

Introducing Alternative Dispute Resolution (ADR) in Criminal Justice System: Bangladesh Perspective

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Abstract

Alternative Dispute Resolution (ADR), which refers to the process of dispute resolution, denotes the idea of making the system of delivering justice friendly to the disputed parties and ensuring quick resolution of the cases. For its simplicity the popularity of this system is increasing day by day. The justice seekers of Bangladesh are frequently harassed in the area of courts. In this respect ADR can make them harassment free. Most of the statutory laws including the main procedural law for civil matters follow this system. The ADR System should be developed more and more in other main Statutes including the Code of Criminal Procedure. ADR can act a viable option for resolving disputes between the victim and the offender. This article explores theoretical concerns underlying contemporary appeals to ADR in the Criminal Justice System.

Keywords: *Alternative Dispute Resolution, Criminal law, Case, Litigation, Justice, Criminal Procedure, Settlement, Twelve Tables, Conflict.*

Introduction

Man lives in a society. With a view to lead a harmonious life in the society, human being undertakes their social interaction, through the different forms of social process-co-operation, competition and conflict. Conflict creates Suits cases. Unlike the suits and trial cases, Alternative Dispute Resolution (ADR) includes processes that are out of court proceedings. Due to fact that pendency of court cases and suits have gone through roofs, ADR has gained paramount significance in almost every civilized dispensation. ADR is generally classified into at least four types-negotiation, mediation, collaborative law and arbitration. Sometimes a fifth type, conciliation, is included as well, but for present purposes it can be regarded as a form of mediation.

The System for resolving dispute alternatively did not evolve in a day or even in a country rather it has been developed in different times, places, and forms of the need of people. The provisions of Alternative resolution exist at 450B.C. in the Twelve Tables adopted by the Romans. According to the rules of Twelve Tables the judges applied their reasonable discretionary power with respect to the settlement of stipulations arising from the contracts

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and the partition of lands acquired by inheritanceⁱ. However, Alternative Dispute Resolution (ADR) is a term which is frequently used in civil suits and proceedings. Like many other countries Bangladesh has also introduced this process in civil litigation system. With regard to criminal litigation the adoption of the process of ADR has been advocated by some researchers.

Criminal justice is the system of practices and institutions of governments directed at upholding social control, deterring and mitigating crime or sanctioning those who violate laws with criminal penalties and rehabilitation efforts. There are arguments both for and against with regard to ADR in criminal justice system. Because the criminal justice system emphasizes the role of the state in resolving offences to ensure peace and to protect the life and property of its subjects. State can never compromise. However, it should be noted that many offences do not fall under the category of crimes affecting the state, but affecting only a particular individual or a group of individuals, ADR can be more effective there.

In spite of the objection with regard to ADR in criminal cases, it has been a revolution for speedy trial. The Constitution of Bangladesh ensures justice but still there are so many pending cases because of which it is tough to ensure proper justice and ADR can play a big role here to speed up the dispute resolution and thus ensure peoples' right to justice.ⁱⁱ

Objectives of the study

All types of Courts in Bangladesh are burdened with litigants. These problems have been arisen due to the defects of adversarial system. The main objective of this study is to analyze the significant role of ADR system in Criminal Justice Administration for the speedy disposal of cases. Also to recognize the concept of ADR in procedural law for criminal matters. This essay also focuses on the advantages and disadvantages of ADR System and the development of ADR method in Criminal Justice System.

Methodology of the study

This is a socio-legal research. This essay is Descriptive and suggestive in nature. This study is based on both primary and secondary data collected from law reports, text-books, journals, Newspaper, websites, and training workshops on ADR in Criminal Justice. The collected data have been processed and prepared in the present form in order to make the study more informative, analytical and useful for the users.

Definition of ADR

ADR is the abbreviation of Alternative Dispute Resolution. When the disputes between the parties are resolved through means which are alternative to formal litigation, this is called Alternative Dispute Resolution.

