Sonargaon University (SU)

Research Monograph

On

Effective Implementation of ADR in the Civil Justice System of Bangladesh: A Critical Analysis.

Research Monograph Submitted for the partial fulfillment of the award of the degree in L.L.B (Hon's)

Department of Law

Sonargaon University (SU)

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Letter of Transmittal

To

Sharmin Jahan Runa
Assistant professor & Head (Acting)
Department of Law
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Subject: Submission of Research Monograph on "**Effective Implementation of ADR in the Civil Justice System of Bangladesh: A Critical Analysis."**

Dear Sir,

This is a great pleasure to submit the Research Monograph on **"Effective Implementation of ADR in the Civil Justice System of Bangladesh: A Critical Analysis."** as a partial requirement for the fulfillment of my LLB course under the Department of Law of the Sonargaon University (SU).

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

Yours sincerely

.....
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Declaration

I do hereby declare that the Research Monograph Title **"Effective Implementation of ADR in the Civil Justice System of Bangladesh: A Critical Analysis."** prepared solely by me and which has been submitted to the department of Law, Sonargaon University (SU) for achieving the LL.B (Hon's) Degree. It is a original work of mine . No part of this research, in any way of or in from, has been submitted to any University or Institution for any Degree, Diploma or for other similar purposes.

.....

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Supervisor Certificate

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

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

.....

Sharmin Jahan Runa
Assistant professor & Head (Acting)
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Acknowledgement

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

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

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

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Thank you

Mariam Akter

Abstract

This paper discusses the emergence of implication and practice of Alternative Dispute Resolution (ADR) for implementing civil justice and to remove suit backlogs in the disputes resolution system of Bangladesh. Bangladesh has rich traditions of common law culture and it reflects in the existing legal system. But due to recent trends of corruption, political deadlocks and some other key obstacles the present mechanism is supposed to unable in resolving a dispute in swift and has been depriving people from the way of implementing and maintaining civil justice. There has seen some objective and subjective factors have led our civil judiciary to a situation where its demerits are ruling over the merits, manifesting in crippling backlogs and delays. This paper highlights on the role of ADR in implementing civil justice, problems and prospects, and statutory provisions of Alternative Dispute Resolution in the trial system. This Article has explored theoretical concerns underlying contemporary appeals to Alternative Dispute Resolution (ADR) in the civil justice system of Bangladesh.

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List of Abbreviations

ADR	:	Alternative Dispute Resolution
AIA	:	Association for International Arbitration
BIAC	:	Bangladesh International Arbitration Centre
CCB	:	Children's Charity Bangladesh
CEO	:	Chief Executive Officer
CJ	:	Chief Justice
CPC	:	Code of Civil Procedure
ENE	:	Early Neutral Evaluation
ISDLS	:	Institute for the Study and Development of Legal Systems
JATI	:	Judicial Administration Training Institute
MP	:	Member of Parliament
NGO	:	Non-Government Organization
NOC	:	No Objection Certificate
TIB	:	Transparency International Bangladesh
UK	:	United Kingdom
UN	:	United Nations
UNDP	:	United Nations Development Program
USA	:	United States of America

Chapter One

Introductory Chapter

1.1 Introduction:

Disputes are a fact of life ADR means Alternative Dispute Resolution, mostly applied to civil cases. When a civil case is instituted in a court of competent jurisdiction, the scenario usually is, that a long time is taken to serve the process, the defendants beat the law and submit their written statement/s after a long delay beyond the permissible statutory period of two months, lawyers and judges do not take any interest in screening out a false and frivolous case at the first hearing of the case under Order X CPC (in fact no such first hearing takes place), they seldom try to shorten the disputed questions of fact and law by application of Orders XI and XII of the CPC and mostly ignore the elaborate procedure of discovery, interrogatories, notice to produce etc. contained in those Orders, the issues of a case are seldom framed following the Code of Civil Procedure, the case takes several years to reach a settlement date and on the date of positive hearing half a dozen or more ready cases are fixed for hearing, resulting in the hearing of none. It delivers formal justice and it is oblivious of the sufferings and woos of litigants, of their waste of money, time and energy and of their engagement in unproductive activities, sometimes for decades.

Most of us who are or were in the judiciary and were or are practicing in the Bar think that nothing can be done about it, or, at least, we have no role to play in the matter, either individually or collectively. We are drifting into a stage of aimlessness, inertia, inaction and helplessness. Many conscientious judges and lawyers have done what they could under the circumstances, but their sincerity has been drowned into the general morass of malfunctioning of the court system.

Our judicial and legal system has a rich tradition of common law culture and it can boast of a long record of good delivery of justice. Like any other legal system, common law with its adversarial or accusatorial features, has both its merits and demerits. But in recent years, certain objective and subjective factors have led our judiciary to a situation where its demerits are ruling over the merits, manifesting in crippling backlogs and delays. Delayed justice fails to pay even the winning party of the litigation, for its costs in terms of time, money, energy and human emotions are too high.

Delay in our judiciary has reached a point where it has become a factor of injustice, a violator of human rights. Praying for justice, the parties become part of a long, protracted and torturing

process, not knowing when it will end. Where it should take one to two years for the disposal of a civil suit, a case is dragged for 10 to 15 years, or even more. By the time judgment is pronounced the need for the judgment in certain cases is no more required. Moreover, in a society of class differentiation, the lengthy process, which is adversarial and confrontational in nature, puts the economically stronger party at an advantageous position. If judiciary functions substantively and in accordance with the procedural laws, an existing wide scope for delays, can transform it into a system which becomes procedurally hostile towards marginalized sections of our people, defeating the goals of social justice.

