolution (ADR) is a process of resolving disputes outside of the court system. ADR can be used to resolve a wide range of disputes, including contract disputes, employment disputes, and personal injury claims[50].

There are many different types of ADR, including mediation, arbitration, and negotiation. Each type of ADR has its own advantages and disadvantages. Mediation is a process in which a neutral third party helps the parties to settle. Arbitration is a process in which a neutral thirdparty hears the evidence and makes a decision. Negotiation is a process in which the parties try tosettle on their own.

ADR can be an effective way to resolve disputes quickly, cheaply, and confidentially. However, there are also some challenges and barriers to effective ADR implementation[51].

One challenge to ADR implementation is the lack of awareness and understanding of ADR. Many people are not aware of ADR or do not understand how it works. This can make it difficult to convince parties to use ADR instead of traditional litigation[52].

Another challenge to ADR implementation is the cost. ADR can be more expensive than traditional litigation, especially if the parties need to hire lawyers or other experts to help them through the process. This can make it difficult for parties who are low-income or have limited resources to access ADR[53].

[50] Ibid.

[51] Ibid

[52] LL.B. (Honours) Student, Department of Law, University of Raj.

[53] "The Code of Criminal Procedure, 1898". No. V of 1898.

A third challenge to ADR implementation is the time. ADR can take longer than traditional litigation, especially if the parties are unable to settle quickly. This can be a problemfor parties who need to resolve their disputes quickly[54].

A fourth challenge to ADR implementation is the complexity. ADR can be complex and difficult to navigate. This can make it difficult for parties to understand their rights and options and to make informed decisions about whether or not to participate in ADR.

A fifth challenge to ADR implementation is the uncertainty. The outcome of ADR is often uncertain, which can make it difficult for parties to commit to the process. This can be a problem for parties who need to know what the outcome of their dispute will be before they are willing to participate in ADR.

Despite these challenges, ADR can be an effective way to resolve disputes. ADR can be faster, cheaper, and more flexible than traditional litigation. It can also be more confidential and less adversarial. ADR can also help parties resolve their disputes in a way that is more satisfying and lasting[55].

If you are considering using ADR to resolve a dispute, it is important to be aware of the challenges and barriers that can be associated with the process. It is also important to choose the right type of ADR for your dispute. There are many different types of ADR, each with its advantages and disadvantages. You should choose the type of ADR that is most likely to meet your needs and the needs of the other parties involved in your dispute[56].

[54] Md. Joynal and others. Vs. Md. Rustam Ali Mia & others, 36 (1984) DLR (AD) 240

[55] Chowdhury, Dr. Jamila. (2013, March 9), Introduction of ADR in criminal cases, The Daily Star (Bangladesh).

[56] Gulfam, Mahua, (2014) "Introducing Alternative Dispute Resolution (ADR) in Criminal Justice System: Bangladesh Perspective".

7.3 Arbitration Council:

Section 2(a) of the Muslim Family Laws Ordinance, 1961 defines that arbitration council means a body consisting of the Chairman and a representative of each of the parties to a matter dealt with in this Ordinance. Arbitration Council is thus a dispute resolution body that functions both in urban and rural areas of Bangladesh. However, this council is not an independent and separate body. The Chairman of a Union Parishad the Chairman of a Pourashava or the city Mayor has to formthis Council. The functions of the arbitration council by such local elected bodies are in addition to their usual functions.

7.4 Reconciliation in Case of Polygamy:

Section 6 of the Ordinance makes a mandatory provision of obtaining permission from the arbitrationcouncil in case of polygamy by any person and if someone enters into a second marriage without the permission of the arbitration council in case of polygamy by any person and if someone enters intoæecond marriage without the permission of the arbitration council, he commits an offense which is punishable up to one-year imprisonment and fine up to take ten thousand. The detailed provisionsunder section 6 are as follows:

i. A man is not permitted, during the subsistence of an existing marriage, to enter into another marriage without previous permission in writing from the arbitration council.
ii. An application for such permission shall be submitted to the Chairman, together with the prescribed fee, and shall state the reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto.
iii. On receipt of such application, the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such conditions, if any, as may be deemed fit, the permission applied for.
iv. In deciding the application, the Arbitration Council shall record its reasons for the decision, and any party may, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision to the Assistant Judge concerned and his decision shall be final and shall not be called in question in any court.