The term Alternative Dispute Resolution includes, in narrow sense, only those processes in which the decision finally arrived at is with the consent of the parties. In wider sense, ADR includes arbitration also along with negotiation, mediation and conciliation-because arbitration constitutes an alternative to litigation .As Arbitration process settles the disputes

outside the Courts it is considered as ADR, as it brings the parties to the negotiation table, identifying the problems, establishing facts, clarifying issues, developing the option of settlement and ultimately solving the disputes through award which is binding on the parties.ⁱⁱⁱ

ADR is also known as external dispute resolution. It is a term ordinarily used to refer to formal dispute resolution processes in which the disputing parties meet with a professional “third party” who assist them to resolve their dispute. In other words the expression, “Alternative Dispute Resolution” is usually used to describe a wide variety of dispute resolution system which is indeed more economical and a time saving mechanism.^{iv}

In Bangladesh perspective ADR means a process of dispute settlement outside the formal judicial system where the parties represent themselves personally or through their representatives and try to resolve the dispute through a process of mutual compromise. In the words of Justice Mostofa Kamal “ADR is a non-formal settlement of legal and judicial disputes as a means of disposing of cases quickly and inexpensively. It is not a panacea for all evils but an alternative route to a more speedy and less expensive mode of settlement of disputes. It is a voluntary and co-operative way out of the impasses”^v

Confucianism of China is considered as the philosophical basis of ADR. Prof. Dr. Mizanur Rahman, in his Book of “Alternative Dispute Resolution” said that “The Philosophy of Confucius was, in essence, one of harmony, of peace, and of compromise resulting in a win-win combination. The Confucian view is that the best way of resolving a disagreement is by moral persuasion and compromise instead of by sovereign coercion. These are based on the strong belief that laws are not the appropriate way to regulate daily life and hence should only play a secondary role”^{vi}

ADR techniques are extra-judicial in character. Many Scholars believe that ADR is evolving as an alternative to the legal system. However, inclusion of different ADR mechanisms does not replace the court system, rather strengthens and further legitimate the formal judicial system.

Characteristics of ADR

Although the characteristics of arbitration, mediation, negotiation and other forms of community justice vary, all share a few common elements of distinction from the formal judicial structure. These elements permit them to address development objectives in a manner different from judicial systems. The common characteristics of ADR are given below:

1. ADR operates without formal representation.
2. ADR program applied the doctrine of Equity.^{vii}
3. ADR system includes more direct participation by the disputants in the process.^{viii}
4. Give opportunity for communication between the disputants.
5. Neutral case evaluation system.
6. ADR includes early neutral evaluation.
7. Make scope for family group conference.

8. Exist neutral fact –finding process.
9. An organizational ombudsman works within the institution to look into complaints independently and impartially.^{ix}
10. Its beneficial.
11. It keeps concentration not to the past but only to the future.
12. ADR processes are swift and cheap.

Development of the concept of ADR in Bangladesh

The judicial system of Bangladesh is adversarial in nature. In giving decree the court faced many problems in Bangladesh and the noticeable inability of the existing legal system to resolve them, an initiative was taken in 1999 by Justice Mr. Mustafa Kamal to initiate reforms in the legal system. Bangladesh Legal Study Group was formed under the leadership of justice Mustafa Kamal. The others members of the BLSG were Justice Mr. K. M. Hasan (then the senior most judge of the High Court Division, later the Chief justice of Bangladesh), Justice Mr. Anwar-ul-haque (then Joint Secretary, Ministry of Law justice and Parliamentary Affairs, later elevated as a justice of High Court Division), Prof. Dr. M. Shah Alam (then a member of the law commission) and Barrister Shafique Ahmed (then President of the Supreme Court Bar Association).^x

In its report the BLSG identified lack of accountability, absence of discipline and fragmentation in the litigation process and the absence of resourceful alternatives to full trials as the most pressing problems. One of the recommendations made in the report was to initiate immediately a Pilot project on mediation, a non mandatory consensual dispute resolution system, in the family Courts in Dhaka, the Capital and the to expand it to other courts. The reason for inclusion of the Family Court in the Pilot project was that it did not involve any new legislation. The Family Courts Ordinance, 1985 itself provides for conciliation whereas inclusion of other courts at that stage needed legislation or amendment of the Civil Procedure Code, 1908. This Ordinance deals with the divorce, restitution of conjugal rights, dower, maintenance and custody of children. The Ordinance empowers the trial judge to effect reconciliation between the parties both before and after trial. It is mentioned that all assistance judges of lower court, lowest tier of subordinate judiciary are ex officio Family Courts Judge.^{xi}

In the Pilot project, statistics show that the total realization of the money through execution of decrees in family suits disposed of by trial is far below the total realization of money in disputes settled through mediation.

