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Critical Review of the Court Based ADR in Bangladesh: Prospects and Challenges

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Abstract: *The study concentrates on the Court Based Alternative Dispute Resolution (ADR) as a special form of ADR in Bangladesh. It critically analyzes the present legal framework for Court based ADR in Bangladesh. The Court Based ADR is not a single process or program rather, it encompasses many different varieties, variations, and flavors of ADR mechanisms. Nevertheless, the research does not focus on whether ADR is better than litigation rather it shows how the courts are transforming ADR and how ADR is transforming in the court system. While reviewing the ADR provisions, the study attempts to assess the existing position of the court based ADR and its efficacy in settling disputes. The study focuses on fundamental laws relating to Court Based ADR in Bangladesh particularly in civil matters, family matters, revenue matters and Artha Rin (Money loan) suits. The study depicts the impact of incorporation of ADR in settling civil suits by analyzing secondary data. It investigates the feasibility of introducing any change into the existing ADR framework in order to develop the present Court Based ADR mechanism. The study concludes by finding out the major challenges of court based ADR in its way of success in Bangladesh.*

Keywords: *ADR, Arbitration, Civil Court, Court Based ADR, Mediation*

I. Introduction

Court based Alternative Dispute Resolution (ADR) or Court-annexed ADR (sometimes also referred to as judicial ADR or court mandated ADR) is a process by which courts redirect certain cases to any of the forms of ADR rather than by way of trial [1]. The Court Based ADR arises where after parties have presented their case to court, the same is referred by the court to one of the ADR machinery for resolution.

Bangladesh for the first time incorporated the provisions of court based ADR into the Family Court Ordinance, 1985 but that was almost dysfunctional until the early 2000 when under the leadership of former Chief Justice Mustafa Kamal it was revived through initiating pilot projects in selected family courts in Dhaka. Witnessing the unprecedented results of the pilot projects in family courts the government was convinced to incorporate the ADR provisions into the Code of Civil Procedure (CPC), 1908. Though initially it was optional, the ADR provisions now have been made compulsory for every civil court by incorporation of sections 89A and 89C of the Code of Civil Procedure, 1908 through the Civil Procedure (Amendment) Act, 2012. Apart from this these two laws, ADR provisions have also been incorporated into the Labor Act, 2006 and the *Artha Rin Adalat Ain* (Money Loan Court Act), 2003.[1]

It is, therefore, evident that the Court Based ADR is now a settled fixture in courts in Bangladesh like many parts of the world. However, just because a process has gathered widespread support does not mean that there is no necessity to examine how well the process has worked. It has been observed that incorporation of ADR has little impact in effective disposal of civil suits. The investigation evaluates the efficacy of the existing legal framework for Court Based ADR and find out the key challenges in its success. The paper systematically considers the interrelationship between ADR and traditional court processes.

II. Notions of Court Based ADR

ADR may either freestanding or Court based. In other words, ADR may be tied to a law suit or freestanding. When the process is connected to the law suit or court case, it is called court based ADR or judicial ADR. The freestanding ADR has no relationship with court cases. When disputants sit for amicable settlement by conciliation on their own, or approach a middle man or neutral third person to negotiate or mediate their dispute that is called freestanding ADR. The commercial arbitration and local or community based ADR are the common examples of freestanding ADR [2].

The court based ADR refers to a process where both parties meet with an arbitrator or mediator, under the direction of the competent court, who will help the parties to focus on their situation and consider the appropriate options for settlement available to them in their suits. The court based ADR programs or practices

[1] This special law established special court and procedure for recovery of the money borrowed from the Banks and Non-banking financial institutions in Bangladesh.

are authorized and used within the court system and their procedures are controlled by the court[2] [3]. The court schedules dates and times for the ADR process and assures the administration of each case referred to ADR, including monitoring and evaluation. The court assures ownership of all aspects of the ADR process, including accommodation within the court and the selection of the neutral. However, that might be narrow description of court based ADR. In wider sense, the court based ADR includes the ADR process referred by the courts. An agreement arising out of the court based program is enforceable as a court order. Generally, after filling a court case a judge or court employee examines the dispute and suggests or orders, as a matter of course, the parties to attempt to resolve their differences through ADR in forms of mediation, conciliation, negotiation or mini-trial etc. In every approach the judge himself or a neutral third person tries to get the disputants to reach an amicable settlement. If they do, the case is dismissed, saving the time and expenses of litigation.

The Court Based ADR is a not a recent phenomenon. Among the different modes of ADR, the court referred arbitration methods was the earliest form of formal ADR in this subcontinent. Thus, the alternative dispute resolution started in this arena in institutionalized form was through reference made by the court to the arbitrator.[3] Whether taking the assistance of ADR system is obligatory or optional essentially depends on the rules of procedure of the court. Where the participation in ADR is required by the court, whether by an individual judge's order or by a court rule that certain types of proceedings will go to ADR, the referral is presumptively mandatory. On the other hand, if ADR use is based wholly on the consent of the parties, the referral is voluntary.