7.5 Reconciliation in Case of Maintenance:

Section 9 of the Ordinance provides for the following provisions about the role of the Arbitration Council in case the husband fails to provide maintenance to his wife:

i. If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may apply to the Chairman.

ii. On receiving such application the Chairman shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.

iii. A husband or wife may prefer an application for revision of the certificate, to the Assistant Judge concerned and his decision shall be final and shall not be called into question in any court.

7.6 Reconciliation in case of executing a Talaq:

One of the purposes of the Muslim Family Laws Ordinance, 1961 was to provide for reconciliation to resolve marital disputes without the intervention of the court. It sponsored the idea of reconciliation in the case of divorce by either spouse by the spirit of the *Quran* and Sunnah. The provisions are equally applicable to both husband and wife exercising their rightto divorce. The Arbitration Council is empowered to effect the procedure of reconciliation beforethe disputants after its process is initiated by service of notice of *Talak.* The purpose of notice of *Talaq* to being served upon the Chairman of Union Parishad and the wife is to prevent hasty dissolutionof marriage or offer a second chance to the disputants, which is beneficial to both parties in the event reconciliation is effected.

Section 7 of the Muslim Family Laws Ordinance, 1961 introduced a single method of dissolving marriages and considered all *Talaq* by the husband as single revocable *Talaq.* Section 8 provides that in the case of *Talaq* by the wife and also in the case of judicial separation the provision of section7 shall apply. In other words, in case of judicial separation, the arbitration council has to be activated for reconciliation because of the parties as well as for effecting separation or *Talaq.*

7.8 Steps of Reconciliation:

Section 7 provides the following steps for reconciliation:

i. Any man who wishes to divorce his wife shall send a copy of the notice of *Talaq* to the Chairman and also a copy to the wife.

ii. A *Talaq*, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice is delivered to the Chairman.

iii. Within thirty days of the receipt of notice of *Talaq*, the Chairman shall constitute an Arbitration Council to bring about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

iv. If the wife be pregnant at the time *Talaq* is pronounced, *Talaq* shall not be effective until the period of 90 days or the pregnancy, whichever be later, ends.

v. With a view to reconciliation between the husband and wife the Arbitration Council shall send letters to both husband and wife and fix a date for reconciliation.

vi. If both the parties appear and reconciliation takes place, *Talaq* will not be effective and the martial tie between the husband and wife will continue.

vii. If one of the parties does not appear or none of them appear, or if the reconciliation process fails, the *Talaq* will be effective on expiry of 90 days. And only after the expiry of these 90 days, each party may get a certificate/ certified copy of divorce from a Kazi.

7.9* Role of the Arbitration Council in the Case of *Talaq:

Sub-section (4) of section 7 of the Muslim Family Laws Ordinance, 1961 provides for provisionfor reconciliation within a period of 30 days from the receipt of the notice by the arbitration council. The purpose of reconciliation is that before making a hasty decision the husband and wifeget an opportunity to reconsider. Here lies the role of the arbitration council to undertake proactive proceedings with a view to reconciliation between the parties.

The role of the arbitration council in holding a reconciliation proceeding is very important because one of the objects of the Ordinance is to give effect to the sanction of the *Quranic* verse. This sanction is reinforced by the fact that during the long period of *Iddat,* much of the intensity of the disputes providing the ground for divorce dies down. However, there are shortcomings both in the law and procedure about its inactivity.

7.10 Oversight Mechanism and Revision to the Assistant Judge:

There is no specific body to monitor the functions of the Arbitration Council except judicial supervision by way of revision etc. Sub-rule (2) of rule 4 specifies that if any party to the proceedings before an Arbitration Council considers the Chairman to be interested in favor of the other party, he may apply to the Assistant Judge for the appointment of a different Chairman. Such an application must record the reasons in the application, thinks fit, he may appoint any other members of the Union Parishad as Chairman of the Council. The Assistant Judge shall stay the proceedings before the Arbitration Council until he has disposed of such application.