The paramount success of the ADR, Courts are changing the mental attitude of the judges, lawyers, litigants and general public who were doubtful about ADR. In a workshop on 31st Oct, 2002, Justice Mr. K. M. Hasan considering the prospects of ADR in Bangladesh remark, “The success of Mediation in the Family Court is not the end. We look forward to the day when introduction of ADR mechanism in other courts, like Commercial Courts will be achieved”. The experience of the Family Courts has provided a strong foundation upon which an environment to introduce ADR in any types cases has been established.^{xii}

History of Criminal Justice System in Bangladesh

The phrase Criminal Justice System refers to the system of State and Local Public Agencies that deal with the crime problem. Proper dispensation of Criminal Justice System is no doubt sine qua none for a healthy secured society. The present criminal justice system of Bangladesh owes its origin mainly to 200years British rule in Indian Sub-Continent; though it has been gradually developed as a continuous historical process through Hindu and Mughal administration. There are at least five periods by passing which our present administration of justice has been developed. In Hindu Period, the King was considered as the King's Court, Chief Justice Court, Village Council etc.^{xiii} In Muslim period, the criminal justice system was administered through three consecutive sub-periods that was period of Turkish Muslims (1100A.D-1206), the Sultanate of Delhi (1206A.D.-1526) and the Mughal Empire(1526A.D.-1857A.D.).The theory of Muslims was based on Quran and their religious book.^{xiv} Somuzat,Diwan-e-Mazalim, Sarde Jehan's Court, Adalat Nazim Subha, Adalat Qazi-e-Subha,Faujder Court etc.The modernization of ancient criminal justice system took place by the interference of the East India Company. The administration of justice was regulated by several Charters and Act. Gradually, Supreme Court and High Court were established. In the last era of British India there were Courts of Session,Presidency Magistrate,1st Class,2nd Class and 3rd Class Magistrate which was established by the Code of Criminal Procedure,1898. Bangladesh has adopted this Criminal Justice System. The judicial procedure is regulated by the Code of 1898 and the Act of 1860 has defined the crimes and prescribed the punishment. This system is considered as the staircase of Criminal Justice System of Bangladesh.^{xv}

Nature of Criminal Justice System

Followings are the nature and features of the Criminal Justice System of Bangladesh-

1. Criminal Justice System is adversarial in nature meaning that the whole process is a contest between two parties one of whom is State and the other is accused of crime. The judge acts as an umpire between parties.^{xvi}
2. A person accused of a crime is presumed to be innocent until the prosecution proves his guilt.
3. Guilt of the accused must be proved beyond any reasonable doubt. This is the criminal standard of proof.
4. In criminal proceeding, the basic rule is that the prosecution bears the legal burden (onus) of proving every fact in issue. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence.^{xvii}
5. Criminal Justice System consists in the punishment of wrongs. Normally in a criminal justice, the injured person claims no right, but accuses the defendant of wrong.
6. In Criminal Justice System, there is no retrospective operation of Criminal law. Retrospective means looking backwards having reference to a state of things existing before the Act in question. It is a settled principle that criminal laws have no retrospective operation in the eye of law. Constitution of Bangladesh also ensures that no person shall be convicted to any offence which is not in force at the time of the commission of the act.^{xviii}
7. It is a general rule that Penal enactments are to be interpreted strictly and not extended beyond their clear meaning. A penal Statute must be construed according to its plain, natural and grammatical meaning. Special criminal law prevails over the general criminal law.^{xix}

8. There are almost five agencies in a criminal justice system. These are:

- (a) Law Enforcing Bodies,
- (b) The Prosecutors,
- (c) The Defence Counsel,
- (d) Adjudicating Authorities and,
- (e) Correctional Services personnel.