III. Nexus between ADR and the Court

Currently it has been the policy of the governments around the world that disputes should be resolved at a proportionate level, and that the courts should be the last resort of dispute resolution. Although ADR is independent of the court system, a judge can recommend that parties involved in litigation enter into it. The court may also impose cost sanctions if it decides that one or more of the parties has been unreasonable in refusing to attempt ADR.[4] If parties refuse an offer to mediate without good reason, then even if they win their case, the judge can refuse to award them some or all of their legal costs. However, there are disagreements with the notion of refusal to award legal costs. It is thought that blanket invitations to mediate, particularly with an implicit threat of penalties for refusal, may not be the most effective approach to the encouragement of ADR at appellate level [4].

IV. Court Based ADR in Bangladesh

Though the journey of court based ADR in the then Indian subcontinent started with the promulgation of Bengal Regulation of 1772,[5] which for the first time statutorily recognized the import and significance of ADR in resolving disputes as part of the court process [5], the Court Based ADR reached its sophistication in the later part of the twentieth century, specifically in the 1980s with the promulgation of the Family Court Ordinance, 1985. Later on, witnessing the tremendous success of the family court in resolving disputes as specified in section 5, the legislature felt the impetus for incorporating ADR provisions in the Code of Civil Procedure in 2003. Thereafter, the ADR provisions were incorporated into the *Artha Rin Adalat Ain (Money Loan Court Act)*, 2003 (as amended in 2010), the Labour Act, 2006, the Income Tax Ordinance, 1984 (as amended in 2011) and some other laws relating to taxation and labor.

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2 World Bank in its 'Alternative Dispute Resolution Guidelines' used the term Court-annexed ADR as alternative to Court Based ADR. The guidelines simultaneously used the term 'Court-connected ADR'. Unlike court based ADR the Court connected ADR is linked to the court system but not part of it. Cases are referred by the appropriate courts to ADR service providers outside the court system. The ADR center, however, might at the same time deal with cases emanating from outside the court system. Agreements arising from court-connected mediation are usually enforceable as court orders. In court-connected models, separate mediation centers handle the provision of mediation services and also take cases that have not yet been issued in court. Thus, their pool of available referrals is potentially wider than that of court based programs.

3 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 exceed Rs. 200/- and the suits were for accounts, partnership, debts, non-performance of contracts, etc.

4 In the conjoined appeals of Halsey v Milton Keynes NHS Trust and Steel v Joy and Halliday the Appellate Court said that all members of the legal profession should now routinely consider with their clients whether their disputes are suitable for ADR. One commentator comments that 'this is close to warning that not to do so could be negligent and a breach of professional duty'. However, Halsey is not the first case where the Court of Appeal has refused to award the legal cost to the winner. In the Dunnett v Railtrack, the Court declined to order the defeated claimant to pay the Railtrack's costs because Railtrack refused to consider an earlier suggestion from the court to attempt mediation. Dunnett was the first reported case where a successful party losing costs because they declined to mediate. In Dyson & Field v Leeds City Council the Court of Appeal gave warning of this possibility to a defendant reluctant to mediate, largely on the basis of additional sanctions in the event of losing at a re-trial.

5 A clause in this regulation provided that "in all cases of disputed accounts, it shall be recommended to the parties to submit the decision of their cause to arbitration, the award of which shall become a decree of the court.

4.1. Laws referred for ADR in Bangladesh

It has been stated earlier that the process of resolving suits through ADR system is nothing new in Bangladesh. All sorts of ADR mechanism prevails in Bangladesh. However, the fundamental statutes that govern ADR system, particularly in civil matters, are as follows:

a) The Code of Civil Procedure, 1908
b) The Muslim Family Laws Ordinance, 1961
c) The Income Tax Ordinance, 1984
d) The Value Added Tax Act, 1991
e) The Customs Act, 1969
f) The Family Courts Ordinance, 1985
g) The Legal Aid (Legal Advice and Alternative Dispute Resolution) Rules, 2015 under the Legal Aid Act, 2000
h) The Arbitration Act, 2001
i) The *Artha Rin Adalat Ain (Money Loan Court Act)*, 2003
j) The Conciliation of Disputes (Municipal Areas) Board Act, 2004
k) The Village Courts Act, 2006
l) The Labour Act, 2006
m) The EPZ Trade Union and Industrial Relation Act, 2004
n) The EPZ Trade Welfare Society and Labour Industrial Relation Act, 2010

4.2. Classes of ADR in Bangladesh

Various types of ADR practiced in Bangladesh may be classified under three major categories, namely, (i) Court based ADR or judicial; (ii) quasi-formal, statutory ADR; and (iii) informal/non-statutory ADR. The primary focus of this study is on the first category, i.e., court based ADR through civil courts.