In areas of enforcement and oversight, it is quite noticeable that though the systems encourage decision-making in an informal atmosphere, the legal provisions for enforcement of the decisionof the Village Courts are adequately formal. However, for both the Village Courts and the Arbitration Councils, there are no explicit legal provisions as to oversight mechanisms.

Provisions of Reconciliation:

Two type of reconciliation proceedings are envisaged in the Ordinance:

i. Pre-trial reconciliation proceeding under section 10; and
ii. Post-trial reconciliation proceeding under section 13.

Both these modes of reconciliation proceedings are court-annexed ADR.

Chapter-8

Problems of ADR in Bangladesh's Civil Justice System

8.1 Problem of Properly Implement ADR in Bangladesh:

Dispute resolution outside of courts is not new in Bangladesh; non-judicial and indigenous methods have been used by the societies for a very long time. However, the main problem is that there is no uniform ADR law in Bangladesh.

a. **Poor knowledge about the provision of ADR:**

   A large number of people do not know about the provision of ADR. About 36% of them were found to have no idea about ADR. Even some judges (about 6%) and also a large number ofadvocates (about 22%) do not know about ADR. Though the laws relating to ADR were incorporated in the Civil Procedure Code in the year of 2003 by still most of the litigants (about83) still do not know about the provision even after seven years. It is further found that about 20% of court staff, 30% of advocates clerks, 25% of NGO officials, 85% of local leaders and 60% of journalists also do not know about the provision of ADR. So, the ignorance of all categoriesof people is the main cause for unsuccessful ADR.

b. **Not giving the idea by the Advocates or by their clerks:**

   The Advocates usually think that ADR is not a suitable alternative to litigation and almost all of them think that ADR may effect negatively upon their income. So, they do not feel interested in settling their cases through ADR at the same time they also do not encourage the litigant people to take the opportunity of ADR. Sometimes they give adverse ideas about it. For that ADR the concerned Advocates and Advocates clerks are another important reason for the non-success of ADR.

c. **Tendency to harass the other party:**

   Harassment in court is a common phenomenon continuing from the existence of the court. It is one of the characteristics of an adversarial system of trial.

d. Court Role is not sufficient enough to guide the parties:

Though the judges ought to take the most interventionist role to promote ADR it has been found that the majority of judges did not use it to encourage the parties to take advantage of ADR.

e. The weak party of the case always tries to hang the case:

Some weak party in a case always tries to hang the case. In many cases, if the weak party somehow possesses the suit lands he tries to hang the case and does not want to sit for compromise.

f. Ego problem among the litigants:

In addition to disagreements between the parties, disputes may involve matters of prestige between families, races, organisations, or even communities. Even if the issue is so small or so easy, it can happen that a very basic problem grows into a very significant, prestigious issue. When this happens, the parties do not want to settle the conflict amicably by compromise. Due to this, ego issues among the parties involved in a dispute play a key role in the mediation process' failure..

g. Influence of a third party:

Many respondents expressed the opinion that when both parties are in agreement during the mediation process about a particular issue, but the mediation process is interrupted when a third party—usually a friend, relative, or someone of the same race as the parties—gets involved and the parties to the suit do not want to compromise the issue in the new context. During interviews, several judges stated that there are situations when the parties completely agree to settle their dispute, but when they return home and get negative feedback from the third party, they change their minds. The mediation procedure was unsuccessful as a consequence.

h. Involvement of 'Touts':

The majority of respondents said that many touts constantly attempted to persuade litigants to follow their advise at every court complex. By doing this, they make money by taking advantage of litigants who are impoverished, in distress, stupid, and uninformed. The touts lose money if a lawsuit is resolved through mediation. Therefore, the promoters would never advise a litigant to use ADR to resolve their dispute. The touts present a negative impression if any litigant wishes to take such advantage. In this approach, the touts obstruct the ADR process.

8.2 Problem in our Civil Justice System:

Our judicial and legal system has a long history of providing equitable outcomes and has benefited greatly from the rich common law legacy. The adversarial or accusatory nature of common law has advantages and disadvantages, just like any other legal system. But in recent years, a number of objective and subjective elements have come together in such a way that our judicial system is now in a position where its flaws outweigh its strengths. Backlogs and delays are being crippled by manifesting. Even the victor of the lawsuit suffers from delayed justice since it incurs excessive time, financial, and emotional expenses.