1.2 Objective of the Study:

The key research objective of this study is to analyze the prospects of ADR in implementing civil dispute resolution process of Bangladesh. 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 trial system.
- To suggest some recommendations to make ADR more effective and acceptable in resolution of dispute.

1.3 Importance of the Study:

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 and speedy for resolution of dispute avoiding procedural claptrap. Alternative resolution of dispute is considered as effective mechanism to the court process to reduce the work load or pressure on the court. Alternative Dispute Resolution is thus an urgent necessity for the present judiciary of Bangladesh. Judiciary of Bangladesh is caught in a vicious circle of delays and backlog of cases. The backlog of cases is prolonging the trial process. As a result justice seekers are suffering from many hurdles losing their confidence on the judiciary. While delay in judicial process causes backlog, increasing backlog puts tremendous pressure on present cases and vice versa. There are about 3.5 million land related cases awaiting disposal across the country and A World Bank survey reveals that most crimes

and corruption in Bangladesh take place in land-related services. The justice seekers are facing harassments amid waiting for disposal of their cases. In PN Duda vs. P.Shiv Shankar and others, the Indian Supreme Court stated that-"Justice cries in silence for long, far too long." To remove the weakness of adversary system in Bangladesh, effective measures should be adopted to dispense justice as early as possible. Article 35(3) of our constitution provided for "Right to a speedy and public trial" So to ensure justice for all Alternative Dispute Resolution is the best possible solution in our country. This process can not only support the legal objectives, but also support other development objectives, such as economic and social objectives, by facilitating the disputes that are impeding progress of these objectives. That is why a fair process for resolving disputes is crucial in the country for defending rights of its citizens. Courts end disputes ensure that people can enforce their rights. But in most part of the world, the never mounting expense of litigation, congested court schedules, delay in disposal of case have battered the confidence of people in the judicial system and have put question on the system. It is an alternative route to a speedier and less expensive mode of settlement of dispute. Though it is not a compulsory method of settlement but a voluntary and willing way out of the impasse to transform actual and potential disputes into a peaceful and positive process and to create a lively congenial environment, alternative dispute resolution can be developed and initiated as compulsory beside the formal justice system in our country.

1.4 Research Methodology:

This is a qualitative study. The general methodological approach of this study is grounded on theoretical approach based on Secondary source. Therefore, this methodology has allowed the researcher to collect the secondary data; relevant literature reviews have been made. For secondary data books, journals, newspaper clips, published articles, and other available resources were explored on this issue.

1.5 Limitation of the Study:

It is very difficult to work in the field level within this short time allocated for this study. So, the first limitation of this paper that field working and data collection standard is very poor. The main limitation of the study on this research monograph is the time binding‟s work. The time is not enough for the study. The Policy making issue is wide range area, so to create a good

research need to prepare sufficient time and should communicate the higher authority of the government. Communicating to the concern Department of the Government is very difficult.

1.6 Summary of the Chapters:

Chapter one is named as Introductory Chapter where introduction, objects, research methodology, limitation of the Study and outline of the research is discussed.

Chapter Two is named as Historical Background & Development of ADR mechanism mentioning the different periods like ancient, modern, British, Pakistan and Bangladesh are discussed.

Chapter Three is named as Conceptual Framework of ADR Mechanism & Civil Justice System where meaning, features, categories and nature are discussed.

Chapter Four is named as Legal Framework of ADR in Bangladesh where the provisions relating to ADR mechanism in Bangladesh are discussed.

Chapter Five is named as ADR as an Effective Way to Reduce the Case Backlog in Bangladesh mentioning Statistics of Current Case Backlog in Bangladesh, Causes of Case Backlog in Bangladesh, and Way to Develop ADR for Reducing Case Backlog in Bangladesh and Special Measures to Develop ADR for Reducing Case Backlog is discussed.

Chapter six is named as Concluding Chapter where Findings, Recommendation & Conclusion of the study are discussed.

Chapter Two

Historical Background & Development of ADR

2.1 ADR in Ancient Regime Justice System:

From the ancient time in this sub-continent including present Bangladesh the laws of arbitration was very popular and were highly accessible. While dealing with such cases on arbitration, the awards were known as decisions of Panchayats, commonly known as Panchats. The decisions of Panchayats were of binding nature in law in force in those times. The head of a family, the chief of a community or selected inhabitants of a village or town might act as Panchayat.[1]

In words of Martin, C.J. arbitration was indeed a striking feature of ordinary Indian life and it prevailed in all ranks of life to a much greater extent than was the case of England. To refer matters to a Panch was one of the natural ways of deciding many disputes in India.[2]

The Hindu idea of Panchayats was that a Panchayat was the lowest tribunal and as such its award was subject to appeal. The Bengal Regulation of 1781 imported the idea that it was the tribunal of the parties „own choice, hence in the absence of misconduct the parties were bound by its decision. Accordingly, the only course left open to the aggrieved parties was that they had to impeach the awards on the grounds of misconducts of the Panchayats. The known misconduct was gross corruption or partiality. This caused the respectable persons to be reluctant to become Panches and the Panchayat system fell in disuse or public infancy. Then the Regulation of 1787 empowered the Courts to refer certain suits to arbitration, but no provision was made in the Regulation for cases wherein difference of opinion among the arbitrator arose. The Bengal Regulation of 1793 (XVI of 1793) empowered courts to refer matters to arbitration with the consent of the parties where the value of the suit did not exceeds. 200/- and the suits were for accounts, partnership, debts, non-performance of contracts etc. In this Regulation, the procedure for conducting an arbitration proceeding was also provided. Regulation XV of 1795 extended the Regulation XVI of 1793 to Benaras. Similarly, the Regulation XXI of 1803 extended the Regulation XVI of the territory ceded the Nawab Vazeer. Since by then the Madras Regulation