Table 1: Classes of ADR under different laws in Bangladesh

Status of ADR	Relevant Legislations	Relevant sections	Methods applied	Key actors
Formal/ court based ADR	The Code of Civil Procedure, 1908 (as amended up to 2012)	S.89A, 89B, 89C, 89D & 89E	Mandatory mediation/ arbitration	The court itself or a third party neutral
	The *Artha Rin Adalat Ain (Money Loan Court Act)*, 2003 (as amended up to 2010)	Chapter on ADR, Ss. 22-25, 38, 44A, 45	Mandatory mediation/ arbitration	The court itself or a third party neutral
	The Family Courts Ordinance,1985	Ss.10(3),(4) & 13	Reconciliation/ compromise	The court itself
Quasi-formal/ statutory ADR	The Conciliation of Disputes (Municipal Area) Board Act, 2004	Esp. Ss.3, 4 and schedule	Almost formal civil and criminal adjudicatory jurisdiction in specified cases	Local government representatives, *paurashava* only
	The Village Court Act, 2006	Ss.1-2 and schedule		Local government representatives, *union parishad* only
	The Arbitration Act, 2001 (as amended up to 2004)	Esp. S.22	Arbitration	Arbitration Tribunal
	Income Tax Ordinance, 1984	Ss.152F-152S	Facilitation	Selected or appointed facilitator
	The Value Added Tax Act, 1991	Ss. 41A-41K	Facilitation	Selected or appointed facilitator
	The Customs Act, 1969	Ss. 192A-192K	Facilitation	Selected or appointed facilitator
	The Legal Aid (Legal Advice and Alternative Dispute Resolution) Rules, 2015 under the Legal Aid Act, 2000	Rules 4-17	Settlement conference	Legal aid officer
	The Muslim Family Laws Ordinance, 1961	S. 6, 7(4), 9(1)	Arbitration	Local government representatives (up & *paurashava*)
	The Labour Act, 2006	S. 210	Conciliation, arbitration	Selected conciliator or arbitrator
	The EPZ Trade Union and Industrial Relation Act, 2004	Ss. 47-49	Conciliation, arbitration	Selected conciliator or arbitrator
	The EPZ Trade Welfare Society and Labour Industrial Relation Act, 2010	Ss. 39-45	Conciliation, arbitration	Selected conciliator or arbitrator
Informal/ non-formal ADR	Informal ADR by NGOs on civil matters		Mediation	NGO mediators

4.3. Court Based ADR in Family matters

The Family Courts Ordinance, 1985 was promulgated with a view to expedite the resolution of cases related to family affairs rapidly and effectively. These courts have been following the ADR procedure in disposing the cases both before and after the conclusion of trial. The family court shall fix a date for pre-trial hearing within 30 (thirty) days after the filing of the written statement by the defendant. Under sec. 10(3) of the Ordinance 1985 the court generally, in the pre-trial hearing, ascertains the issues between the parties and attempt to affect a compromise or reconciliation between the parties. The Family Court, if it deems fit or on the application of any disputants, may conduct the whole or part of the trial in camera. The Court can take steps to compromise or conciliate between the parties even after the closing of evidence and before pronouncing final judgment [6]. Where the dispute is settled through compromise or reconciliation between the parties, the Court shall execute the decree or give decision on the basis of that compromise or reconciliation.

4.4 Court Based ADR in Civil matters

Following the unprecedented success of the Family Court in resolving family disputes through ADR machinery[6], the legislature felt encouraged to incorporate ADR mechanisms into the Code of Civil Procedure, 1908 (CPC). The ADR methods come into the civil matters in broader way by the amendment of Civil Procedure Code (Amendment) Act, 2003. The amended Act of 2003[7] introduces the court based mediation and arbitration as integral part of the civil proceedings in Bangladesh. However, it was the discretionary power of the court to explore the scope of mediation. Later on, the CPC was amended again in 2012[8] that made the mediation system mandatory in all sort of civil proceedings. The Act went through another amendment in 2006 that introduced the provision of mediation even at the appellate stage.

4.4.1 Mediation in Original Civil suits

As stated, section 89A of the CPC provides for the provisions relating to mediation. Explanation 1 to the section defines mediation as flexible, informal, non-binding, confidential, non-adversarial and consensual dispute resolution process in which the mediator shall facilitate compromise of disputes in the suit between the parties without directing or dictating the terms of such compromise. The analysis of the definition reveals that mediation under the CPC is flexible, informal, non-binding, confidential, non-adversarial and consensual in nature [7]. Here, the third party who works as mediator just facilitates the process without any direction or dictation as to how and in what terms the compromise will be reached.

The CPC as it stands now after the amendment in 2012 makes the mediation process compulsory, which means the court is now under an obligation to refer every dispute of civil nature to which the CPC is made applicable. Under the current arrangement the court may, after the written statement has been submitted with the court, itself initiate mediation proceeding, or may refer the same to the engaged pleaders of the disputing parties, or to the parties themselves, or to a mediator from the mediator penal prepared by the concerned district judge under 89A (10) of the CPC.[9] After reference of a dispute to the engaged pleaders of the disputing parties, they shall, upon consultation with their respective clients, appoint another pleader who was never worked for the parties before, or a retired judge, or a mediator from the panel of mediators prepared under section 89A (10), or to any other person, who, in their opinion, is competent to facilitate the mediation process as a mediator.[10]

When the parties themselves decide to mediate with the help of third party neutrals, then they may, upon discussion with their respective pleaders and the mediator, fix the amount of fees to be paid by each party to the mediator, the procedure to be followed during the mediation process and all other ancillary and related matters. The court shall intervene only when the parties, their respective pleaders and the mediator fail to settle down the aforesaid issues, in which case the parties will be bound to abide by the decision of the court.[11]

The amended section also brought into effect changes with regard to time frame relating to the start and the end of the mediation process. The section imposes obligation upon the parties to inform the court within 10 days time starting from the date of reference to mediation by the court under section 89A (1) as to who is being appointed as the mediator, failing which the court shall itself appoint one within next 7 (seven) days. The section also restricts the timeframe to 60 days within which the mediation process must be concluded. The court

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6 The total realization through mediation since the introduction of mediation in the Family Courts from June 2000 to 16th May 2001 was about TK. 51,00,000 (estimated £46,360). K. M. Hasan, (former CJ of Bangladesh), 'A Report on Mediation in the Family Courts: Bangladesh Experience', presented in the 25th Anniversary Conference of the Family Courts of Australia, Sydney, 26-29 July 2001.

