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RESEARCH ARTICLE

THE ROLE OF JUDICIARY TO UPHOLD ALTERNATIVE DISPUTE RESOLUTION IN BANGLADESH: AN ANALYSIS

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Abstract

Recently Alternative Dispute Resolution (ADR) has gained widespread acceptance among both the general public and the legal profession in ensuring prompt and available disposition of justice. Almost two decades have been passed since ADR was introduced in the civil justice system in Bangladesh like many other countries. Actually ADR system is a supplementary to the traditional trial and tries to resolve a dispute in a compromising manner where both party solve their problems in a win- win strategy. But after a many years of introducing this in the legal system of Bangladesh, no remarkable improvement is being seen in judicial system. This study explores the challenges of ADR for which the burden of cases are not being reduced considerably and to find out the effective role of Judiciary in this aspect. Lack of public awareness, less interest of lawyers, deficiency of circulation and monitoring are some causes for this situation. We have gone through the application of ADR of some countries which are seen to be benefitted and this study suggests for some recommendation which may be taken by judiciary for establishing ADR in a developed way. This work is based on secondary data. It may help the judiciary and the policy makers to develop their ideas for taking necessary steps in the application of ADR at optimum level.

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Introduction:-

Alternative Dispute Resolution (ADR) is a very important issue today specially in ensuring prompt and available administration of justice. ADR is generally considered to be alternative to a formal litigation sometimes even outside of the court. In Bangladesh this ADR system is not newer; rather the thing which is new here is the extensive promotion and proliferation of ADR models and its increased uses. Though almost seventeen years have been passed since ADR was introduced in the civil justice system in Bangladesh and in some other laws dealing with civil matters, there is no official statistics on the achievement of ADR is available either in the Ministry of Law or in the Supreme Court. And without substantive reports and statistics from the respective courts it is very difficult to predict how far the new system of ADR is successful in Bangladesh. Also the numbers of pending cases are increasing alarmingly. This paper will explore the challenges of ADR for which the burden of cases are not being reduced considerably and to find out the effective role of Judiciary in this aspect. This work is based mainly on secondary materials i.e. statutory laws relating to ADR issue, journals, books, online reports and judgments also. Here descriptive methods have been applied for in-depth knowledge about ADR, its emergence; basis of applications. The

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objective of this study is to find out limitations of ADR for which its response is not so remarkable and also to get some ways how the ADR methods can be used more effectively to establish the availability of the administration of justice in Bangladesh. It may help the judiciary and the policy makers to develop their ideas for taking necessary steps in the application of ADR at optimum level.

Alternative Dispute Resolution:

Alternative dispute resolution (ADR), sometimes termed as external dispute resolution (EDR) usually considered being alternative procedure of solving litigation even outside of the judicial process. It acts as a means for disagreeing parties to come to an agreement through compromise with the help of a third party such as arbitrator or mediator. However, ADR is also increasingly being adopted as a tool to reduce disputes alongside the court system itself. ADR being non-adversarial or the inquisitional system of justice is a procedure for resolving a dispute other than settling litigation even in a non-traditional way. It is a new dimension in our justice delivery system and a creation of the demand of litigants who are unable to access the formal legal system. It is an important vehicle to transform and improve the informal systems of justice through resolution rather than settlement because it is recognized as win-win strategy by solving disputes on compromise. This system is easier, time saving and cheap as compared to traditional adversary system of litigation. ADR has been introduced in Bangladesh mostly in our civil legal system as well as family matters. It is like an umbrella system which works through negotiation, mediation, conciliation, arbitration.

Negotiation:

Is the most informal method and resolves the problems by the conflicting party themselves or by the trained negotiator acting on behalf of a particular person or organization.

In **Mediation** a neutral third party (mediator) assists the disputing parties to reach a settlement but cannot give a view of the strengths or weaknesses of the parties. It is used in a wide range of disputes including commercial disputes, family disputes, neighbor disputes and employment disputes.

Conciliation is similar to mediation but in conciliation the third party in spite of being 'neutral' takes a more active role, deliberately suggesting ways in which the parties might reach settlement.