[1] Tewari, O.P, The Arbitration & Conciliation Act with Alternative Dispute Resolution, 4th Edition (2005) Reprint 2007, Allahabad Law Agency, Faridabad, page 2- 4

[2] Ibid

IV of 1816 and V of 1816 empowered the Panchayats to settle disputes by them. In Bombay Regulations IV and VII of 1827 similar provisions were made.[3]

2.2 ADR in Modern Regime Justice System:

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 1960. The introduction of new laws protecting individual rights, as well as less tolerance for discrimination and injustice, led more people to file lawsuits in order to settle conflicts. For example, the Civil Rights Act of 1964 outlawed discrimination in employment or public accommodations on the basis of 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 to deal with a variety of conflicts, because they helped relieve pressure on the overburdened court system.[4]

Dispute resolution outside of courts is not new; societies world-over 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 1970, 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 litigation arising from an overcrowded court system. Ever since, the legal ADR movement in the United States has grown rapidly, and has evolved fruni experimentation to in3titutionalization with the support of the American Bar Association, academics, courts, the U.S. Congress and state governments.[5]

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[3] Ibid

[4] Litvak, Jeff; Miller, Brent. "Using Due Diligence and Alternative Dispute Resolutions to Resolve Post-Acquisition Disputes" (ISSN 2329-9134)

[5] Ibid

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. Innovations in ADR models, expansion of government-mandated, court-based ADR in state and federal systems and increased interest in ADR by disputants has made the United States the richest source of experience in court connected ADR.[6]

2.3 The Association for International Arbitration (AIA):

The Association for International Arbitration (AIA) is a non-profit organization, founded in Paris in 2001 by Johan Billiet. The Association for International Arbitration has an increasing number of members among arbitrators and mediators of international backgrounds.[7]

The Association was established with the aim of facilitating arbitration, mediation and general forms of dispute resolution internationally. Today, the AIA has developed into an organization dealing in the private international law field to meet the needs of the fast-growing evolution of dispute resolution within the international community. AIA provides information, training and educational activities to expand the promotion of arbitration and ADR globally by means of securing partnerships with various organizations and parties to get involved in the life of the association.[8]

The association constantly works to develop partnerships in the international realm and to provide the international community of arbitrators and ADR professionals with continuous exposure to the latest international developments, activities and opportunities in the field. AIA continually encourages the participation and contribution of its members in the pursuit of the association's goals.[9]

2.4 Development of ADR in British Period:

The formal system of administration of justice introduced during the British rule replaced the old system of dispensing justice through feudal set-up. But the traditional institutions continue to

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[6] Ibid
[7] http://www.arbitration-adr.org/activities/ [Last Retrieved on 02.08.2015 at 09.30pm]
[8] Ibid
[9] Ibid

play their role of dispute resolution though not known by their old name. As because we still have disputes between members of a clan. After math, arbitration and conciliation as the methods of ADR, received statutory recognition in the code of civil procedure code, 1908 (section 89, arbitration and order XXXII A rule 3, conciliation). Having passed the Arbitration Act, 1940, arbitration provision was repeated from the CPC But it is pertinent to say that the application of the provisions this Act was not satisfied ant the courts would not follow these provisions mandatory.[10]

2.5 Development of ADR in Pakistan Period:

During the Pakistan period, arbitration as one of the important method of ADR, received statutory recognition in the Muslim family ordinance, 1961. Under this ordinance, to arbitration, as a method of ADR is mandatory to resolve the dispute as to dissolution of marriage. Union perished would have to follow arbitration process to resolve this dispute. Having followed the above mentioned ordinance the family court ordinance was promulgated in 1985 and as a result some family courts have been established in different places of Bangladesh.[11]

2.6 Development of ADR in Bangladesh:

In June 2000, formalized ADR was introduced in Bangladesh by means of court- annexed judicial settlement pilot projects, in an effort to decrease delays, expenses, and the frustrations of litigants laboring through the traditional trial process. The pilot program began in a collaborative effort with ISDLS in a series of Bangladeshi legal studies of Californian ADR systems. Three Pilot Family Courts were established in the Dhaka Judgeship, which exclusively used judicial settlement to resolve family cases including: divorce, restitution of conjugal rights, dower, maintenance and custody of children. An amendment to the Code of Civil Procedure was not necessary due to an existing 1985 Family Courts Ordinance, which authorized the trial judge to attempt reconciliation between parties prior to and during trial. The pilot courts were staffed by 30 Assistant Judges selected from all over Bangladesh, lawyers and non-lawyers, who were

[10] Md. Abdul Halim, ADR in Bangladesh: Issues and Challenges, 2nd Ed, CCB Foundation: Dhaka, 2011.
[11] Ibid

given training by a United States mediation expert. During this assignment, the Assistant Judges were relieved of all other formal trial duties.[12]

All three pilot programs were fully functioning by January 2001. Once judges had begun successfully settling cases, the program was expanded slowly to additional courts throughout the country. By the end of the first year of the program, the judicial settlement procedure in family disputes had effectively been introduced in 16 pilot family courts in 14 districts of Bangladesh.[13]