7 Sections 89A and 89B were inserted by section 3 of the Code of Civil Procedure (Amendment) Act, 2003

8 Section 3(a) of the Code of Civil Procedure (Amendment) Act, 2012

9 See section 89A (1) of the CPC

10 See section 89A (2), ibid

11 Section 89A (3), ibid

may, however, of its own motion or upon a joint request preferred by the parties extend the time period for another 30 days.[12]

It is quite obvious that the mediator may come into contact with many sensitive matters or documents of confidential nature and hence, the section also imposed a serious obligation upon the mediator about maintaining confidentiality. It says that the mediator shall prepare a report about the outcome of the mediation process. If the mediation is successful, then the terms of compromise must be reduced to writing with precision in the form of an agreement. The parties will put their hands as executants and their lawyers, if there be any, and the mediator as witnesses.

In order to encourage the parties to cooperate with the mediation process the provision accommodates the following arrangements:

(i) the mediation process shall be confidential and any communication made, evidence adduced, admission, statement or comment made and conversation held between the parties, their pleaders, representatives and the mediator, shall be deemed privileged and shall not be referred to and admissible in evidence in any subsequent hearing of the same suit or any other proceeding;
(ii) the parties will always have the option to get back to the stage of formal judicial process from which the dispute has been sent for mediation;
(iii) in case of court initiated mediation same court shall not hear and dispose the suit, if the court continues to be presided over by the same judge;
(iv) the parties will get back the entire amount of money paid as court fees during the institution of the suit and the court will issue a certificate to that effect;
(v) once an agreement is reached and executed by the parties, the same is considered to be final and no party will be permitted to reopen the same either by way of a fresh suit or by way of appeal or revision.

4.4.2 Mediation in Appeal

Appeal is considered to be the continuation of the original suit. Hence, in 2006 the parliament opened up the avenue for the resolution of a civil dispute through ADR even at the appellate stage. In order to facilitate the process section 89C was inserted into the CPC. Though at its birth the mediation provision at this stage was discretionary in nature lying with the hands of the court, the CPC as it stands after 2012, makes the same as compulsory. Now every appeal deriving from original decree must be referred to mediation and comply with the same provisions as enumerated in section 89A.[13]

4.5 ADR in the *Artha Rin Adalat Ain* (Money Loan Court Act), 2003

The *Artha Rin Adalat Ain (*Money Loan Court Act*), 2003* is a special law that laid down, for the very first time, the foundation for speedy disposal of money suits connected with the banking and non-banking financial institutions. The end in view, *inter alia*, was the quick recovery of loan amount advanced by the financial institutions within the shortest possible time. Before the amendment in 2010, the provision of ADR was incorporated into the Act in the form of 'settlement conference'. The court could mediate the suit after the written statement was filed by the defendant or defendants, by adjourning the subsequent procedures of the suit. According to the provision, the presiding judge would call for a settlement conference with a view to settle the dispute at an early stage of the case. The settlement conference would be held in camera. Nonetheless, the *Artha Rin Adalat Ain* (Money Loan Court Act) as it stands now after amendment in 2010 has incorporated the provisions of mediation both at trial as well as the appellate stage repealing the provisions relating to settlement conference.

Section 22 of the amended *Artha Rin Ain* (Money Loan Act) incorporated the provisions of mediation almost in the same words and manners as is provided for under section 89A of the CPC but with the exception that in the former case a special resolution providing for authorization of the Board of Directors of the concerned financial institution authorizing one of its officers must be passed and submitted with the concerned *Artha Rin Adalat* (Money Loan Court*)*. The Court will take special care as to whether the authorized officer has acted, during the mediation process, in consonance with the said authorization.[14] Unlike the ADR provisions in the CPC, the *Artha Rin Adalat Ain* (Money Loan Court Act) created a scope for the *Artha Rin* (Money Loan) Courts according to which the courts may employ another attempt in order to effect compromise at the post trial stage before passing a final judgment or order in accordance with the provisions of chapter four of the Act.[15] The statute has taken a precautionary measure in respect of disputes having monetary value exceeding take five crore. In this connection, section 25 provides that a special authorization needs to be obtained from the