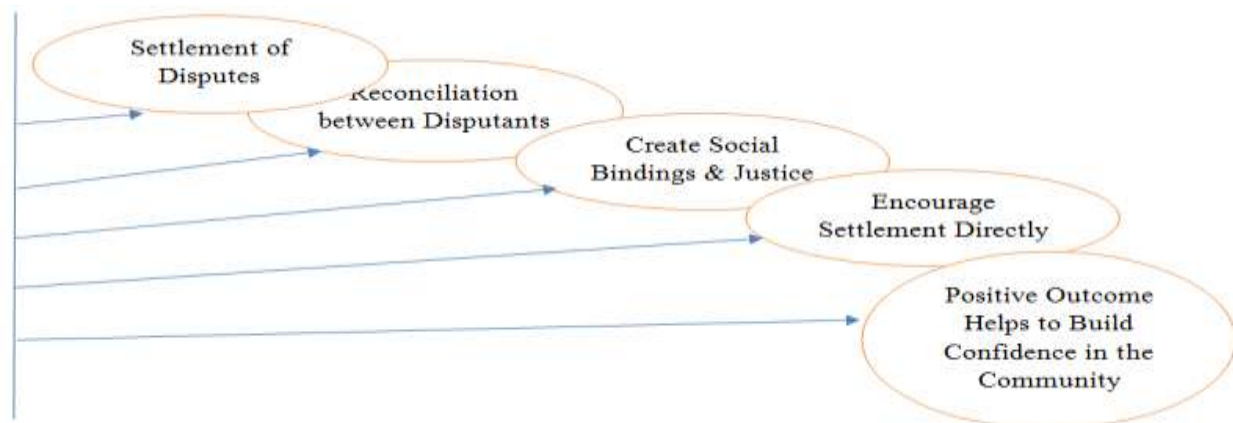
In **Arbitration** the parties to a dispute refer it to one or more persons who is called arbitrator and agree to be bound by his decision. The arbitrator may be a lawyer, or an expert in the related field of the dispute. The arbitrator has much closer a role to that of a traditional judge.

Med-Arb is a hybrid process which combines mediation and arbitration for resolving a dispute.

Role of ADR:

ADR keeps vital role to resolve dispute by compromising between the parties which is seen as win-win strategy rather than win-lose strategy of tradition trial system. Thus it helps Judiciary to reduce case burden as well as creating trust on it.

In brief role of ADR can be shown as follows:



Challenges of ADR in Bangladesh:

Still Bangladesh could not manage to institutionalize and make the ADR tools truly functional, though it has been incorporated in civil justice system more than a decade. But 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 the family related disputes has met with failure. Here Judiciary has great role to attain the success of ADR. Some problems and challenges faced by the legislations related to court based and quasi formal ADR are discussed as follows:

ADR's challenges in family matters:

At the appeal level, the Family Court Ordinance (FCO) has no clause relating to ADR, like the CPC. In addition, there is no provision, like the CPC, for the replacement or change of judges in the event of the failure of the ADR sponsored by the FCO.

The FCO approved the creation and establishment of independent Family Courts to deal exclusively with family disputes. Nevertheless, it is surprising that no separate Family Courts have yet been created; rather the Assistant Judge Court has served as the Family Court Judge who is already overburdened with other civil suits.

Family disputes are of a very delicate and personal nature requiring an experienced and well-trained judge. But the Assistant Judge court, the lowest tier of the subordinate judiciary which is most inexperienced, acts as the Family Court Judge under section 4 of the FCO. But in India the Family Courts Act 1984 allows a person not to be fit to be named as a judge unless he / she has held a judicial office for at least seven years.

In Bangladesh at the moment, only the Judges of the Family Court are liable for making a decision and there is no provision in the FCO concerning transfer of a dispute to a individual or entity outside the courts.

There is no counseling support in a district at the FCO which is extremely necessary in order to provide assistance to the parties in the resolution of family disputes.

ADR's Civil and Money Loan challenges:

The CPC contains no general or specific guidelines for mediators on the maintenance of equal participation and opportunities for parties which may create serious problems in the event of an imbalance in power. However, there is no clear provision for evaluating the agreement reached after mediation is completed under the CPC.

However, the CPC contains pre-trial and appeal mediation clauses, but the mediation process at the end of the trial was not integrated into the CPC until the judgment was pronounced. It is an established fact that the parties are generally aware of the merits of their case just after the trial is concluded. Consequently, in the appeal stage, post-trial mediation can prove more successful than mediation.