The reasons for the delay in the functioning of our civil justice system are both systemic and subjective. They may be identified as follows:

- Common law oriented adversarial or accusatorial character of the civil process as against inquisitorial as practiced in continental Europe, meaning that the litigation is a party controlled which provides wide maneuvering powers to the lawyers and presupposes lesser initiative and relative passivity of the judges.
- Slow process of service of summons, which can be further slowed down by the intentions of the parties concerned indicating the poor state of court administration.
- Too much reliance on the resort to interim injunctive relief and orders, learning the hearing of the main contentions and issue to infinity.
- Frequent adjournments of the trial caused by the insistence of the lawyers, and the reluctance of the judges to limit these adjournments, such reluctance being explained partly by heavycases and partly by their unpreparedness to continue and complete the process.
- Vested interest of the lawyers for lengthening and delaying the process for they are often paid by their appearances in the court.
- Commonly made interlocutory orders and appeals that fracture the case into many parts and effectively stay the trial.
- Scope for frequent amendments of the plaints and written statements at any stage of the trial.

- Reluctance of the judges, accentuated by their statutory non-compulsion, to use pre-existing rules and orders to expediter the trial, or to sanction the parties for failing to follow the procedural requirements, meaning that the judges do not take initiative to employ procedural power of their rule-making power to achieve procedural effectiveness.
- Absence of lawyer-client accountability giving the lawyer monopoly power to conduct the case the way he considers best suited to his interest.
- Little scope for client-client interaction, which hides the potential for alternative, dispute resolution and intensifies the confliction nature of proceedings.

8.3 Why our civil justice system is not working properly?

Delay in litigation is still prevailing in the field of civil justice. The multiplicity of litigation, delay in disposal, and causes for miscarriages of justice in civil cases spell nerve breakingthe tension, anguish, and financial strain on the litigants.[57] Delay in our judiciary has reached a point where it has become a factor of injustice, a violator of human rights.[58] Delay in civil justicein Bangladesh is caused by many reasons. There is a fertile field in the Code of Civil Procedure, 1908 for a clever lawyer to prolong and protract proceedings to any length of time.[59]

Defects in the procedural law

The Code of Civil Procedure's rules are often improperly followed, which gives cases a chance to avoid swift resolution and causes a significant amount of delay. The processing fee is not paid soon enough after the plaint is filed, delaying the summons' delivery to the defendant. After the defendant submits his appearance, the defence attorney frequently requests lengthy adjournments so that they can submit a written statement. Before disputes are resolved after the pleadings are closed, there is a stage where documented proof must be produced, but no one cares to do so at this time. The regulations for the discovery and inspection of documents, as well as for serving a search warrant. Before the cases get to trial, the parties can frequently narrow their disagreement if these measures are applied correctly.

[57]MdNannuMian&ShaikhRajibHossain. Problems of Alternative Dispute Resolution Mechanisms and Proposals for Improvement: A Study in Bangladesh. International Journal in Management and Social Science, India, Vol.1, No.1, 2013, p.23.
[58]DrAlam, M. Shah (Professor of Law, University of Chittagong and Chairman of Law Commission), A Possible Way out of Backlog in Our Judiciary, The Daily Star, Dhaka, 16 April 2000.
[59] Narayan Swamy, "The Procedural Law in India Requires through Change" AIR, 1987, Jour.85.

Delay due to the Litigants

It is found that the respondents verified that delay on the behalf of litigants is for the following reasons; lack of legal knowledge, failure to produce witnesses; intentional time killing, malicious prosecutions, delay in submission in a written statement and lack of client to client interaction.