Due to the high settlement rates these courts were achieving, the Law Minister convened a conference in 2002 in order to spread awareness of the achievements of these programs. The conference brought together all District Judges, Presidents and Secretaries of all District Bar Associations, previous Chief Justices, the current Chief Justice, Judges of both divisions of the Supreme Court, and prominent lawyers from throughout the country.[14]

In 2003, the Civil Code of Procedure was amended to introduce mediation and arbitration as a viable means of dispute resolution in non-family disputes. In addition to this amendment, the Money Loan Recovery Act stipulated the use of Judicial Settlement Conferences for money loan recovery cases. A training program led by former Chief Justice Mustafa Kamal took place at the Judicial Administration Training Institute (JATI) in Dhaka for the forty judges that have exclusive jurisdiction over money loan recovery cases. Mediations began in non-family disputes in July 2003.[15]

[12] Prof. Dr. Answar Ali Khan, An introduction to Alternative Dispute Resolution (ADR), 2nd Ed, Dhaka: Hira Publication, 2011, pp. 9-10.
[13] Ibid
[14] Ibid
[15] Ibid

Chapter Three

Conceptual Framework of ADR Mechanism & Civil Justice System

3.1 Meaning of ADR Mechanism:

Alternative dispute resolution (ADR) (also known as external dispute resolution in some countries, such as Australia) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. 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; attendance that is, not settlement at mediation). The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. Some of the senior judiciary in certain jurisdictions (of which England and Wales is one) are strongly in favor of the use of mediation to settle disputes.[16]

"Alternative dispute resolution" (ADR) is a term generally used to refer to informal dispute resolution processes in which the parties meet with a professional third party who helps them resolve their dispute in a way that is less formal and often more consensual than is done in the courts. While the most common forms of ADR are mediation and arbitration, there are many other forms: judicial settlement conferences, fact-finding, ombudsmen, special masters, etc. Though often voluntary, ADR is sometimes mandated by the courts, which require that disputants try mediation before they take their case to court.[17]

[16] Lynch, J. "ADR and Beyond: A Systems Approach to Conflict Management", Negotiation Journal, V-Number 3, July 2001, Volume, Page-213.
[17] Ibid

3.2 Features of ADR Mechanism:

Although the characteristics of negotiated settlement, conciliation, mediation, arbitration, and other forms of community justice vary, all share a few common elements of distinction from the formal judicial structure. These elements permit them to address development objectives in a manner different from judicial systems.[18]

- **Informality:** Most fundamentally, ADR processes are less formal than judicial processes. In most cases, the rules of procedure are flexible, without formal pleadings, extensive written documentation, or rules of evidence. This informality is appealing and important for increasing access to dispute resolution for parts of the population who may be intimidated by or unable to participate in more formal systems. It is also important for reducing the delay and cost of dispute resolution. Most systems operate without formal representation.

- **Application of Equity:** Equally important, ADR programs are instruments for the application of equity rather than the rule of law. Each case is decided by a third party, or negotiated between disputants themselves, based on principles and terms that seem equitable in the particular case, rather than on uniformly applied legal standards. ADR systems cannot be expected to establish legal precedent or implement changes in legal and social norms. ADR systems tend to achieve efficient settlements at the expense of consistent and uniform justice. In societies where large parts of the population do not receive any real measure of drawbacks of an informal approach to justice may not cause significant concern. Furthermore, the overall system of justice can mitigate the problems by ensuring that disputants have recourse to formal legal protections if the result of the informal system is unfair, and by monitoring the outcomes of the informal system to test for consistency and fairness.

- **Direct Participation and Communication:** Direct Participation and Communication between Disputants Other characteristics of ADR systems include more direct participation by the disputants in the process and in designing settlements, more direct dialogue and opportunity for reconciliation between disputants, potentially higher levels of confidentiality

[18] Ibid

since public records are not typically kept, more flexibility in designing creative settlements, less power to subpoena information, and less direct power of enforcement. The impact of these characteristics is not clear, even in the United States where ADR systems have been used and studied more extensively than in most developing countries. Many argue, however, that compliance and satisfaction with negotiated and mediated settlements exceed those measures for court ordered decisions. The participation of disputants in the settlement decision, the opportunity for reconciliation, and the flexibility in settlement design seem to be important factors in the higher reported rates of compliance and satisfaction.

3.3 Categories of ADR Mechanism:

There are many different ADR types that may involve third party's help and that may be binding as well as non-binding. The two most common types of ADR are mediation and arbitration; however, each has its own variations, too.[19]

- **Mediation** involves the help of a go-between third party, called a **"mediator,"** whose job is to help parties reach some mutual agreement. A mediator cannot force parties to agree and is not even permitted decide the outcome of a dispute. Therefore, while mediating, both parties retain significant control over the course of mediation. Mediation is fully confidential and agreements are usually non-binding, so parties may still pursue litigation following the mediation process.[20]

- **Arbitration** also involves the help of a neutral third party. During arbitration, an "arbitrator" acts a bit analogously to a trial judge by listening to the partie's grievances. Unlike a mediator, an arbitrator is not a passive go-between facilitator. After listening to the parties, an arbitrator (often a professional in the party's subject of dispute) actually pronounces a decision. Arbitration is still less formal than a full-blown trial because many rules of evidence don't apply to arbitration. Arbitration can either be binding or non-binding.[21]

[19] http://www.legalmatch.com/law-library/types-of-alternative-dispute-resolution-adr.html#sthash.D0B9YjgZ.dpuf [Last Retrieved on 10.08.2015 at 09.03am]
[20] Ibid
[21] Ibid