Section 89A as it stands following the 2012 amendment allows the court to refer the case to compulsory mediation. If either or both of the parties and their lawyers remain absent, the court will have no choice but to postpone the stage to a different date. Also, the mediation is expected to fail unless the parties are present and the court has referred the suit to the parties for mediation, but the parties or any of them do not appear before mediator. With this in mind, this section does not provide the court with the means to enforce the parties' attendance. Therefore the present clause adds to the existing delay procedure.

Most frequently, after the dispute has been referred to mediation, each party does not wish to settle and withdraws from mediation without specifying each justification in which case the mediator has no other choice than to disclose the failure of mediation to the court. Under section 89A there is no punitive provision for the party which withdraws from mediation unreasonably.

Lawyers are also alleged to prevent their clients from settling their disputes by ADR in fear of a reduction in their profits.

Present Limitations and Future Directions for ADR Practices in Bangladesh:

Although this ADR system is not a specific law, it is a popular out-of-court dispute resolution process. There are some drawbacks to this technique too followings are some common weaknesses that must be addressed-

Serious Power Disparities ADR:

While ADR is a fairly open conflict resolution mechanism, if such an ADR allows parties to negotiate with each other, any significant power imbalance between the parties might impede the effectiveness of ADR.

ADR on domestic violence:

Family violence practice can make the women silent or visibly controlled by their husband who perpetrates it and so they cannot effectively engage in mediation (Chinking & Astor 2002). Without skilled mediator, mediation may worsen their conjugal relationship in such situation.

ADR and lawyers' role:

Family court judges broadly identify that they are not getting enough cooperation from lawyers. This is because rapid disposal would result in a loss of their company profits, hampering ADR's Bangladesh performance.

No-uniformity in various ADR processes:

There is still non-uniformity in the formal sector practiced in the ADR phase. Additionally, some laws delineate the ADR process in a very brief manner (e.g.: FCO – 1985, MFLO – 1961) so that this may hamper the effectiveness of various forms of ADR practiced.

Lack of social understanding on ADR's benefits:

A large part of the Bangladeshi society is unconscious of ADR's benefits compared to trial. In many developed countries, parties are provided with sufficient information as to why the practice of ADR should first be exercised, in addition to raising social awareness of ADR knowledge to people.

Conflict Management of Alternative Dispute Resolution and Role of Judiciary in this Respect:

In our existing justice system of Bangladesh, it is not possible for the court to maintain the judicial system properly. The explanation for this is shortage of judges and the cost of prosecutions. This usually takes a lot of time in case of some civil cases than criminal ones. And here the possible solution is if our judge will play a crucial role in the creation of the Alternative Dispute Resolution Process outside the formal trial, then it can be assured that the case can be reduced by 50% (fifty percent). While there are several other rules, Muslim Family Laws Ordinance, Family Court Ordinance, Labor Law, Money Loan Court Act etc., like the Civil Procedure Code, this ADR structure has been developed, but there is no proper way to settle such disputes by ADR process. Absences of evidentiary value and non enforceability as well as procedure are the main reasons behind this conflict in ADR. Here judiciary can keep this procedure up to date to ensure that the parties achieve the same advantage as a criminal trial in the shortest possible period. We have to hold some of the following items for that:

Firstly, the Judiciary can take the necessary steps to create a separate institution where only the ADR system can be established to collect data on all cases resolved by conciliation, mediation and arbitration and to print monthly Magazines from the Bangladesh Supreme Court.

Secondly, with this statistical data analysis, the mediator or arbitrator in the ADR system may take the required decisions and refer those to the parties who seek for good evidence in favour of ADR.

Furthermore, the Supreme Court and government might inaugurate a separate court system to be formed where only ADR cases can be filed and settle those disputes quickly by separate mediators. Also a separate arbitration council, headed by a judge of the High Court Division and other senior judges from different districts may be formed. This council will do research on the mechanism of ADR in different countries and make rules for the development of this system in Bangladesh. There should be system to train and motivate the lawyers to cooperate with this ADR Mechanism as well.

Like the Muslim Family Laws, where it is mentioned that the Assistant Judge will only review, our judiciary should follow the Indian system here. Here they make a separate court system where family matters are to be reviewed and for that judges must be trained up for at least seven years. Beside these, the Judicial Body may conduct seminars, workshops for the different communities and societies of our country in order to make people aware of this ADR system and to take it as a constructive dispute resolution system.