[12] See section 89A(4), ibid
[13] See section 89C (1) (2), ibid
[14] See section 24 of the *Artha Rin Adalat Ain* (Money Loan Court Act), 2003.
[15] See section 23, ibid

managing director or the chief operating officer, as the case may be, of the concerned financial institution before concluding a deal by way of ADR mechanisms under section 22. The Act takes one step ahead of the Civil Procedure Code in the sense that it provides for mediation provisions not only at the appellate stage, but even at the revision and execution stage of an *Artha Rin* (Money Loan) suit as well.[16]

V. *Quasi* Formal ADR

A number of statutes are now in force in Bangladesh in which ADR provisions in quasi formal form have specifically been incorporated.[17] Those statutes include, *inter alia*, the Muslim Family Laws Ordinance, 1961, the Income Tax Ordinance, 1984, the Arbitration Act, 2001, the Conciliation of Disputes (Municipal Areas) Board Act, 2004, the Village Courts Act, 2006 and the Labour Act, 2006. Though the primary objective of this research is to study the functional aspects of CBA in the civil courts of Bangladesh, still the researcher find it necessary to focus on some of the statues which provided for ADR mechanisms in quasi formal manner. The ADR mechanisms in some of those statutes are enumerated hereunder:

5.1. Under the Muslim Family Laws Ordinance, 1961

The fundamental rules relating to succession (doctrine of representation under section 4), polygamy, divorce, maintenance and dower of Bangladeshi Muslims residing in Bangladesh are codified in Muslim Family Laws Ordinance, 1961 (MFLO). This Ordinance provides mechanism for reconciliation through Arbitration Council in case of polygamy, divorce and maintenance.[18] However, the Ordinance does not provide for any description of the arbitration procedure. The proceeding of the Arbitration Council is not a judicial proceeding. The Arbitration Council under MFLO is constituted by the Chairman and representatives of each of the parties to a matter.[19] The Arbitration Council facilitates the settlement of dispute regarding:

i. Polygamy (section 6)
ii. *Talaq* or dissolution of marriage (section 7)
iii. Maintenance (section 9)

5.2. Under the Income Tax Ordinance, 1984

The Income Tax Ordinance, 1984 (ITO) to be read with the Income Tax Rules, 1984 provides for the detail provisions relating to the income tax matters including but not limited to the method of maintaining books of accounts, methods of calculation of taxable income, methods of resolution of disputes arising between the assessee and the Deputy Commissioner of Taxes (DCT) including the provisions of appeal and reference, penalty provisions and provisions relating to criminal prosecution. The ADR provisions were not there in the ITO that has been inserted for the first time in 2011 by the Finance Act of 2011. A brand new chapter titled Chapter XVIIIB was incorporated having sections starting from 152F to 152S. Though the term 'mediation' can be found nowhere in the body of the said sections, a plain reading of the sections, however, reveal that mediation in the form of 'facilitation' by a third party facilitator has been incorporated into the ITO.

It has already been noticed that the CPC and the *Artha Rin Adalat Ain* (Money Loan Court Act) have provided for compulsory ADR mechanisms but the ITO sets an eligibility test for the aggrieved assessee before s/he may avail the recourse of the ADR mechanisms. A dispute shall not be a matter of procedure referred to ADR as is the case under the CPC and the *Artha Rin Adalat Ain* (Money Loan Court Act). Section 152I provides that any aggrieved assessee may apply for permission for resolution of the dispute through the ADR process. The application must be in such form and within such time accompanied by such fees as may be prescribed by the National Board of Revenue (NBR). Again, as to the eligibility to apply for ADR, section 152J provides for two preconditions. An assessee shall not be eligible to apply for ADR if he fails to-

(a) submit the return of income for the relevant year or years; or
(b) pay tax payable under section 74

Further, section 152N imposes certain obligations upon the facilitator appointed under section 152K as to whether the aforesaid conditions have been satisfied by an applicant assessee. In order to satisfy himself as to the fulfillment of the conditions, the facilitator shall, upon receiving the application of ADR, forward a copy of the application to the respective DCT and also call for his opinion on the grounds of the application and also whether the conditions referred to in sections 152I and 152J have been complied with. The DCT shall respond within five working days, failure of which shall lead to a presumption that the conditions have been fulfilled.

[16] See section 44A and 38 respectively, ibid
[17] The ADR is termed '*quasi* formal' because no civil court is directly involved in the ADR process under those enactments. In almost all the laws as listed above the parties themselves play the central roles in the ADR process.
[18] See sections 6, 7 and 9 respectively of the MFLO, 1961
[19] Section 2, ibid

Section 152N also empowers the facilitator to serve notice upon the parties, adjourn the proceeding when so required, call for records or evidences and cause to make such enquiry as he may deem fit and proper.

Section 152L provides for certain rights as well as certain duties of an assessee during an ADR process. An assessee shall be entitled to negotiate himself or by an authorized representative. He may even be dispensed of his personal appearance if he can furnish sufficient reasons for doing so. Again, an assessee is obliged to carry out certain duties including submission of all related papers and documents and disclosure of all issues of law and facts. He also needs to be cooperative, interactive, fair and *bonafide* while negotiating for resolution. If it is proved that any agreement has been reached by way of untrue declaration, or submission of any false document, the agreement shall be set aside and appropriate legal action be initiated against him.