❖ **Mediation-Arbitration** is a mixture of arbitration and mediation that combines the benefits of these two methods. Basically, parties commence with mediation, and if an agreement had not been reached, they move on to arbitration. The same or different third-party neutral may conduct the mediation and the arbitration sessions of Med-Arb.[22]

❖ **Mini-trial** is a mechanism for the parties to test their case and shed light on settlement discussions. In a mini-trial, each party‟s attorney presents an abridged version of the case. The information is presented to a panel of representatives chosen by both parties. The panel representatives actually decide a mini-trial outcome. Unlike other ADR mechanisms, mini-trial is unique in that it often occurs after commencement of formal litigation.[23]

❖ **Summary Jury Trial (SJT)** is essentially a mock trial with a neutral jury that produces a verdict. It is similar to a mini-trial but is ordered by the court rather than being stipulated by the parties. After hearing the verdict, the court usually requires parties to attempt settling their case before litigating in court.[24]

❖ **Early Neutral Evaluation (ENE)** usually occurs when a case has just been filed. The early neutral evaluation may be conducted by a judge-appointed evaluator from whom provides parties learn insights about the case. For example, after case examination, an evaluator may educate parties about their arguments' relative strengths, chances of winning, and settlement options.[25]

❖ **Negotiation** is exactly what it sounds like: parties negotiate with each other to achieve a compromise. Although obvious, this form of ADR is often overlooked. Negotiation does not typically involve any go-between neutrals and is as informal and open-ended as parties wish to make it.[26]

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[22] Ibid
[23] Ibid
[24] Ibid
[25] Ibid
[26] Ibid

3.4 Advantage & Disadvantage of ADR Mechanism:

The take-up of ADR depends on a combination of three critical factors. First, the extent to which disputants and their advisors are aware of ADR. Second, the adequacy of the supply of ADR services for those that would wish to take-up ADR services. Third, the perceived advantages and disadvantages of ADR.[27]

- **Advantages of ADR Mechanism:** The international literature on ADR identifies five major outcomes from ADR. They are:
  - Increased settlement
  - Improved satisfaction with the outcome or manner in which the dispute is resolved among disputants
  - Reduced time in dispute
  - Reduced costs in relating to the dispute resolution
  - Increased compliance with agreed solutions.

- **ADR Practitioners' Views on the Advantages of ADR:**
  - Reduced financial costs
  - Flexible solution
  - Confidentiality
  - Ability to influence outcome
  - Disputant control
  - Disputants satisfaction
  - Speedy resolution

- **Lawyers' Views on the Advantages of ADR:** The majority of lawyers believe that disputants seek ADR resolution of disputes in an effort to:[28]
  - Reduce the cost of a dispute
  - Speed resolution, and
  - Reduce uncertainty around the outcome of judgment in the court system

[27] http://www.justice.govt/publications/global-publications/a/alternative-dispute-resolution-general-civil-cases [Last Retrieved on 10.08.2015]
[28] Ibid

❖ **Disputants' Views on the Advantages of ADR:**

- Cheaper resolution
- Faster resolution
- More control
- Informal process/relaxed/less stressful
- More creative solutions
- Preserves relationships

❖ **Disadvantages of ADR Mechanism:** There was widespread support across stakeholders for the use of ADR techniques to resolve disputes. ADR was not always seen as an alternative to resolution through the courts, however. Moreover, even the most enthusiastic supporters of ADR - ADR practitioners - still saw some potential disadvantages for disputants in using ADR.[29]

- Lack of enforcement
- Increased costs
- Delaying tactic
- Compromise of principles
- ADR practitioner may not have the technical skills required
- Need other party to be willing to come to the table
- No right of appeal

3.5 Meaning of Civil Justice System:

Civil procedure is the body of law that sets out the rules and standards that courts follow when adjudicating civil law suits as opposed to procedures in criminal law matters. These rules govern how a law suit or case may be commenced, what kind of service of process is required, the types of pleadings or statements of case, motions or applications, and orders allowed in civil cases, the

[29] Ibid

timing and manner of depositions and discovery or disclosure, the conduct of trials, the process for judgment, various available remedies, and how the courts and clerks must function.[30]

3.6 Meaning of Suits of Civil Nature in Bangladesh:

In order that a civil court may have jurisdiction to try a suit, the first condition which must be satisfied is that the suit must be of a civil nature. The word „civil" has not been defined in the code. But according to the dictionary meaning, it pertains to private rights and remedies of a citizen as distinguished from criminal, political, etc. the word „nature „has been defined as „the fundamental qualities of a person or thing; identity or essential character; sort, kind, character"". It is thus wider in content. The expression „civil nature" is wider than the expression „civil proceedings". Thus, a suit is of a civil is of a nature if the principal question therein relates to the determination of a civil right and enforcement thereof. It is not the status of the parties to the suit, but the subject matter of it which determines whether or not the suit is of a civil nature.[31] There are some examples of suit in civil nature:[32]

- Suits relating to rights to property;
- Suits relating to right to share in offerings;
- Suits for damages for civil wrongs;
- Suits for specific performance of contracts or for damages for breach of contracts;
- Suits for specific relief's;
- Suits for restitution of conjugal rights;
- Suits for dissolution of marriages;
- Suits for rent;
- Suits for or on account;
- Suits for rights of franchise;
- Suits for rights to hereditary offices;

