

ALTERNATIVE DISPUTE RESOLUTION (ADR): ULTIMATE FATE AND COMMUNITY BASED STRIVE

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Abstract

In Bangladesh, recent years, there has been renewed emphasis on the Alternative Dispute Resolution schemes as a means to avoid the use of contested hearings in the formal litigation and to ensure the most fundamental right of access to justice for all in an easy way. This paper discusses the emergence of implication and practice of Alternative Dispute Resolution (ADR) for implementing civil justice, compounding cases in criminal justice system, to mitigate and reduce the rate and incident of domestic violence and to remove suit backlogs in the disputes resolution system of Bangladesh. But due to recent trends of corruption, political deadlocks and some other key obstacles the present legal system is supposed to enable in resolving a dispute in swift and has been depriving people of the way of implementing and maintaining access to justice for all. Following the considerable advantages of ADR almost every country of the world has introduced ADR system in its justice delivery system which has paved the way to the promotion of access to justice indiscriminately for all. This paper highlights on the role of ADR in implementing civil and criminal justice, showing the fairness, efficiency, and effectiveness of ADR, problems, and prospects, statutory provisions of Alternative Dispute Resolution in the trial system and provide some recommendations for the complete success of ADR. This paper also reveals the active participation of the community people in ADR in order to provide better performance in ADR as well.

Introduction

In any state, access to justice is considered as the most vital component of human rights. Bangladesh Constitution maintains equality before the law for every citizen of Bangladesh and ensures the right to enjoy the protection of the law and to be treated equally in accordance with law. (*The Constitution of Bangladesh*) The Universal Declaration of Human Rights 1948 says more or less same provisions regarding access to justice. (*UDHR, 1948*) But due to some reasons, access to justice to the vast majority people of Bangladesh has become a hollow promise guaranteed under the constitution. (*ALAM, M. SHAH-2001*) A recent judgment of the Supreme Court of India has observed that Interminable, time-consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective

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and speedy for resolution of dispute avoiding procedural claptrap. (*State Trading Corporation Of ... vs Indian Sugar Mills*). In most of the cases, access to justice is only available to the resourceful person and powerful elite because of their huge amount of money. (*NASER MOSTAFA MAHMUD-2006*) But article 35(3) of our constitution provided for “Right to a speedy and public trial”. To apply article 35(3) of our constitution “**Alternative Dispute Resolution**” is thus an urgent necessity for the present judiciary of Bangladesh. (*S. Khan on land management*) Ex-Chief Justice Mustafa Kamal described ADR as “a non-formal settlement of legal and judicial disputes as a means of disposing of cases quickly and inexpensively”. (*The Daily Star-2007*) This process can not only support the legal objectives but also support other development objectives. Though it is not a compulsory method of the settlement but a voluntary and willing way out of the impasse to transform actual and potential disputes into a peaceful and positive process. (*ADR practitioners guide, 1998*). Besides the court and other legal authorized institutions, Bangladesh police have the ample opportunity to resolve the family disputes, land disputes and to some extent reconcile the monetary issues and compromise petty offences.

Objectives:

The key research objective of this study is to analyze the prospects of ADR in implementing civil dispute resolution process and compounding offenses in the criminal justice system of Bangladesh. This research will show the present success, the ultimate fate and the future prospect of ADR. In addition to that the research objectives are as follows:

- To explore the necessity and challenges of Alternative Dispute Resolution in Bangladesh.
- To identify problems and prospects in implementing the ADR in the existing civil as well as the criminal trial system.
- To suggest some recommendations for making ADR more effective and acceptable in the resolution of the dispute.
- To engage common people in ADR process for its better success and longevity.

Methodology

This is a socio-legal research. This study is descriptive and suggestive in nature. Therefore, this methodology will allow the researcher to generate new theory out of initial data, which may also modify or elaborate the existing theory. This study is based on both primary and secondary data. In order to collect the secondary data, books, journals, newspaper clips, published articles, law reports, text-books, training workshops on ADR and other available resources were explored on this issue. The collected data have been processed and prepared in present form in order to make the study more informative and analytical and useful for the users.