Criminal Court Structure of Bangladesh

The apex criminal court is the Appellate Division and High Court Division of Bangladesh. Besides those there are some other ordinary criminal Courts which have their legal basis in the Code of Criminal Procedure, 1898.

Section 6 of the Cr.P.C provides the following two types of courts-

1. Court of Sessions and
2. Court of Magistrates.

The Court of Sessions is presided over by the following three types of judges-

1. Session Judge,
2. Additional Judge,
3. Joint Session Judge.

The Court of Magistrates may be of the following classes-

1. Judicial Magistrate,
2. Executive Magistrate.

The Courts of Judicial Magistrates may be presided over by as many as five types of Magistrate-

1. Chief Judicial Magistrate or Chief Metropolitan Magistrate,
2. Additional Chief Judicial Magistrate or Additional Chief Metropolitan Magistrate,
3. Senior Judicial Magistrate (First Class Magistrate, Metropolitan Magistrate),
4. Second Class Magistrate,
5. Third Class Magistrate.

The adjudicating authorities perform its proceeding through following two stages-

1. Proceeding Stage and
2. Trial Stage.^{xx}

Proceeding stage consists of taking cognizance of a criminal proceeding and transfer to an appropriate court. Under Section 190, any CMM,CJM,MM,1st class Magistrate or other Magistrate specially empowered may take cognizance of an offence on the basis of any of the three sources-(a) upon a charge sheet (b) upon a complaint (c) upon own knowledge or private information. Under Section 193, the Court of Sessions can take cognizance of offence.^{xxi}

Trial stages has two phases-(a) trial in Magistrate Court and (b) trial in Session Court. This is because the nature and procedure of trial in these two courts are different. Trial in Magistrate Court takes two forms-Summery trial and Regular trial. In Summery trial, the Court shall try the accused in short. Here the Court is dispensed with the recording evidence. The distinctive features of this system is that the Magistrate can impose sentence not exceeding 2years. Strict rules of evidence may not be followed here.^{xxii} In regular trial, the Magistrate will first consider the record of the case and he will hear the parties. Having done that if he considers the charge to be groundless, he may discharge the accused. But if he is of opinion that there is a prima facie case for the accused, he shall frame a formal charge. After framing charge, if the accused pleads his guilt, he may convict him accordingly. If the accused does not plead his guilt, magistrate shall proceed to hear the case on the basis of evidence. If after hearing evidence, the Magistrate finds the accused not guilty, he shall record an order of acquittal. But if the Magistrate finds the accused guilty, he shall pass the sentence.^{xxiii} Trial in Sessions Court starts with the opening of the prosecution case. The Public Prosecutor (PP) opens the case by describing the charge brought against the accused and starting by what evidence he will prove the guilt of the accused. Then the Session Judge will give both the sides chance to argue in favour of framing charge or discharge. After such hearing and considering the record of the case, if the judge finds no sufficient ground he will discharge the accused. But if the Judge is of opinion that there is a prima facie case, he will frame a formal charge. After framing formal charge, if the accused pleads the guilt, he will be convicted. If the accused does not plead his guilt, the PP will first examine all prosecution witnesses. Cross-examination and re-examination will also be held accordingly. After considering prosecution evidence and arguments, the court will pass the order of acquittal or conviction.^{xxiv}

Causes of delay in disposal of Criminal Cases

Article 35(3) ensures the right to speedy justice as fundamental rights. But due to some unavoidable circumstances, it is impossible to ensure the right of speedy disposal of cases. From the analysis of the disposal procedure of cases, the following causes of delay can be remarked-

1. Absence of completion of trial of criminal cases within time.
2. Inadequate number of judges.
3. Non attendance of witness at trial.
4. Absence of skilled and experienced regular prosecution.
5. Absence of exclusive criminal courts of session.
6. Absence of regular inspection of the subordinate session court by the Session judges or Supreme Court.^{xxv}