[30] SK Golam Mahbub, Alternative Dispute Resolution in Commercial Disputes: The UK and Bangladesh Perspective (2005), P-21.
[31] ibid
[32] Ibid

Chapter Four

Legal Framework of ADR in Bangladesh

4.1 The Code of Civil Procedure, 1908:

The Code of Civil Procedure was amended in 2012 (Act IV of 2012) to introduce mediation under section 89A, arbitration under section 89B and mediation in appeal under section 89C. All these mechanisms are court-annexed and were made applicable in all kinds of non-family litigations. Section 89A provides for mediation at pretrial stage whereas arbitration may be resorted at any stage of litigation.[33]

Mediation in appeal is provided under 89C, under which an Appellate Court may mediate in an appeal or refer the for mediation in order to settle the dispute or disputes in that appeal, if the appeal is an appeal from original decree under Order XLI and is between the same parties who contested in the original suit or the parties who have been substituted for the original contesting parties. The provision is no doubt unique but unfortunately the Appellate Courts are not found so vigilant to implement the same let alone the parties to the appeal.[34]

4.2 The Muslim Family Laws Ordinance, 1961:

Under the Muslim Family Law Ordinance, 1961 provision for reconciliation through arbitration council which is not a part of judicial ADR but administrative in nature has been provided for in three circumstances.[35]

- In case of polygamy under section 6;
- In case of dissolution of marriage (divorce) and making it effective under section 7;
- In case of failure of the husband to provide maintenance of his wife under section 9

4.3 The Customs Act, 1969:

The said act was amended by Finance Act, 2011 (act XII of 2011) and thereby included chapter XVIIIA under the caption Alternative Dispute Resolution covering section 192A to 192K, which brought new dimension in our international export and import.[36]

[33] Section 89A, 89B & 89C of the Code of Civil Procedure, 1908
[34] Ibid
[35] Section 6,7 & 9 of the Muslim Family Laws Ordinance, 1961
[36] Section 192A to 192K of The Custom Act, 1969

4.4 The Income- Tax Ordinance, 1984:

By Finance act, 2011 a ground backing change made in the Income Tax Ordinance, 1984 by incorporating chapter XVIIIB under the caption Alternative Dispute Resolution including section 152F to 152S.[37]

4.5 The Family Courts Ordinance, 1985:

Family Court Ordinance provides for a mechanism for reconciliation through judges as a necessary part of judicial proceedings (court annexed ADR). It has built in conciliation mechanism enabling disputant parties to resolve the outstanding issue informally, inconspicuously and with a sense of accommodation in which the family Courts play the role of a well –wisher and friend rather than adjudication. The role of the family judge is of vital importance for attempting such reconciliation between the parties. Two types of court-annexed reconciliation proceedings are envisaged in the ordinance-[38]

(I) Pre-trial reconciliation proceedings under section 10; and

(II) Post-trial reconciliation proceedings under section 13

In fact the enactment of the family Court system was rooted in a social welfare philosophy to establish a link between the legal and social sciences. But these provisions have not been properly understood and practiced so far.

4.6 The Value- Added Tax Act, 1991:

By Finance Act under Section 41Ka to 41ta the procedure of ADR was incorporated that brings new phenomenon in our Revenue Law.[39]

4.7 The Arbitration Act, 2001:

In Bangladesh the Arbitration Act of 1940 was in force until 2001 when the Arbitration Act, 2001 was enacted. As the act of 1940 causes much delay in settlement of disputes between parties in law courts, which prevented investment of money in Bangladesh by other countries. So Bangladesh has taken major reform in this regard and finally in 2001 the Arbitration Act, 2001

[37] Section 152F to 152S of The Income Tax Ordinance, 1984

[38] Section 10 & 13 of The Family Court Ordinance, 1985

[39] Section 41Ka to 41ta of The Value Added Tax Act, 1991

was enacted by the Parliament bringing in substantial reforms in arbitration, regarding domestic and international disputes.

4.8 The Money Loan Court Act, 2003:

The Money loan Recovery Act (Artharin Adalat Ain, 2003) was enacted in 2003 within built provisions for ADR. The process is settlement conference to be presided over by a trial Judge and to be held in camera. The proceedings are confidential. As this method proves ineffective so the present government amended the law in 2010 (Act XVI of 2010) and included mediation in place of settlement conference. Thereby new provisions were incorporated under section22 and 23 of the Loan Recovery Act, 2003.[40] Section 38 of the amended act provides the parties to mediate the case even at the execution stage. Section 44 Ka provided that ADR may be made during appeal and revision stage.[41]

4.9 The Conciliation of Dispute (Municipal Area) Act, 2004:

The adjudication process of both the laws are based on informal traditional shalish system which is considered as ADR. Unlike formal judicial adjudication Board of Conciliation is not required to follow the law of evidence and other procedural law. As a result, there does not seem to have any problem of providing easy and speedy rural justice by these forums and as such they may be viewed as forums of ADR.

4.10 The Labour Law, 2006:

The first legislation where the concept of ADR in the form of negotiation and conciliation has been effectively introduced and recognized by law is in the field of labour law, namely Industrial Relations Ordinance, 1969 which is now replaced by the Labour Act, 2006. This Code being both social and legal legislation envisages two different approaches to dispute resolution‟

(I) pure legalistic approach to individual employment dispute; and

(II) Socio-legalistic approach to industrial dispute.