Discussions

Concept 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. (*Barrister Shafique Ahmed on inaugural session of a training course on ADR*) It includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. ADR, as it brings the parties to the negotiation table, identifying the problems, establishing facts, clarifying issues, developing the option of settlement and ultimately solving the disputes through award which is binding on the parties. (*S.R. Dr. Myneni at Hyderabad*) Some researchers and specialist of ADR want to replace the name of ADR as BDR (Better Dispute Resolution), Judicially Assisted Dispute Resolution (JADR). (*Political Constitutionalism by Richard Bellamy*)

Historical Background of ADR

ADR has grown rapidly in the United States since the political and civil conflicts of 1960. Throughout the 1970s and 1980s, a range of non-traditional dispute resolution processes evolved under the general umbrella of ADR. (*Melissa Lewis & Les McCrinmon, The Role Of ADR*) In 1976, the Roscoe Pound Conference aimed to highlight ADR as consensual focus on advantage overcrowded courts and litigious citizens. (*Laura Nader, Controlling Processes in the Practice of Law*) In Indian sub-continent, Panchayat (assembly of elders and respected inhabitants of a village) decided almost all dispute between the inhabitants of the village. (*Laura Nader*) Under British Period Bengal Village Self-Government Act 1919 and Conciliation Court Ordinance 1961 were introduced to resolve disputes locally. After Independence, The Village Court Act of 1976, The Family Court Ordinance of 1985, The Arbitration Act-2001, The Labour Law 2006 were introduced to mediate, reconcile and arbitrate various disputes arose from different classes of people by a consensual method. Former Chief Justice of Bangladesh, Mr. Justice Mustafa Kamal said, In Bangladesh, ADR started moving its feet in January 2000. (*Md. Akhtaruzzaman, Concept and laws on ADR and Legal Aid*)

Characteristics of ADR:

The common characteristics of ADR are given below:

1. Operate without formal representation.
2. Equitable justice. (*S.C. Dr. Tripathi on ADR*)
3. Direct participation. (*Ibid*)
4. Keep concentration only to the future.
5. Neutral case evaluation system.
6. An effective organizational ombudsman. (*S.M. Atickus, A Text Book on ADR & Legal Aid*)
7. Beneficial.
8. Swift and available.

Classification of ADR:

The variety of ADR models found in different countries may be classified in the following ways: (*M.A. Halim, ADR in Bangladesh*)

- i) Court-Annexed ADR:**
- ii) Binding or Non-binding ADR:**
- iii) Formal and informal ADR:**
- iv) Basic and Hybrid ADR process:** (*Ibid.*, p. 34- 37.)

Modes of ADR:

Negotiation, mediation, conciliation and arbitration are the most common features of ADR technique in Bangladesh.

Negotiation:

Bargaining is a common feature of the negotiation process. Negotiation system creates a structure to encourage and facilitate direct settlement between parties to a dispute, without the intervention of a third party. (*M.A. Halim, ADR in Bangladesh*)

Mediation:

Mediation is a voluntary and informal process in which the disputing parties select a neutral third party to assist them in reaching a mutually acceptable settlement. (*Jean R. Sternlight on ADR*)

Conciliation:

Conciliation is a type of mediation whereby the disputing parties use a neutral third party (a conciliator) who meets with the parties separately in an attempt to resolve. (*Former Chief Justice Mustafa Kamal on ADR*)

Arbitration:

Arbitration is a process by which a dispute between two or more parties is submitted to a panel of impartial third parties for resolution on the merits based on the evidence presented at a hearing. (*Ibid.*, p. 42.)

The necessity of ADR in Bangladesh:

Justice delayed is justice denied is a very common adage in the judicial domain. It is one of the most burning problems in the administration of justice in Bangladesh. This system of justice is so ambiguous and miserable for the mass people that it cannot be explained in a word. There are many instances that poor people who went to court to address their grievances after selling off their lands and property to meet the expenses of the court but did not get justice in their lifetime. At present, the only demand of mass people is the speedy approach to justice. The Indian Supreme Court stated that-“Justice cries in silence for long, far too long.” (*PN Duda vs. P. Shiv Shankar and others*)

To remove the weakness of adversary system in Bangladesh, effective measures should be adopted to dispense justice as early as possible. So to ensure justice for all, Alternative Dispute Resolution is the best possible solution in our country. From 1985 to 2000 total money realized in connection with family suites in three courts is Tk.61, 99,759/50 whereas the total realization through mediation since the introduction of mediation in the same courts from June 2000 up to 16th May 2001 i.e. in twelve months is Tk.50, 94,501/00. (*The law commission of Bangladesh*)

The practice of ADR through Statutory Provisions in Bangladesh:

The Code of Civil Procedure (Amendment) Act, 2003: Mediation and arbitration have been inserted in section 89A, 89B and 89C the Code of Civil Procedure (Amendment) Act 2006 for all civil suits except suits under the Artha Rin Adalat Ain 2003. (*The Code of Civil Procedure*)

The Muslim Family Laws Ordinance, 1961:

Here ADR is related to divorce and no second marriage is necessary if it compliance with section-7 of this Act. Under this Act 30 days notice, reconciliation attempt by Chairman and 90 days time are required for the effectiveness of talaq. (*MFLO-1961*) In Abdul Aziz vs. Rezia Khatoun, it was held the non-compliance with section 7(1) makes talaq legally ineffective. (*21 DLR*)

The Family Courts Ordinance, 1985:

The most important provisions have been inserted in the Family Courts Ordinance 1985 for the conciliation between the parties at pre-trial stage and trial stage of suits concerning divorce, dower, maintenance, restitution of conjugal life and custody of children. An attempt to settle the dispute through the alternative process is compulsory for the judges. (*-sec- 10 and 13*)

The Arbitration Act, 2001:

Under the Arbitration Act 2001, arbitration is mandatory if any dispute falls within the ambit of the said Act or if any civil suit, at any stage of it, is withdrawn on the application of the parties. (*The Code of Civil Procedure*)

Other Legislative Provisions relating to ADR:

1.Artha Rin Adalat Ain, 2003: (ss- 21 and 22) **2. Labour Law, 2006:** **3. Value Added Tax Act, 1991 (Act XXII of 1991):** (ss-41Ka to 41Ta), **4. Village Court Act, 2006 and Conciliation of Disputes (Municipal Areas) Act, 2004:**, **5.Customs Act, 1969 (Act IV of 1969):** (Chapter XVIIIA, ss-192A to 192K), **6. Income Tax Ordinance, 1984:** (Chapter XVIIIIB, ss-152F to 152S), **7. The Contract Act 1872:** (Sec-28) **8. The Specific Relief Act 1877:** (Sec-21) **9. The Bank Companies Act 1991:** (Sec-76)

ADR in Criminal Cases in Bangladesh:

Section 345 of the Code of Criminal Procedure enacts a provision for compromise between the adversary parties to a little extent where court permission is required in some cases. Besides this, Gram Adalat Ain, 2006 (*Akhtaruzzaman Md, Concept and Laws on ADR*) and Birodh Mimangsha (Paura Elaka) Board Ain,2004 (*Ibid*) deals to dispose of some petty criminal offenses by compromise.

The success of ADR in Bangladesh:

A great achievement in the disposal of the suits has been acquired by ADR which can be perceived from the following pictures.

Table 1. Pen Picture of ADR (*Hasan K.M~ A Report on Mediation*)

SL. No.	Act/Court/Project	Disposal of Cases	Realization
1.	The Artha Rin Adalat Ain	84945 (May 2003 to February 2013)	-
2.	C.P.C	39402 (July 2003 to June 2013)	-
3.	Pilot project	14418 (2000 to 20013)	Tk.177770455
4.	Family courts	9267 (2006 to 2013)	Tk. 23345863

Problems of ADR in Bangladesh:

Though ADR mechanism has been initiated in our civil laws but the result is beyond expectation. There exists a lot of reason for which Alternative Dispute Resolution fails to become a success. Among those following are mentionable-

1. Not mandatory; (*Haq Dr. Naima, Divorce Conciliation*)
2. Parties interest are overlooked
3. Absence of specific guideline
4. Unskilled mediator;
5. Lack of sufficient budget and institutional framework
6. No leagal obligation
7. Quasi-judicial (*Md. Abdul Halim, ADR in Bangladesh*)
8. Unawareness
9. Negative impression. (Disputed Parties, Lawyers and also Judiciary)
10. Non-application of ADR in old cases under section 89A; (*The Code of Civil Procedure*)
11. Want of separate ADR legislation;

Community Based strive:

The ultimate fate of ADR will be fruitless if the community people are not aware of the usefulness of ADR. The effective participation of community people as well as community policing will make ADR stronger than it is now. (*A K M Shahidul Hoque on Community Policing*) So community-based strive is essential for its better application. Community people must have the eagerness to know the related provisions of ADR, to reconcile and resolve their disputes, to inform their problems to the legal authority in order to get the benefit of ADR. In recent years, Bangladesh Police took the various initiative to compound offenses and try to resolve family and land disputes by applying ADR method. The application of ADR through BD Police may be more effective and fruitful in domestic violence, restitution of conjugal rights, prevention of dower, erradication of drug addiction, reduction of family infliction by giving proper counseling and legal support to the affected people. Barguna district police established "Jagorani" (Women Support Center) under the leadership of Superintendent of Police (the author of

this article) to establish equality, to promote justice, to uplift gender equity and reinforce the rule of law by applying the principles of ADR with a view to avoiding cases in the police station and the court at the first instance. Here generally comes the victim of domestic violence, tortured women, unruly children, helpless parents, women fall into dowry and the people facing land disputes. Jagorani got 250 claimants within six months after its establishments. This organization of the Barguna District Police resolves 205,(November 2016 to August 2017) disputes by applying ADR process with the help of community people such as teachers, students, community policing and renowned personalities of that district. Here give the success rate of “**Jagorani**”-(Data Base Information)