Delay caused by the judges

Insufficient judge: Each lower court judge, on average, is overburdened with around 2,000 cases for their hearing and disposal. A total of 1,397 judges have been dealing with more than 27.5 lakh cases across the country.[60]

There is a general feeling that the government is not appointing a sufficient number of judges to deal with increasing work. It is a common experience that even existing vacancies in various HCD remain unfilled for an unduly long time. Prompt appointment of judges to fill the existing vacancies and creation of additional posts insufficient number would go a long way to solve the problem of delay and arrears.[61]

Adversarial system in civil procedures

In our procedural law although there are provisions for chronological advancement of cases there is no compulsion for maintaining a timeframe for each chronological step. A case arrived at the peremptory hearing after long journey can be brought back again to the primary stage by any of the parties without any reasonable excuse by taking advantage of the absence of compulsion. In Bangladesh adversary system of trial is enforced the adversary of trial in our country is in vogue. In this system, the accused person know the charges taken against him and preserves the right of self-defence. Both the complaint and the litigant have to face interrogations in this system. This system has some inherent weakness because of having a very normal role to play of judges. So it leads to delays and high costs in the disposal of cases.

[60] The daily star September 09, 2017
[61] Civil Procedure by-C.K.TAKWANI

Slow process in service of summons

A great deal of delay occurs in summon service, processes filed by the parties are not promptly sent to the nazir for service.[62] Though summons must be filed along with the plaint in practice, it is not strictly observed. The slow process of service of the summons was further slowed down by the intentions of the parties concerned, indicating a poor state of court administration.[63] Processes filedby the parties are not promptly sent to the Nazir for necessary action and process service returns are also not sent to the sheresta of respective courts from Nazarat in time.[64] Under the present procedural system, the process server is the most powerful person without being responsible for his failure to serve a summons in time. This makes him shirking his work; as a result, more often summons is returned with the endorsement of 'party not found', or 'address not known ' and most of such endorsement are bogus and not genuine.

Failure of the parties to present

Dismissal for default followed by miscellaneous cases under Order IX Rule 4 and rule 9 of the Code of Civil Procedure for the restoration of suits is a regular feature.[65] Intentional non-appearance and absence by the filing of a petition for adjournment result in the dismissal for default to linger in the course of litigation. Such malpractice needs to be discouraged because orders passedby the trial courts in such miscellaneous cases give rise to miscellaneous appeals consuming muchtime in the disposal of the original suit. However, responsible and conscious discharge of professional duties by lawyers can only fight out such unbecoming practices. Appearance on the date of ex-parte disposal seeking adjournment for filing of W.S. and rejection of such petitionsfor adjournment is followed by miscellaneous appeal creating deadlock and setting aside of the ex-parte order by the appellate courts in terms of liberal construction enabling opportunity to the other side to contest the original suit consume much time to dispose of the original suit.

[62] Islam, Md. Nur (Assistant Judge), Justice delivery system: Internal component for delay should be eliminated, The Daily Star, July 6, 2003.
[63]DrAlam, M. Shah (Professor of Law, University of Chittagong and Chairman of Law Commission), A Possible Way out of Backlog in Our Judiciary, The Daily Star, Dhaka, 16 April 2000.
[64]Haider, Md. Tarik, Delay in Judicial Proceedings- Problems and Suggestions Towards Solution- A judge's View, Judicial Administration Training Institute Journal, volume. Viii, June 2009 at p.7.
[65]Order ix of Code of Civil Procedure, 1908.

Presentation of plaint without documents

The Code of Civil Procedure, 1908 provides that where the plaintiff relies upon documents in his possession or power as evidence in support of his claims, he shall produce themin Court when the plaint is presented and shall at the same time deliver the documents to be filed with the plaint.[66] But it is observed that when the summons is ordered to be served upon the defendant a copy of plaint only without copies of documents is served upon him. As a result, the defendant appears in response to the summons, he seeks an adjournment for filing his written statement on the ground that he has to inspect the documents and other issues reliedupon by the plaintiff in his plaint and this usually causes an unusual delay in disposal of the proceedings.

Intentional delay caused by the defendant in submitting a written statement

Once the defendant is served with a summons, he appears before the Court. On the first appearance, the engaged lawyer of the defendant prays for time on the plea that he has just received the copy of the plaint and he has not yet gone through the concerned documents of the suit. The case is adjourned and on the next dates, the defendant's pleader prays for time on different pleas to file a written statement. The request for time is repeated until the judge interferes personally and expresses concern and this causes a delay of proceedings.