Types of ADR in Criminal Cases

ADR in criminal cases may be of two types-

1. Compounding Offence.
2. Plea Bargaining.^{xxvi}

ADR in Criminal Cases in Bangladesh

The term Alternative Dispute Resolution is often used to describe a wide variety of dispute resolution mechanism that are short of, or alternative to, full scale court process. In short, it means to resolve any dispute between the parties outside the court. Bangladesh has introduced this system in the Civil Justice System. ADR has not been yet widely introduced in criminal justice system. Section 345 of the Code of Criminal Procedure enacts provision for compromise between the adversary parties to a little extent. Besides this Gram Adalat Ain,2006^{xxvii} and Birodh Mimangsha (Paura Elaka) Board Ain,2004^{xxviii} deals to dispose of some petty criminal offences by compromise. The Criminal Court has no other alternatives but to acquit the offenders if compromise petition is submitted in case of compoundable offences.

The opportunity of ADR in criminal cases should be increased by widening the scope of Section 345 of Cr.P.C. It is needed to widen the ambit of compoundable offences may have the adverse effect on the public peace and tranquility. The success of the ADR will ensure the peace in society.

Compounding means compromise or amicable settlement. Generally, a criminal act in which a person agrees not to report the occurrence of a crime or not to prosecute a criminal offender in exchange for money or other consideration is called compounding offences. One the other hand, it can be said that compoundable offences are those which can be compromised by the parties to the dispute. The permission of the Court is not necessary. Note that the aggrieved party or the victim may compound an offence. Not even the public prosecutor has the power to compound an offence.^{xxix} Offences which may lawfully be compounded are mentioned in section 345 of the Cr.P.C. An offence created by a Special Law is not compoundable. The Court cannot allow compounding of an offence which is not compoundable under Section 345. Compoundable offence may be of two types: (a) Compounding with the permission of the Court;(b) Compounding without the permission of the court. Section 345 (1) provides the list of offences which can be compounded without the permission of court,. Section 345 (2) provides the list of offences which can be compounded only with the permission of the Court. Penal Code, 1860 covers wide range of offences, defining the offences and the provisions of punishment. Whereas the Code of Criminal Procedure prescribes the procedure to try the offences compoundable can also be compromised outside the court. Main object of compounding to maintain peace in the society. But all kinds of offences are not compoundable, basically in case of heinous offences. Except the offences mentioned in the column of section 345 of the Code of Criminal Procedure cannot be compounded, such as murder, rape, kidnapping, dacoity, smuggling, abduction etc.

General Rule of Compounding of Offences

1. Compounding of Abetment of Offences: When any offence is compoundable under section 345 of Cr.P.C, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.^{xxx}

2. Person Competent to Compound: When the person who would otherwise be competent to compound an offence under section 345 of Cr.P.C is (under the age of eighteen years or is) an idiot or a lunatic, any person competent to contract on his behalf may (with the permission of the Court) compound such offence.^{xxxi}

3. No Composition in Some Case: When the accused has been sent for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is sent or the case may be, before which the appeal is to be heard.^{xxxii}

4. Direction of High Court Division to Compound Cases: The High Court Division acting in the exercise of its power of revision under section 439 (and a court of session so acting under section 439A) may allow any person to compound any offence which he is competent to compound under section 345 of Cr.P.C.^{xxxiii}

5. Acquittal: The composition of an offence under section 345 of Cr.P.C shall have the effect of an acquittal of the accused (with whom the offence has been compounded).

6. No Compounding except Section 345: No offence shall be compounded except as provided by section 345 of Cr.P.C.^{xxxiv}

Guiding Principles in Compromise of Criminal Cases

No compromise can be made before charge sheet is submitted. Following points should be kept in mind while compromising an offence:

1. The compromise proceeding should be guided by legal process and no legal provisions shall be hampered by compromise.
2. Patience hearing should be given to both the parties.
3. Conciliator should not impose any decision over the parties.
4. Extra benefit should not be given to any parties.
5. No one should be declared guilty or convicted in conciliation proceeding.
6. Equality should be ensured in case of male and female.
7. Deed of compromise should be in written form.
8. Copy of the deed of Compromise should be provided both the parties.^{xxxv}

When Compounding Possible?

