



## THE NEED FOR ESTABLISHMENT OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

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### **Introduction**

In a country of one hundred and sixty million people, backlog of huge cases both in the lower as well as the higher Judiciary is not something very unexpected. Hence, before its too late, it is high time to search for an effective alternative method to solve this problem of backlog of cases. One of the most important solutions for this problem is effective introduction of the concept of ADR in our judicial system. The questions are: Are we ready for implementing this concept? What more do we require? This is the topic of my article today.

### **ADR is not a new concept**

Originally, in ancient India, Alternative Dispute Resolution or ADR, as we know today, was the way disputes were generally settled. The whole village by way of *Gram Panchayat* used to solve the problems of the villagers by sitting together and mediating the problems faced by the two parties. Since the advent of the modern legal system, this method of dispute settlement has largely been set aside.

Likewise, rural Bangladesh has a long tradition of doing Shalish in family matters or in minor disputes. Shalish is still the most effective procedure for quick and useful legal redress. Shalish provides a win-win situation for both the parties and entails less sufferings and costs.

### **What is ADR?**

ADR is a term that refers to several different methods of resolving disputes outside traditional legal and administrative forums. The main ADR alternatives to civil litigation are arbitration, conciliation and mediation. Disputing parties use these ADR methods because they are expeditious, private and generally much less expensive than a trial. Mediation is a concept that is often mistakenly confused with conciliation. Although the two methods have similar aspects, they are fundamentally different. To appreciate the differences between arbitration, mediation and conciliation, it is helpful to explain them separately.

### ***Arbitration***

Arbitration is an ADR method where the disputing parties present their disagreement to one arbitrator or a panel of private, independent and qualified third party “arbitrators”. The arbitrator(s) determine the outcome of the case. While it may be less expensive and more accessible than trial, the arbitration process has well-defined disadvantages. Some of the disadvantages include the formal or semi-formal rules of procedure and evidence as well as the potential loss of control over the decision by the parties after transfer of decision-making authority to the arbitrator.

### ***Mediation***

Mediation is an ADR method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured multi-stage process to help parties reach a conclusive and mutually satisfactory agreement. A mediator assists the parties in identifying and articulating their own interests, priorities, needs and wishes to each other. Mediation is a “peaceful” dispute resolution tool that is complementary to the existing court system and the practice of arbitration.

### ***Conciliation***

Conciliation is another dispute resolution process that involves building a positive relationship between the parties of dispute. It is, however, fundamentally different from mediation and arbitration in several respects. Conciliation is a method employed in civil law countries and it is a more common concept there than mediation. The “conciliator” is an impartial person that assists the parties by driving their negotiations and directing them towards a satisfactory agreement. It is unlike arbitration, in that conciliation is a much less adversarial proceeding. It seeks to identify a right that has been violated and searches to find the optimal solution.

### **Legislative developments**

The first footsteps towards taking resort to alternative methods of dispute resolution in the ancient India can be traced back as early as *The Bengal Regulation Act, 1772* which provided that in all cases of disputed accounts, parties are to submit the same to arbitrators whose decision are deemed a decree and shall be final.

*The Regulation Act, 1781* further envisaged that judges should recommend the parties to submit disputes to mutually agreed person and no award of arbitrator could be set aside unless there were two witnesses that arbitrator had committed gross error or was partial to a party.

A recommendation for the first time was made to the Second Law Commission by Sir Charleswood to provide for a uniform law regarding arbitration. The *Code of Civil Procedure* was then enacted accordingly in 1859. Sections 312, 313-325 and 326-327 laid down the permission and procedure for arbitration without the court’s intervention.

*Contract Act, 1872* also recognizes arbitration agreement as an exception to Section 28, which envisages that any agreement in restraint of legal proceedings is void.

Later, the *Arbitration Act, 1899* was also enacted to apply only to presidency towns to facilitate settlement of disputes out of Court.

*The Arbitration Act, 1940* repealed and replaced the previous Act of 1899 on the subject. This Act of 1940 was followed in Bangladesh throughout the Pakistan period till the year 2001 when the new law on arbitration viz. the *Arbitration Act, 2001* was promulgated after the Law Commission of Bangladesh proposed amendment in the law regarding Arbitration in 1999. As such, the current legislation in force in Bangladesh today regarding arbitration is the *Arbitration Act, 2001*.

An important feature of the current legislation in force is that it has been codified along the lines of *Model Law on International Commercial Arbitration* adopted by *United Nations Commission on International Trade Law (UNCITRAL)* and therefore corresponds to international standards of norms.

It is worth mentioning here that during the Pakistan period, *The Muslim Family Laws Ordinance, 1961* (Ordinance No. VIII of 1961) was enacted which also provided for a

reconciliation process through an arbitration council in respect of Talaq by Muslims before the Talaq could become effective.