Upon conclusion of the facilitation process, a dispute may be partly or fully resolved. Whatever be the case, in each case the facilitator shall record in writing the details of the agreement reached between the assessee and the representative of the Commissioner. The agreement shall include the terms of the agreement including any tax payable or refundable and any other necessary and appropriate matter and the manner in which any sums due under the agreement shall be paid and such other matters as the facilitator may think fit to make the agreement effective. Thereafter, the agreement must be signed by the assessee and the Commissioner's representative and the facilitator.

When an agreement is finally reached and executed by the parties, it shall immediately become binding upon both the parties and it cannot be challenged or reopened before any Tribunal or Court either by the assessee or any other income tax authority. Like the CPC and the *Artha Rin Adalat Ain* (Money Loan Court Act), ITO also provides that if the facilitation process fails to produce any effectual result, in that case the parties shall be entitled to take the recourse of appeal and in computing the prescribed time limitation for preferring appeal, the time passed between the filing of the application and the decision or order of the ADR shall be excluded. Similar ADR provisions have also been incorporated into The Value Added Tax Act, 1991 and The Customs Act, 1969 by the Finance Act of 2011.

5.3. Under the Conciliation of Disputes (Municipal Area) Board Act, 2004

The Conciliation of Disputes (Municipal Area) Board Act, 2004 establishes a dispute Resolution Board for easy and speedy settlement of a number of disputes within municipal areas. The Act entirely follows the conciliation as a method to settle the disputes mentioned in its schedule. Though the Act does not define 'conciliation', the decision of the Dispute Conciliation Board is binding upon the parties.[20] The Act empowers the board to try both petty civil and criminal matters as stated in the schedules. However, the Board shall not try the case if the accused is found guilty of another cognizable offence (in case of offences in first part of the schedule), if there is a question of a minor's interest or a previous agreement in any arbitration between the parties exists or a government or its employee is a party to it. Parties cannot employ lawyers to represent them before the Board. Nonetheless, the Board cannot impose imprisonment but order for damages, or compensation, restitution of property.[21]

5.4. Under the Village Courts Act, 2006

It is pertinent to mention here that, though the term 'Village Court' has been mentioned in the Village Court Act, the adjudication under the Act is not performed by any judge.[22] The Village Court is constituted upon an application by one of the parties to a dispute. The Chairman of the *Union Parishad* (UP) or any of the members of the UP where the chairman is incapable of chairing or his neutrality is in question shall be the chair of the Village Court. Each Party shall select two members of which one must be a member of the UP.

The Village Court has exclusive jurisdiction over petty civil and criminal matters specified in the schedule of the Act except where the accused is found guilty of another cognizable offence mentioned in first part of the schedule, and if there is a question of a minor's interest, or a previous agreement in any arbitration between the parties exists, or a government or its employee is a party to it. The Village Court cannot impose imprisonment. It can only pass order of compensation for damages up to a maximum of TK. 25,000/- and restitution of property. However, the procedures as enumerated in the Evidence Act, 1872, the Civil Procedure Code and the Code of Criminal Procedure, 1898 (CrPC) are not applicable to the Village Court. In addition to that, no lawyers can be engaged by either party before the Village Court to represent their cases.

[20] See Section 11 (3) of the Conciliation of Disputes (Municipal Area) Board Act, 2004
[21] See Section 9, ibid
[22] For a definition of who is a judge, see section 19 of the Penal Code, 1860

Table 2: Statistics of Village Courts of selected Districts from 2010 to 2014

Sl. No.	Name of the Districts	Number of civil suits filed	Number of civil suits disposed of	Pending suits
1.	Manikgonj	486	357	129
2.	Brahmanbaria	865	696	169
3.	Gazipur	7912	5466	2466
4.	Narsingdi	2152	1638	514
5.	Narayangonj	2516	1838	678

Source: Field survey

5.5. Under the Labour Act, 2006

The Bangladesh Labour Act of 2006 incorporated provisions for the settlement of industrial disputes through ADR. Where an industrial dispute is likely to arise between the employer and the workers, the employer or the Collective Bargaining Agent (CBA) shall communicate his or its views in writing to the other party.[23] The party receiving it shall in consultation with the other party arrange a meeting with the other party for collective bargaining on the issue raised in the communication within fifteen days.[24] Where the parties reach a settlement of the issue discussed, a memorandum of settlement shall be recorded in writing and signed by both parties and a copy thereof shall be forwarded to the government, the Director of Labour and the conciliator.[25]

The government shall appoint conciliators to settle the industrial disputes and shall specify jurisdiction and functions.[26] If a settlement of the dispute is arrived at in the course of conciliation, the conciliator shall send a report thereof to the Government together with a memorandum of settlement signed by the parties to the dispute.[27] However, if the conciliation fails, the Conciliator shall try to persuade the parties to agree to refer the dispute to an Arbitrator for settlement in which case, the award of the Arbitrator shall be final and no appeal shall lie against it.