At any stage of Criminal Proceeding the parties may take initiative to submit deed of compromise and even in appellate stage it can be submit before the Court. The order is discharge of the accused when the deed is filed before framing of charge whereas the accused is to be acquitted if the compromised deed is submitted after framing of charge whereas the accused is to be acquitted if the compromised deed is submitted after framing of charge. Before pronouncement of judgment compromise deed can be filed.^{xxxvi} The Pakistan Supreme Court permits submission of deed of compromise after serving the conviction and acquit the accused in appellate stage.^{xxxvii} But when the lower Courts record is called for under section 435 of the Code of Criminal Procedure, Magistrate can not permit the parties to submit compromise deed.

Advantages of ADR: The main advantage of ADR is that like the normal court system it does not consume huge time which helps to resolve the dispute speedily and cheaply. The method of ADR contains the following typical advantages-

1. It is cost effective and produces quicker resolution of dispute.
2. It facilitates the maintenance if continued relationship between the parties even after the settlement or at least the period the settlement is attempted.
3. Increase control over the process and the outcome.
4. Increase satisfaction of the disputants.
5. Improve Attorney-client relationship.^{xxxviii}
6. ADR supports Court reform^{xxxix}
7. Ensure justice for disadvantaged group.
8. Higher abidance leads to a permanent resolution of conflicts.
9. In rural areas, the court is a taboo for women, ADR process ensure privacy. That means it is a confidential process.^{xl}
10. ADR is a consensual process to enhance social harmony.
11. There is no scope for bias or corruption.

Disadvantages of ADR: It is true that ADR system plays an important role in speedy disposal of dispute but there are some limitations of this system too, which are as under-

1. No system of precedent.
2. Lack of legal expertise.
3. A court action may still be required.
4. Extreme power in balance between the parties.
5. Settlement is not deterrent.
6. Undermining judicial reforms efforts.^{xli}

Necessary Steps to Introduce ADR in Criminal Justice Delivery System

The opportunity of ADR in Criminal Cases can be increased by enlarging the scope of Section 345 of the Code of Criminal Procedure carefully. It would eliminate the various malpractices now resorted to be the parties to put an end to criminal proceedings pending in the Courts in which a non-compoundable offence has, in fact, been compounded out of court. In Criminal Jurisdiction, thousands of cases filed under section 138 of the Negotiable Instrument Act, 1881 which are not compoundable. But in this case, ADR system may be very much effective and the Complainants will be benefited. A considerable number of cases filed under section 385 of the Penal Code are pending in the Courts of Session for years together. These types of cases are suitable for compromise through Court if necessary amendment be made in the procedural laws. ADR system can also be introduced to confirm juvenile justice under the Children Act, 1974. This system can also be effective for the trial of environmental cases under the Environmental laws. To preserve Human Rights it is necessary to introduce ADR system in Criminal Justice delivery system. In the case of *Md. Joynal and others v. Rustam Ali and others*, Supreme Court encourages compromise in criminal cases.^{xlii} Establishment of ADR training institute and allocation of fund is another requirement for introducing ADR in Criminal Justice. For the success of this system, mass awareness should be built.

Conclusion

Alternative Dispute Resolution (ADR) is used when there is any conflict between two groups regarding a specific situation. When the two parties are not able to come to any solution, then they go for ADR. Only ADR processes have the potential to reduce significantly the costs and delays associated with traditional court proceedings. This system has already been introduced in Civil Litigation System. To introduce this system in Criminal Justice System like Code of Civil Procedure, Code of Criminal Procedure should be amended. ADR can be introduced in Code of Criminal Procedure by enlarging the scope of section 345 and inserting a new section and empower the Criminal courts to dispose of criminal cases through ADR. Critics believe that ADR encourages compromise. Compromise can be good way to settle some dispute but it is not appropriate for others. Though there exist criticism, its still helping the common people in getting the judiciary service cheaply. Also the judiciary system is getting speed as it is facing less petty case of charge.



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