Table 2. Counsel, Support and Performance of Jagorani: Women Support Center

SL. No.	Activities of Jagorani	No. of accusation	No. of Disposal
1	Family Infliction	112	105
2	Prevention of Child Marriage	19	19
3	Eve teasing	15	13
4	Registration of Marriage	23	20
5	Mutual “Talaq”	7	7
6	Regular Cases in Police Station	11	11
7	Suit sent to District Legal Aid	5	05
8	Running application	25	-
9	Dowry	6	5
10	Land Disputes	18	13
11	Others	9	7

This type of activities taken by the author will also pave the way of ADR.

District Legal Aid office, Barguna: Barguna district legal aid office also tries to reconcile between the contested parties through ADR process which started on 2017. This is shown in table -3(January2017 – August 2017)(Statistics Report)

Table 3. Litigation and Solution By Legal Aid

SL. No.	Activities of Legal Aid	No. of accusation	No. of Disposal
1	Civil litigation	04	1
2	Criminal litigation	02	-
3	Familly disputes	05	-
	Total	11	1

NGO- Jagonari, Barguna: This NGO also works with women and children. They give notice to the both contested parties and try to mediate between the parties. If they fail to do so, they referred it to the legal organization. Their epic of general course of action are shown in table- 4 (January2016 – August 2017)(Statistics Report)

Table 4. A way out of ADR by NGO

SL. No.	Activities of Jagonari	No. of accusation	No. of Disposal
1	Family Infliction	16	05
2	Prevention of Child Marriage	03	01
3	Registration of Marriage	02	-
4	Referred to Jagorani	05	05
5	Suit sent to District Legal Aid Office	02	-
6	Running application	10	-
7	Dowry	01	01
	Total	39	12

Village courts in Barguna: Local Elite, Chairman and Member of Union parishad and other educated people also try to solve some vilage some pretty nature disputes. Table -5 indicates the matters. (January2016 – August 2017)(*Statistics Report*)

Table 5. Participation and role of Local Government Bodies

SL. No.	Activities of Village court	No. of accusation	No. of Disposal
1	Domestic violance	25	10
2	Prevention of Child Marriage	01	01
3	Restituion of Marriage	02	-
4	Referred to Jagorani	13	13
5	Suit sent to District Legal Aid	05	-
6	Running application	20	-
7	Dowry	07	02
8	Land Disputes	26	15
	Total	98	41

Recommendations towards an effective ADR system

The implementation of the following recommendations which will enhance the access to justice through the effective ADR mechanisms:

1. Various actors like the GOB Ministries, Judiciary, Bangladesh Police, the NGOs, the Local Government bodies, the media and other civil society can play an important role in promoting awareness, popularity, and effectiveness of the ADR mechanism in Bangladesh.
2. A separate institutional framework should be developed and equipped with proper decorations.
3. Separate skilled and trained mediators should be appointed.
4. The separate code can be enacted and establishment of separate mediation courts for the successful ADR in Bangladesh.

5. The limitation imposed by section 23 of the Artha Rin Adalat Ain 2003 must be removed.
6. Lawyers and Judges should show positive attitude for the nourishment of ADR.
7. The list of compounding offenses must be enlarged.
8. The philosophy of community policing, the participation of community people and the information gathered from community policing should be executed without delay.
(A K M Shahidul Hoque on Community Policing)

Conclusion

Alternative Dispute Resolution mechanisms are believed to be a consensual approach to the settlement of dispute not following the intractable formalities of the adversarial trial system. It is described as informal, confidential, expeditious, effective, mutually participatory, cost and emotion effective, promoter of peace and social harmony by removal of enmities and contributor to a breakthrough in a prevailing crisis of backlogging of cases. Though the traditional shalish system was practiced at the community level for the settlement of minor disputes within the local area and are practiced all over Bangladesh till now and the NGOs assisted mediation especially in family related matters, it is increasingly losing credibility due to imposing the arbitrary decision on the reluctant disputants by the powerful personnel of the village. Newly inserted provisions of ADR in different legislations of Bangladesh have created a window of opportunity of access to justice for all especially for the poor or disadvantaged groups of people who cannot go to the court due to their financial constraint. It ensures integrity, impartiality, and authenticity of the mechanisms. If we can introduce ADR both in civil and criminal justice system, it will enhance the opportunity of disposal of cases, build the confidence of mutual relationship between the claimant parties, lessen the workload of judiciary as well as police, increase the confidence of the general people and establishing the equity in the society.

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