Court Based ADR in Bangladesh:

ADR mechanism is also followed through formal court in Bangladesh and these can be divided into three major categories: (i) Court-based ADR or judicial; (ii) quasi-formal, statutory ADR; and (iii) informal / non-legislative ADR. This study focuses primarily 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	Code of Civil Procedure 1908	Sections – 89A, 89B, 89C, 89D, 89E	Mediation / Arbitration	The Court itself is a third party nature
	Artha Rin Adalat – 2003	Chapter on ADR, Sections - 22-25, 38, 44A, 45	Mediation / Arbitration	The Court itself is a third party nature
	Family Court Ordinance – 1985	Section – 10 (3), (4) & 13	Reconciliation / Compromise	The Court itself

Role of ADR for Effective Civil Justice System:

ADR is mostly being applied in civil justice system of Bangladesh in the following manner,

The ADR may support the reform of the Court and go together with the trial in reducing case backlog which is impeding the performance of the trial. Complex procedure is impeding the effectiveness of the court.

ADR can increase the satisfaction of the outcomes of the disputants while high expense, lengthy delays and restricted access harm the public trust with the current administration of justice.

ADR services may provide the greater access to justice to vulnerable sections of the society. ADR programs can reduce the delay in dispute resolution where these delays result from complex formal procedures. The Court's resources are inadequate to hold to the backlog of the case. General people struggle a lot here and so ADR can play a critical role in this section as ADR may circumvent inadequate or unreliable tribunals.

As case filing costs in the court are high and intolerable for the general public, ADR will provide all access to a good cost-effective dispute resolution program here.

Development of ADR System by Judiciary in Various Countries:

ADR in India: India in this field is not new and was in existence even under the previous Arbitration Act of 1940. Disputants in the complexities of modern life – style want a decision and that too, as quickly as possible. They have developed Lok Adalat System in India for the implementation of this system. Here, ADR is an effective alternative dispute resolution method in lieu of litigation. The Committee for the Operation of Legal Aid Schemes (CILAS) consisting of the Law and Justice Ministry, Govt. In 1980 Lok Adalat was recommended to be formed from India. Consequently, one of the components of the Lok Adalat movement is acknowledged. According to the Legal Services Authority Act, 1987, which was implemented on November 9, 1995, it has assumed considerable significance and gained constitutional recognition.

ADR in Malaysia: Malaysia used mediation, conciliation, adjudication and arbitration in their dispute resolution system. Those ADR methods are becoming increasingly popular dispute resolution mechanisms. Some view litigation as time – consuming and believe that such ADR approaches will save time and cost efficient. They created 1952 Arbitration Act. This act applies to arbitration at home and on international level. We do comprise the International Arbitral Awards Act 1985 Convention on the Recognition and Compliance. Malaysia is a party to the International Arbitral Awards Convention on the Recognition and Compliance. They make some special Award scheme on their disputes. There are: a) Awards redress, b) Awards relief, c) Awards arbitration, d) Arbitral Awards compliance.

Malaysia Arbitration Institution: Malaysia has a well-known arbitration institution to promote state, regional and international arbitration-the Kuala Lumpur Regional Arbitration Center or KLRCA. This has its own collection of arbitration rules that currently place the Malaysian legal system.

ADR in Singapore: Singapore has pushed the ADR sector to rise. Singapore has made great strides alongside London and Hong Kong in establishing itself as one of the epicenters for conflict resolution. We also create a mechanism that is the Mediation Center of Singapore (SMC). Throughout the different sectors of society, mediation is practiced here; appealing to the diverse ethnic and social context of Singaporeans and it has also regulated their culture to government and industry.

ADR in USA: By the case of Burchell vs Marsh judges said that, Judges chosen by the parties to decide on the matter brought before them, finally and without appeal. In 1990, the Federal Court formed itself in the USA. There the Civil Justice Reform Act (CJRA), which is a federal district court to enact a civil justice cost and delay mitigation strategy, considerable progress has been seen in the development of ADR systems and the use of ADR by federal and state courts. Here they settle all conflicts summarily by early impartial assessment and mini-trials, mediation and arbitration. They even spread this in all states like "California, Minnesota, New Jersey, Texas, New York, Florida, etc.

ADR in French law: Judges hearing a matter may, with the consent of the parties, designate a third party for up to three months for settlement. Judicial Conciliation in French Law is a document that the First President has drawn up. They make the system across their whole system in the European Union. They have developed this ADR within fifteen years which is becoming an important element of the European legal system. In French law, specific cases of ADR have been addressed as follows:

1. Dispute between employers and employees.
2. Disputes between tenants and landlords;
3. For Consumer-Business disputes.
4. With regards to insurance.
5. In banking matters.