[40] Section22 and 23 of the Loan Recovery Act, 2003

[41] Section 44 Ka of The Money Loan Court Act, 2003

4.11 The Village Court Act, 2006:

The adjudication processes of both the laws are based on informal traditional shalish system which is considered as ADR. Unlike formal judicial adjudication, the Village Court is not required to follow the law of evidence and other procedural law. As a result, there does not seem to have any problem of providing easy and speedy rural justice by these forums and as such they may be viewed as forums of ADR.[42]

[42] Section 19 of The Village Court Act, 2006

Chapter Five

ADR as an Effective Way to Reduce the Case Backlog in Bangladesh

5.1 Statistics of Current Case Backlog in Bangladesh:

❖ **Case Backlog in Appellate Division:** A huge backlog of around 2.3 million cases is pending with the courts across the country including the Appellate Division and High Court Division of the Supreme Court (SC), causing immeasurable suffering to the litigants. There are now six judges for the Appellate Division, 97 judges for the High Court Division and around 1,600 judges for the lower courts across the country. A total of 16,647 cases were pending with the Appellate Division of Supreme Court till December 31, 2012 after disposal of 94 cases in that month. The number of cases at the Appellate Division was 16,219 in November, 2012. An SC study report earlier showed that the number of pending cases at the Appellate Division was 14,474 until May 31 last year. A total of 585 cases were registered with the Appellate Division in May that year while 131 were disposed of in that month.[43]

❖ **Case Backlog in High Court Division:** In contrast with the current situation at the Appellate Division, the number of pending cases at the High Court Division had decreased to 280,000 in May last year from 353,000 in September 2010. A total of 294,978 cases were pending with the High Court till November 30, 2012, after 5,505 cases were filed and 33 were revived and 2,874 were disposed of in this month. In October 2012, the number of total pending cases at the High Court was 292,313. Now, a total of 465 death reference cases are pending with the High Court Division, as 145 death reference cases were disposed of in 2012.Among the death reference cases, 24 were sent to the High Court for hearing after preparing their paper books. Besides, 18 cases were made ready for sending them to the HC benches for hearing. In 2011, the High Court has disposed of total 64 death reference cases. A total of 2,132,046 cases were pending with all the courts of the country including the Appellate and High Court Division till December 31, 2011. A total of 1,083,827 cases were filed with all the courts of the country and a total of 948,689 cases were disposed of in 2011.[44]

❖ **Case Backlog in District & Sessions Judges:** In that year (2010), 748,822 cases were pending with the District and Sessions judges‟ courts of the country. The District and Sessions judges‟ courts had disposed of 207,477 cases, as 327,759 cases were filed with

[43] http://www. archive.thedailystar.net/beta2/news/backlog-of-cases/ [Last Retrieved on 17 August 2015]

[44] Ibid

those courts and a total of 1,076,164 cases along with previous cases were remaining pending with these courts in 2011. The District and Sessions Judges‟ courts across the country had disposed of 281,251 cases, as 362,563 cases were filed in 2010. Earlier in 2010, the number of total pending cases at the Appellate Division was 9,141 after it had disposed of 1,583 cases. The number of pending cases at the High Court Division was 313,735 after it had disposed of 693,096 cases in that year.[45]

- **Case Backlog in Magistrate Court:** A total of 706,061cases were filed with the magistrates‟ courts across the country in 2011. The magistrates‟ courts had disposed of 671,628 cases and 763,518 cases were pending with those courts in that year. The magistrates‟ courts had disposed of 1,061,252 cases, as 1,167,335 cases were filed in those courts the same year (2010). At the end of 2010, the number of total pending cases at the magistrates‟ courts was 1,942,163, according to sources.[46]

5.2 Causes of Case Backlog in Bangladesh:

The reasons for delays in our civil justice system are both systemic and subjective. They may be identified as follows:[47]

- Common law oriented adversarial or accusatorial character of the civil process as against inquisitorial as practiced in continental Europe, meaning that the litigation is party-controlled which provides wide maneuvering power to the lawyers, and presupposes lesser initiative and relative passivity of the judges.[48]

- Slow process of service of the summons which can be further slowed down by the intentions of the parties concerned, indicating a poor state of court administration.

- Too much reliance on the resort to interim injunctive relief and orders, leaving the hearing of the main contentions and issues to 'infinity'.

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[45] Ibid

[46] Ibid

[47] Md. Akhtaruzzaman, Concept and laws on Alternative Dispute Resolution and Legal Aid, 4th ed., Dhaka; Razia Khatun, (2011), P-31.

[48] Ibid

- Frequent adjournments of the trial caused by the insistence of the lawyers, and reluctance of the judges to limit these adjournments, such reluctance being explained partly by heavy case-load and partly by their unpreparedness to continue and complete the process.

- Vested interest of the lawyers for lingering and delaying the process, for they are often paid by their appearances in the court.

- Commonly made interlocutory orders and appeals which 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 expedite 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 already within their reach, nor do they make use of their rule making power to achieve procedural effectiveness.

- Absence of lawyer-client accountability giving the lawyer monopoly to conduct the case the way he considers best suited to his own interest.

- Little scope for client to client interaction which hinders potentiality for alternative dispute resolution and intensifies conflictual nature of the proceedings.

- Failure of the parties to present the witnesses - sometimes genuine, sometimes deliberate.

- Vagueness in the terms and wordings of the plaint and written statement, charging on the court time to clarify the issues, and the failure of the judges to impose costs for frivolous suits and pleadings.

- 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.[49]

- Inadequate administrative and logistic support system, enormous work-load of the judges, poor salaries and poor working conditions - all having negative impact on the initiative and efficiency of the judges.
- Insufficient internal discipline and accountability.