5.6. Under ADR under the Legal Aid Act, 2000

The provisions relating to ADR were incorporated into the Legal Aid Act in 2013 by inserting section 21A to the Act. In order to give effect to section 21A (2) of the Legal Aid Act the government has promulgated a set of rules in the name of 'the Legal Aid (Legal Advice and Alternative Dispute Resolution) Rules, 2015' (hereinafter referred to as the *Legal Aid Rules*). Rules 4 to 17 of the Legal Aid Rules enumerated in great length the ADR provisions in the form of meditation. Section 21A (2) of the Legal Aid Act as amended in 2013 empowers the legal aid officer appointed under section 21A (1) to act as the mediator in cases of disputes that come to him either in the form of application for legal advice or by reference by any competent court or tribunal. If any disputing party consents to ADR, the legal aid officer sends a letter to the other party to the dispute seeking his consent to settle the dispute through ADR. If the other party consents to ADR, the legal aid officer arranges a meeting with the presence of the parties at a convenient place and time.[28]

After service of notice in accordance with the provisions as incorporated under Rules 6, 7 and 8 the legal aid officer shall comply with the provisions of Rule 9 which include fixing the procedure to be followed in the mediation, explaining the parties about the merits of mediation. The rule also provides that the legal aid officer cannot impose his decisions upon the parties and the fundamental basis of such mediation proceeding will lie on the principle of equity, conscience and impartiality.[29] The legal aid officer has the power to adjourn the mediation proceeding for a period not exceeding 7 (seven) days if the same cannot be concluded on a day or the parties fail to reach a decision.[30] The legal aid officer while in the process of dispute resolution through ADR is directed to adhere to the provisions as incorporated under Rule 11.

Though the Legal Aid Rules on ADR were promulgated in 2015, the original provisions on ADR were incorporated into the Legal Aid Act in 2013. The researcher has managed to collect a report on ADR by the district legal aid officers. The report is reproduced hereunder:

[23] See Section 210(1) of the Labour Act, 2006
[24] See Section 210(2), ibid
[25] See Section 210(3), ibid
[26] See Section 210(5), ibid
[27] See Section 210(8), ibid
[28] Rule 4 (1) & (2) and Rule 5 of the Legal Aid Rules
[29] Rule 9 (2) and (3) of the Legal Aid Rules
[30] Rule 10, ibid

Table 3: Statistics on ADR chaired by the District Legal Aid Officer, 2014

Sl. No.	Name of Districts	Number of cases sent by Court or Tribunal	Number of cases taken up for ADR	Number of cases resolved by ADR	Number of beneficiary of ADR	Amount of money recovered through ADR
1.	Kishoreganj	-	73	55	146	20,00,000/-
2.	Gopalganj	-	16	15	22	5,00,000/-
3.	Bogra	46	38	12	30	9,90,000/-
4.	Rangpur	-	7	3	6	-
5.	Chittagong	-	10	8	15	-
6.	Comilla	02	47	4	5	3,00,000/-
7.	Brahmanbaria	-	6	2	12	3,60,000/-
8.	Moulavibazar	-	4	2	7	-
9.	Barisal	-	44	36	75	-

Source: National Legal Aid Services Organization (Bangladesh)

The Table shows that the District legal aid officers have achieved a commendable success in resolving a good number of disputes by way of ADR. Since the ADR rules have been formulated recently, the legal aid officers, it is hoped, will be able to resolve more disputes in an amicable manner through applying the ADR tools. This will in effect help to reduce the existing backlog of cases pending for disposal before the formal courts and tribunals.

VI. Achievements of Court Based ADR

6.1. In Family Courts

The Family Court Ordinance was promulgated in 1985. In this Ordinance the provision of mediation, an ADR process been incorporated in section 10, 11 and 13 giving the court ample scope to mediate the disputes among the parties. But the courts did not practice these provisions widely until the year 2000. A total sixteen pilot courts were undertaken in between 2000 to 2001 in different districts of the country. Trained judges were posted there. Those pilot courts achieved immense success in disposing of the family cases through mediation. A statistics shows that the pilot courts disposed 2418 family cases (about 35% of total pending family cases) and realized Tk. 74.47 million through mediation in three years (from July, 2001 to June, 2004) after their establishment [8]. Whereas, before these initiatives from 1985 to 2000, in fifteen years, the total amount of money realized through some 70 Family Courts were about Tk. 6.2 million and those courts disposed less than one thousand family cases through mediation [8].

6.2. In Civil and Money Loan Courts

The success in the Family Court encouraged the parliament to enact a provision of ADR for the civil courts. Finally the provision of ADR was incorporated into the Code of Civil Procedure in July, 2003. In order to observe the working of the civil courts, quarterly statements of disposal of suits in the civil courts for three years starting from 2012 to 2014 have been collected from the administrative officers of four district courts.