In 1976, the *Village Court Ordinance, 1976* was passed. This was also another attempt to move away from the traditional legal and administrative forums and settle certain petty civil and criminal disputes through a panel of elected representatives of the local government. This was arguably the first legislation on ADR after the independence of Bangladesh. The *Village Court Ordinance, 1976* was, subsequently, repealed by the *Village Court Act, 2006* which is the law currently in force on the subject. One of the unique features of this law is that no lawyer is allowed to be appointed by the parties in any proceedings before a village Court. It is completely controlled and operated by people who are neither lawyers nor trained judges.

Since 1985, the *Family Court Ordinance, 1985* had given jurisdiction to the trial Judge to effect reconciliation between the parties both before and after the trial. This Ordinance dealt with divorce, restitution of conjugal rights, dower, maintenance and custody of children. All Assistant Judges were *ex officio* Family Court Judges.

There were two epoch making legislations, (i) The *Code of Civil Procedure (Amendment) Act, 2003*, enacted on the 27<sup>th</sup> February, 2003 and given effect to from the 1<sup>st</sup> July, 2003 and (ii) *Artha Rin Adalat Ain, 2003*, effective from the 1<sup>st</sup> May, 2003.

The Code of Civil Procedure was amended to introduce, through sections 89A and 89B, as in India and Pakistan, ADR through mediation or arbitration in all kinds of non-family litigations. Any time after a written statement is filed, if all the contesting parties are in attendance in the court in person or by their respective lawyers, (a) the court may mediate the dispute (b) or refer the dispute to the engaged lawyers of the parties (c) or to the parties themselves where no lawyer has been engaged (d) or to a mediator from a panel prepared by the District Judge in consultation with the President of the District Bar Association. If the dispute is referred to the respective lawyers they may, with the consent of their clients, appoint another lawyer not engaged by the parties, or a retired judge, or a panel of mediator referred to earlier or any other person whom they deem to be suitable to act as a mediator. By further amending the *Code of Civil Procedure, 1908*, mediation has been extended to appeal cases as well in all non-family litigations from 1<sup>st</sup> July, 2006.

As per the amendment, mediation means flexible, informal, non-binding, confidential, non-adversarial and consensual dispute resolution process in which the mediator shall facilitate a compromise of disputes without directing or dictating the terms of such compromise. If the mediation results in a compromise decree, both the plaintiff and the defendant will get back the money they spent on court fee. Failure of mediation within a stated or extended period will bring the case back to the trial Judge for trial. If the court was the mediator itself when the mediation failed, the trial will be held by another Judge of equal jurisdiction. Whatever transpires in the mediation proceedings is not receivable in evidence at the trial of the case in question or at the trial of any other case between the parties. A decree given after such mediation is not amendable to appeal or revision.

The *Artha Rin Adalat Ain, 2003* originally stipulated a provision for mediation meeting under the chairmanship of the Judge of an Artha Rin Adalat. But, subsequently, through an amendment made in the Act in 2010, some new provisions for mediation through an independent third party have been incorporated. The *Artha Rin Adalat Ain, 2003* also provides scope for resolution of disputes through ADR at the decree execution stage.

The government has also introduced the system of ADR in solving the tax disputes. The Tax disputes can be settled now through ADR even at the appellate stage also.

Likewise, in gas related disputes, the *Bangladesh Energy Regulator Commission Act, 2003* and the *Gas Act, 2010* also contain provisions for settlement of disputes through Arbitration. The disputes arising out of issues regarding compensation in land acquisition matters are also settled by Arbitration.

It is indeed very heartening to see, and I believe it will not be out of context to mention here, that even in international arena, Bangladesh has shown her belief in resolving disputes through ADR in a friendly and peaceful manner. Earlier, in 2009 we referred our maritime disputes with Myanmar and India to the international arbitration tribunals under the United Nations. Recently the International Tribunal on Law of the Sea (ITLOS) by a historic verdict, and indeed a very first one in these types of maritime disputes involving sovereign countries, decided the issues largely in favour of Bangladesh. It was decided in such a way that both Bangladesh and Myanmar were happy with the outcome and it was a win-win situation for both the countries. Both the countries welcomed the verdict. Similarly, the maritime dispute with India was also solved through international arbitration.

### **Problems**

From my little experience, I have identified certain problems which are inherently associated with the current system of ADR.

#### ***Consent of the parties***

For ADR to be successful, especially in arbitration proceedings, both the parties must agree to refer the dispute to be settled through arbitration or mediation. Under the Arbitration Act, 2001 if one party does not respond to the other party's notice requesting arbitration to solve a particular dispute, the system provided by the current Act of 2001 as regards appointment of an arbitrator through Court on behalf of the non-responding party is very cumbersome and sometimes it takes years together to even get the arbitration tribunal constituted and the hearing started. So, it is basically, going through the same saga if both the parties do not agree to ADR.

#### ***Lack of precise Rules***

Since no specific Rules of Procedure have been framed for arbitration, the parties are to depend on the Rules of arbitration determined by a Tribunal. This lacuna in the system makes ADR an uncertain game.

#### ***No appeal on merit***

Even if a party is not satisfied with the merit of the outcome of a resolution of a dispute through arbitration, there is no room for filing any appeal on merit. Only an award can be set aside if it can be seen that the Tribunal was biased. This aspect of the matter sometimes deters a prospective litigant from choosing arbitration over litigation.