5.3 Way to Develop ADR for Reducing Case Backlog in Bangladesh:

The following issues are made to reduce the case backlog through ADR and thus enhance harmony in the society:[50]

- The government should set up a high-powered commission comprising impartial legal experts (preferably retired judges) to scrutinize the existing legal provisions introduced for promoting ADR with a view to identifying the loopholes and recommending legal provisions for revolutionizing the outside-court settlement of disputes.
- The said commission should be given the necessary power so that they can draw up an effective plan of action to make the ADR system a success.
- All cases may not be suitable for the ADR. Whichever case is suitable for it must be resolved through ADR. Going to court must be the last resort in such cases.
- It is not enough to enact any legislation in a bid to modernize the ADR system. The government, the Bar and the Bench must be committed to developing a culture for dispute resolution through ADR. They must be aware of what ADR can do, especially when the courts are heavily overburdened with millions of cases.

[49] Ibid

[50] Md. Abdul Halim, ADR in Bangladesh: Issues and Challenge, 2nd ed., CCB Foundation: Dhaka, (2011), P-63.

- A specialized and dedicated arbitration bench manned by a skilled judge or judges may be set up in the High Court for the purpose of dealing with international arbitration matters more effectively and professionally. Such an arrangement would command respect from the international business community and create confidence of the parties involved in the judicial system in the country.

- Sufficient resources should be allocated in the national budget so that adequate ADR institutions can be built and proper training imparted to the lawyers, judges and stakeholders on ADR. At the same time, proper publicity should be made to sensitize everyone about the advantages of ADR.[51]

5.4 Special Measures to Develop ADR for Reducing Case Backlog:

There are some special measures which may be taken for the development of ADR mechanism for reducing case backlog in Bangladesh. These are:[52]

- Establish a National Judicial (Policy making) Committee for ensuring efficient utilization existing resources.

- Establish effective procedures for selection, training, and oversight of Mediators and arbitrators.

- Find or create a sustainable source of financial support.

- Create an effective outreach and education programme to reach users.

- Create support services to overcome under barriers.

- Establish effective procedures for case selection and management.

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[51] Ibid

[52] Prof. Dr. Answar Ali Khan, An introduction to Alternative Dispute Resolution (ADR), 2nd ed., Dhaka: Hira Publication, (2011), P- 9-10.

- Establish effective procedures for programme evaluation.

- Curtail the yearly holidays of the Supreme Court of Bangladesh from 66 Days to 30 days as a short term measure to reduce backlog.

- Increase civic engagement and create public[53]

[53] Ibid

Chapter Six

Finding, Recommendation and Conclusion

6.1 Findings:

Through the study I found number of Challenges to implement the ADR mechanism in Bangladesh to reduce the Civil Case backlog namely political challenges, economic Challenges, legal challenges and social challenges. Each and every challenges have been keeping a vital role showing their unwillingness to implement the ADR mechanism in our civil litigation system. Political challenges are available in both dwelling society and Court society. It has a great influence to obstruct ADR mechanism. Economic Challenge is another vital one. With due respect to all some Lawyers, Officers of the court, judges are involved to earn money by general process. They are not interested to develop ADR mechanism. The thought concern person about a civil case that it‟s a process of investment through which the interest will be continued for forever. But they don‟t think that when the process will become easier than present time and then people will be more interested to ensure their rights through filing a suit and when number of suits will be increased definitely the earning of concern person will be increased.

6.2 Recommendations:

The following recommendations are made to reduce the case backlog through ADR:

- The government should set up a high-powered commission comprising impartial legal experts (preferably retired judges) to scrutinize the existing legal provisions introduced for promoting ADR with a view to identifying the loopholes and recommending legal provisions for revolutionizing the outside-court settlement of disputes.
- The said commission should be given the necessary power so that they can draw up an effective plan of action to make the ADR system a success.
- All cases may not be suitable for the ADR. Whichever case is suitable for it must be resolved through ADR. Going to court must be the last resort in such cases.
- It is not enough to enact any legislation in a bid to modernize the ADR system. The government, the Bar and the Bench must be committed to developing a culture for dispute resolution through ADR.
- They must be aware of what ADR can do, especially when the courts are heavily overburdened with millions of cases.
- A specialized and dedicated arbitration bench manned by a skilled judge or judges may be set up in the High Court for the purpose of dealing with international arbitration matters more

effectively and professionally. Such an arrangement would command respect from the international business community and create confidence of the parties involved in the judicial system in the country.

- Sufficient resources should be allocated in the national budget so that adequate ADR institutions can be built and proper training imparted to the lawyers, judges and stakeholders on ADR.
- At the same time, proper publicity should be made to sensitize everyone about the advantages of ADR.

6.3 Conclusion:

Delay in disposal of cases become common culture in our court system. Now days it become a factor of injustice, a violator of human rights. People are getting frustrated while they are filing a suit before the court as they are uncertain about when they will see the end of the disputes. But it cannot be ignored that every litigants have right to speedy and fair trial. Alternative dispute resolution mechanism has the potentiality to manage a case without causing delays and financial loss to the parties. In an effort to streamline the life of a case while preserving justice, alternative dispute resolution (ADR) offers an arena for litigation outside of the trial process. We can take the examples of developed countries like UK and USA where due to initiation of ADR mechanism at trial system they are getting success while dispensing justice. So to ensure justice for all ADR mechanism can be practiced as mandatory as it does not hamper human rights. But to get the full benefit of this mechanism, it must be free from any kind of baseness.

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