Table 4 State of pending and disposal of civil suits in 2012-2014

Name of the Districts	Year	Number of cases at the end of the previous year	Number of cases filed	Total	Number of disposal	Number of disposal through ADR	Percentage (%) of disposal through ADR out of total disposal	Pending cases at the end of the year
Jamalpur	2012	9356	2592	11948	1618	72	4.45%	10330
	2013	10330	3942	14272	2018	74	3.67%	12254
	2014	12254	7426	19680	3304	77	2.33	16376
Narsingdi	2012	7131	4123	11254	2575	78	3.03%	8679
	2013	8679	9646	18325	2989	68	2.28%	15336
	2014	15336	12728	28064	4955	48	.97%	23109
Manikganj	2012	8045	4307	12352	2038	38	1.86%	10314
	2013	10314	4610	14924	1918	41	2.13%	13006
	2014	13006	3076	16082	2174	132	6.07%	19908
Kurigram	2012	9224	3435	12659	2592	34	1.31%	10067
	2013	10067	3155	13222	2350	10	.43%	10872
	2014	10872	2729	13601	2901	25	.86%	10700
Total		124614	61769	186383	31432	697	2.22%	160951

The above Table shows a clear picture of how the ADR provisions in the selected districts have been working in the last three years. The figure of disposal of civil suits through ADR is quite shocking. The total number of disposal of suits in the four selected districts in last three years was 31432, out of which only 697 suits were disposed of through ADR. The percentage of disposal through ADR is only 2.22% of the total number of disposal. The official statistics demonstrate that ADR is not working satisfactorily which needs immediate intervention by way of overhauling the entire ADR regime.

VII. Challenges of ADR in Bangladesh

As is evident from the preceding discussions, more than a decade has been elapsed since the incorporation of ADR provisions into the civil law of the country. However, Bangladesh still could not manage to institutionalize and make the ADR tools truly functional. The high expectation of success of ADR tools in curbing case backlog and providing quick but inexpensive remedy avoiding procedural complexity and formality in the civil, *Artha Rin* (Money Loan) and to some extent in the family cases has met with failure [9]. Some problems and challenges faced by the legislations related to court based and quasi formal ADR are discussed hereunder:

7.1 Challenges of ADR in Family matters

- The Family Court Ordinance (FCO) does not have provision relating to ADR at the appellate stage like the CPC. Further, like the CPC there is no provision for the substitution of judge in case of failure of judge sponsored ADR under the FCO [10].
- It was envisaged in the FCO to form and establish separate Family Courts to deal exclusively with family disputes. Nonetheless, with utter surprise that no separate Family Courts have been established yet, rather the court of Assistant Judge has been working as the Family Court Judge who is already overburdened with other civil suits.
- Family disputes are very sensitive and personal in nature that requires a judge who is experienced and well trained. But under section 4 of the FCO the court of Assistant Judge, the lowest tier of the subordinate judiciary who is most inexperienced, acts as the Judge of the Family Court. But in India the Family Courts Act, 1984 requires that a person shall not be qualified for appointment as a judge unless s/he has held a judicial office at least for seven years.
- Currently, only the Family Court Judges are responsible for effecting compromise and no provision relating to referring a dispute to a person or institute outside of court is present in the FCO.
- In the FCO there is no counseling support service in a district which is extremely necessary for providing assistance to the parties in resolving family disputes.

7.2 Challenges of ADR in Civil and Money Loan matters

- In the CPC there is no general or specific guideline for the mediators regarding the maintenance of equal participation and opportunity for the parties that may create serious problem in case of power imbalance. There is also no explicit provision pertaining to reviewing the agreement arrived at upon conclusion of mediation under the CPC [11].
- Further, the CPC incorporates mediation provisions at the pre-trial and the appellate stage but mediation mechanism upon conclusion of the trial before the pronouncement of judgment has not been incorporated into the CPC. It is an established fact that the parties usually are aware of the merits of their case just upon conclusion of the trial. Therefore, post-trial mediation may prove to be more effective than that of the mediation at the appellate stage.
- Section 89A as it stands after the amendment in 2012 requires the court to refer the suit for compulsory mediation. If either or both the parties and their lawyers remain absent, the court has no option but to postpone the stage to another date. Again, when the parties are in attendance and the court has referred the suit to the parties for mediation, but the parties or any of them does not appear before mediator, then the mediation is bound to fail. In this backdrop, the section does not empower the court with the tools to enforce the attendance of the parties. Thus, the present provision adds to the existing practice of delay.
- Quite often it happens that after the suit has been referred to mediation any of the party does not want to compromise and withdraws from mediation without assigning any reason in which case a mediator has no other option but to report the court about the failure of the mediation. Under section 89A there is no penal provision for the party who unreasonably withdraws from mediation.
- It is often alleged that lawyers discourage their clients for resolving their disputes through ADR in fear of reduction of their income level.

VIII. Concluding Remarks

The legal framework of ADR has developed in Bangladesh over the last few years and acquired a distinct position in the dispute resolution process. ADR mechanisms can now be applied in resolving a wide array of commercial disputes, family disputes and civil disputes, among others, thus easing access to justice. However, if we juxtapose the ADR provisions under different laws of the country with their functional aspects, then it will be obvious that the court based ADR mechanisms could not manage to yield satisfactory result as it has been expected at the time of their introduction. It is true that Court Based ADR under different laws can be transformed not only to an aid to the earlier resolution of litigation but can also be used as a tool for case management.

It is in the public interest that the constitutional function of the judiciary should not compromised by blurring its boundaries with non-judicial services. So long as the clarity of the distinction is maintained and appropriate quality controls, including evaluative and cost-benefit assessments undertaken, then the ADR has much to offer in connection with the judicial process. Alternatively, mandatory ADR requires careful oversight to ensure that it should not be coercive and should not impose too much of a barrier to trial for those parties who want or need judicial determination.

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