Delay caused due to passing interlocutory orders

Interlocutory matters like applications for a temporary injunction, local inspection, local investigation and appointment of receiver consume much time of the Courts. Orders either rejecting or allowing the temporary injunctions are followed by miscellaneous appeals preventing the disposal of civil suits because a long time is spent on the disposal of miscellaneous appeals in the higher court.

[66] Order 7 rule 14 Code of Civil Procedure,1908.

Application for transfer of the suit

On the application of any of the parties, the High Court Division or the District Court may at any stage transfer any suit or appeal pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same.[67] So, the parties have to apply to the High Court Division or the District Court for transfer of the suit and it takes the delay in civil litigation.

Application for local investigation

A judge has the power to make a local investigation in person in any case or may appoint Advocate Commissioner to hold a local investigation.[68] The object of local investigation is to obtain evidence which from its very nature can only be obtained on the spot and to elucidate any point which is left doubtful on evidence taken before the court. It takes a long time to make any local investigationof any suit which is also one of the main causes of delay in civil litigation.

Application for remand of the suit

An appellate court has the power to grant remand. [69]Remand means sending back the case to the trial court for a retrial of the case. If the appellate court or revisional court finds lacuna in the procedure and then the case is sent back on the remand to the trial Court, in which procedure relates and the time spent is almost the same as that spent in the first round.

Application for amendments of pleading

Civil lawsuits take longer to complete because there is room for many revisions to the evidence and written testimony at any point in the trial. Because there is no lawyer-client relationship accountability, the attorney has complete discretion over how to handle the matter and may even drag out the proceedings. Order 16, rule 17 gives the Court the authority to grant a request for pleading change at any point in the course of the proceedings. In most cases, the application for amending a pleading is permitted to settle the actual issue in dispute between the parties. There may be circumstances when changes are required. However, there is no deadline set for requesting factual revisions after the pleadings were filed.

[67]The Code of Civil Procedure, 1905.s.24.
[68] The Code of Civil Procedure, 1908, Order –xxvi & rule 9.
[69] The Code of Civil Procedure, 1908, Order- 41, rule -23.

Delay in the execution of the decree

In the execution stage, judgment debtors take advantage of technicalities adopt dilatory tactics,and make application of tricks with intent to delay the execution. The entire judicial process in a civil suit has been brought to disrepute by the manner and method of executing proceedings that protract over decades and others are unintentional.

Delayed in the appearance of a witness

The witnesses of the parties are often found not present in the Court on the date of the hearing. Consequently, the hearing of the case has to be adjourned. Self-respecting persons avoid attending the courts as witnesses because of the atmosphere around the court and the treatment metedout to them.

Transfer of judges

Rotation and transfer of judges, often meaning that the same judge who heard testimony may not decide the dispute, taking away thereby much of his incentive to push forward the proceedings to judgment and seriously impeding the process of continuous trial; the new judge may have to repeat some of the procedural requirements already fulfilled. Midterm transfer of judges often causes a delay in the disposal of cases.

Insufficient judge

There is a general feeling that the government is not appointing a sufficient number of judges to deal with increasing work. It is a common experience that even existing vacancies in the High Court Division remain unfilled for an unduly long time. Prompt appointment of judges to fill the existingvacancies and the creation of additional posts with insufficient numbers would go a long way to solve the problem of delay and arrears.

Chapter-9

Concluding Part

9.1 Recommendation

It is beyond doubt that, the present problem in the Judiciary system is increasing and it is not possible to resolve all problems and disputes in one night. So, to resolve increasing disputes in Bangladesh we have to emphasize the establishment of ADR. To make ADR more effective, extensive, and proactive, coordination is needed among different agencies.

Some other initiatives need to be taken, which are given below:

Creating social awareness about ADR among the people;

a. Make ADR mandatory in some specific law like (family dispute);
b. Emphasis on utilizing 'Emotional Intelligence' to mediate in ADR;
c. Involving local good political and non-political leaders for the betterment of the ADR;
d. Take initiatives to publicity that ADR is less costly than typical judicial process;
e. Take initiative to publicity of the advantage of ADR;
f. Spreading the success story of ADR;
g. Encouraging NGOs to become involved in ADR;
h. Involving the Bar Associations in ADR;
i. Providing skillful training for mediators;
j. Matching Government and NGO efforts.