#### ***Lack of institutional support***

Countries where the system of ADR has become successful put much emphasis on institutionalization of the system of ADR. For example, in the UK, USA, Singapore, France etc., we will find that there are so many private institutions which offer institutional support for ADR. This is helpful because these institutions have their separate Rules of procedure and panel of Arbitrators. They have their own system of arranging the whole arbitration in their own way. The parties simply write to them referring a dispute and they do the rest. Some of the big names are London Court of International Arbitration (LCIA), Singapore International Arbitration Center, Hong Kong International Arbitration Center, Indian Council of Arbitration etc.. In Bangladesh we have Bangladesh Council of Arbitration (BCA),

Bangladesh International Arbitration Center (BIAC) etc.. Although we have some institutions working in this field, more support should be given to these institutions by the government and Courts may also sometimes refer disputes to them for resolution. The expenditures for ADR through these institutions for ADR should also be brought under some kind of regulations.

### ***Lack of awareness***

People will have to be made aware of the advantages of ADR and disadvantages of court-based litigations. People do not have the requisite knowledge of the system. That is why the system is not becoming common in our country.

### **Prospects**

In almost all the agreements nowadays, lawyers are routinely incorporating an arbitration clause for settlement of possible disputes. Because of the legal requirements in various laws, parties involved are at least required to attempt mediation to solve the dispute outside the Court room. The government in the recent past has also reiterated on many occasions its plan to make ADR mandatory in certain cases. All these factors taken together, I see a very good prospect for ADR in Bangladesh. Before that, however, we need to educate people for the system.

I personally have certain recommendations for the system to become more effective, which are as follows:

### ***Establishing a state-run parallel authority for ADR***

A nationwide network needs to be envisaged for providing solutions through ADR. **An independent apex body viz. a Commission for Alternative Dispute Resolution needs to be constituted to lay down policies and principles for making ADR available to the common man to frame most effective and economical schemes for ADR.** It should also disburse funds and grants to different ADR Authorities and NGOs for implementing ADR schemes and programmes for the common man.

The records of ADR proceedings, especially arbitration proceedings, should also be required to be mandatorily filed with the said proposed commission since these are essentially judicial documents and may be required in future in any other proceedings. Under the present system, the documents pertaining to private ADRs are not kept properly for future use despite the fact that the rights of the parties involved depend so much on these documents. Therefore, if these documents are needed in Court proceedings in future, these are nowhere to be found rendering the very spirit of the entire system of ADR futile.

### ***ADR to be made mandatory in certain cases***

To successfully bring ADR to the common man while still reducing the backlog of cases piled up in Courts, radical steps need to be taken. It is important that the legislature introduce certain provisions which discourage initiation of litigations in cases where out of court settlements can easily be worked out.

### ***Imparting Legal Literacy***

Perhaps the biggest roadblock that faces any country is illiteracy. Our government has continuously been trying to eradicate illiteracy and now the new task has become even harder, that is, to impart legal literacy to the literates and illiterates alike.

Legal literacy empowers one to be an active and alert citizen, thereby making a population more vigilant about its rights and duties. ADR is a fairly new concept to many and concepts

like these not only take time in percolating to the grass root levels, acceptance of such a concept is also a big problem. Therefore a robust programme imparting legal literacy to the masses in Bangladesh, especially in the field of ADR becomes a necessity. Not only will this allow bringing ADR to the common man, an aware citizen will contribute positively to the development of the nation too.

### ***Integrating ADR in the legal education***

The legal education of today's Bangladesh needs to take the ADR mechanisms seriously. Today these mechanisms are taught only as part of specialty courses which primarily focus on the deployment of these processes only, whereas emphasis should be given on the practical sides of this topic.

The need of the hour is different – It is time when these dispute resolution mechanisms are taught as essential courses for a new breed of lawyers who will be adept in these forms of dispute resolutions and these lawyers will surely help the ordinary man in the long run.

### **Conclusion**

According to the Ministry of Law, Justice and Parliamentary Affairs, disposing off over million cases pending with the Courts in Bangladesh would take at least 86 years, if no new cases are filed. The pending cases not only make litigant public suffer, but also cause loss to the state.

The judicial system may collapse unless the remedial steps are taken immediately by the executive and the legislators. To reduce the burden on the courts, there is no alternative to ADR. Each of the ADR processes addressed herein, arbitration, mediation, and conciliation, provides important benefits to parties and may be seen as complementary to the judicial process.

This objective can be best achieved by establishing the proposed ***Commission for Alternative Dispute Resolution*** under an Act of Parliament which will be the regulatory authority in this field with certain powers of keeping records of the arbitration proceedings so that certified copies of different proceedings can be provided for future use, taking up different projects for making ADR a more common method of dispute resolution, making recommendations to the government for framing appropriate policies in this regard and, most importantly, taking measures for educating the nation, at the school, college and university levels, for making people aware of the urgent necessity of this system of dispute resolution in the prevailing situation in Bangladesh.