Recommendation:-

It is clear from all the discussion that we have regulated the ADR system in Bangladesh and made some laws for creation of this sector. Yet our justice system in this field still lacks. We make this program for a cost-effective way to reduce the burden of court and encouraging parties come here for settlement of disputes. But this sector has made parties come here like that, so they can't get proper redress and have to go to the courts in the end. So here we need to improve our system to make ADR successful, so that parties can build trust in this sector and come here to settle their disputes quickly. Following recommendation may be helpful in this regards.

Specific law for ADR:

A separate and specific statute on ADR with its various operating rules and regulations should be drawn up. It will assist the judges and lawyers to apply ADR in shortest possible time. For example, as is the case in Australia, the National Alternative Dispute Resolution Advisory Committee (NADRAC) sets a range of general guidelines that apply to all forms of ADR, eligibility of being an ADR practitioner.

Monitoring Body:

Office of Special monitoring body should be established in every court so that this body may check all the cases if these can be resolved applying alternative procedure outside of the court and encourage the litigating parties in this regards by presenting the positive sides of ADR. Also they might keep record of the cases solved in this way and published it through manual as well as digital way for publicity.

Design of the ADR curricula and training of the necessary personnel:

Educational curriculum should be developed with the lessons need for ADR from the secondary level so that social norms and attitude might be developed in friendly way as well as adequate training of the judges and relevant bodies might be imparting for getting successful ADR practices in Bangladesh. A skilled mediator is powerful tool for a successful resolution.

Making the local bodies more involved:

Local self government and influential people should be given cognizance in a limited access so that they are willing to participate in resolving dispute. In early Muslim period, kazi's court had to deal small amount of cases as village Panchayet was powerful in this regard and most of the cases was solved here. If local bodies are authorized enough judiciary will be benefited by avoiding heavy case load.

Institutional reform:

Another important issue which is still not adequately considered in Bangladesh is ADR's institutional development. There are many specialist bodies offering various ADR services in many developed and developing countries, such as Australia, Singapore, Malaysia, Indonesia, the Philippines and India. In addition, mediation centers and arbitration centers are established in many countries in an extensive effort to deliver justice in a professional manner through ADR. This can be followed in Bangladesh with the leadership of judiciary so that both informal as well as court based ADR can be developed by reducing the malediction of traditional justice system.

Keeping record as precedent:

In formal trial decision of Higher court has binding effect on lower court but in ADR no such system has developed yet. If judicial organ of the country keep the authentic record of successful ADR resolution and use it in further similar cases it might broaden the field of application of ADR in Bangladesh. Thus judiciary as a guardian may adopt ADR as a part of justice delivery system.

Awarding judges:

It is a matter of desire that the judges solving a case through ADR get two extra point and this is implemented newly in Bangladesh. When judge will get extra consideration, they will try for increasing application of ADR. Also the lawyer should be well paid.

Increasing awareness

Judiciary may impart ADR success story to aware the public by arranging seminar, workshop etc and export better knowledge from abroad. As judiciary face the challenges it can solve them easily by creating awareness.

Conclusion:-

In the legal system Bangladesh, ADR has gradually acquired a distinct role during the process of dispute resolution over the last few years specially in resolving a wide range of commercial disputes, family disputes and civil disputes. ADR structures can now be applied to promote the access to justice. But if we put together the provisions of the ADR in line with its practical characteristics, it is obvious that the mechanisms of the Court-based ADR cannot yield a satisfactory result as planned at the time of implementation. This is accurate that the courts have incorporated alternative conflict settlement in different laws and have referred the parties for mediation before the pre-trial stages. Nonetheless, we should not have a systematic and non-effective mechanism which would mean that parties cannot find any lasting solution in mediation or arbitration, or any alternate conflict resolution process. Our judiciary, like the other countries I have discussed in my paper, must play a vital role in this sector. That country has taken the initiative and resolved the dispute with the new ADR mechanism outside the court room, so it works. As long as the distinction is transparent and adequate quality controls are established, including measurement and cost-effectiveness assessments, the ADR has plenty to give in relation to the judicial process. In this study, we may urge that these recommendation might be effective to implement Alternative Dispute Resolution in a greater extent and it will ultimately uphold the dignity of judiciary as well as the achieve the trust of the public on administration justice.

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