9.2 Conclusion:

The idea of resolving family-related disagreements through alternate means is very important. Bangladesh has long attempted to implement the ADR system with the trial of family conflicts by means of several statutory instruments. In order to quickly resolve family issues, we have developed ADR procedures such as the Muslim Family Laws Ordinance, 1961, and the Family Courts Ordinance, 1985. In fact, adopting ADR in family courts has already produced a number of successful outcomes in Bangladesh. However, it hasn't yet fully tapped into the system's advantages on the expected level. We are not properly on the board as a result of several issues related to our current system. To address the current issues with ADR processes in family situations, all parties involved, including policymakers, implementing agencies, solicitors, and judges, must take a comprehensive approach. Our judicial system has to develop a proper procedure for having judges arbitrate conflicts instead of going to court. Our family court judges are required to decide a specific number of cases within a specified time frame. However, consideration should also be paid to the interests of solicitors and any conflicts of interest. The communities of attorneys in our country ought to remember that the great profession of law is not just about making money. There is a huge chance for them to become ADR specialists even inside the ADR system for family affairs, which may allow them to have respectable professional lives. Now, it is up to the government to launch some lobbying and education campaigns to inform everyone about ADR methods..

Bibliography

Books

1. Mohammad Rustam Ali, *ADR a mechanism to get quick justice in easy and cheapest way*1st Ed. (Dhaka: Shajib Law Books, 2009).
2. Sarvesh Chandra, ADR: is conciliation the choice. *What it is and How it works*, (Delhi: Universal Law Publishing Co. Pvt. Ltd, 2002).
3. Kazi Ebadul Hoque, Administration *of Justice in Bangladesh*, 2nded. (Dhaka: Asiatic Society of Bangladesh, 2006).
4. Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach*, 1st ed.Karachi Cambridge Scholars Publishing, 2011).

Journal

1. Naima Haider, Dispute Settlement Mechanisms in International Contracts Bangladesh Journal of Law. vol. 7 (1&2) (2003)
2. Sumaiya Kabir, 'Alternative Dispute Resolution: How It works in Bangladesh', The Dhaka University Studies, part-F, vol. 15(1), (June 2004),
3. Shima Zaman, Chandra Mandal, Sayed Masud Reza and, Polash Kumar.Existing ADR framework in Bangladesh, Human Rights: sixty years after UDHR, ed. Mizanur Rahman (Dhaka: Summer School Manual by ELCOP and palak prokashoni, 2008)
4. Alamgir Muhammad Serajuddin 'Judicial Activism and Family law in Bangladesh' Asiatic Society Journals of Law, vol. 3 (June 2010).

Statutes:

1. The Code of Civil Procedure, 1908 (as amended in 2003 and 2006).
2. Artha Rin Adalat Ain, 2003 (Money Loan Court Act).
3. Salish Ain, 2001.
4. Dispute Conciliation (Municipal Area) Board Act, 2004.
5. Family Courts Ordinance, 1985.
6. Muslim family Laws Ordinance, 1961.
7. Village Courts Act, 2006.

Websites:

1. [http://en.wikipedia.org/wiki/Judicial_activism,.
2. [http://www.banglapedia.org/httpdocs/HT/J_0127.HTM,
3. [http://www.c-s-p.org/Flyers/978-1-4438-2733-1-sample.pdf,
4. [www.adrpresentposition.com I
5. [http://www.thedailystar.net/law/accesed on 08 August 2008 vision.htm I last visit on 3rd
6. [http: //www.thedailystar.net/law/accesed on 11 November 2012/corridor.htm.
7. [http:// www.adb.org/ Documents/ Events/2009RETa5987/ Final accessed on
8. [http: // www. the daily star. net. / accessed on 1st November 2008 I last visit on 9. [http:// www.thedailystar.net. /accessed on 28 January 2007]
9. [Islam Zahidul, The New Age, Dhaka, December, Tuesday, 12. 2006 I l
10. [http://www.asiaticsociety.org.bd/journals/June_2010/contents/03_Alamgir% 20Muhammad%20Serajuddin.htm].