

Is ADR a Help or Hindrance to Justice?

Rashedul Hassan

EXIM Bank Agricultural University Bangladesh, Chapainawabgang

ABSTRACT

The rule of law and judicial fairness are important factors for national stability and development. In Bangladesh, the courts are overwhelmed by a large number of pending cases. Bangladesh has a prominent place in this noble endeavour. The Access to Justice movement and the Alternative Dispute Settlement movement have shaped the role and function of courts in society. Both movements criticize the courts for failing to provide accurate, authentic and achievable justice for citizens. Laws, regulations, policies and legal frameworks for the effective implementation of the ADR mechanism should be formulated, developed, designed and firmly established to ensure and promote judicial fairness. They should keep good contact with the court and avoid disputes. Funds provided by governments and development partners should be used to implement and enforce adverse drug reactions at all levels. This paper aims to clarify the necessity of ADR and different types of dispute resolution mechanisms; The need to design a dispute resolution system is the most important prerequisite for unlocking the potential of the ADR as a tool for providing access to justice. It attempts to provide a comprehensive understanding of the ways of obtaining judicial justice in our legal system; Through the theoretical and practical investigation of the judicial practice of courts and courts under different legislation in Bangladesh, this paper reveals the fairness, efficiency and effectiveness of ADR in promoting judicial access. Finally, it discusses the alternative dispute resolution (ADR) reform brought about by Bangladesh's access to justice as a welcome element.

KEYWORDS

Alternative Dispute Resolution (ADR); Justice; Bangladesh.

1. Introduction

In exemplifying this conundrum, Witticism of Joseph Grynbaum, P.E1 demonstrates that "An ounce of mediation is worth a pound of arbitration and a ton of litigation!" Axiomatically, justice system is a public good and access to justice is in no way a luxury. Since these are surely not side issues, it can be argued that access to justice hampered is making peace hindered. Resultantly, democratic governance gets negated where

access to justice for all citizens is deficient and restrained. Hence, in promoting access to justice, Alternative Dispute Resolution (hereinafter, ADR) in today's world is a widely accepted, adopted and appreciated method for reducing the figure as well as costs of litigations.

Through adopting ADR as an alternative route for reaching an expeditious and less-expensive mode of settlement of disputes, many developed and developing countries of the world have gained tremendous success in reducing case backlogs and increasing access to justice particularly for the poor. So, it is now well-understood that ADR is a very effective tool in delivering justice due to 'settlement within the locality, being easily approachable, and lesser cost'.

In conformity with the Constitutional mandates that create various avenues for enhancing access to justice, in recent years in Bangladesh, there have been numerous attempts to take a system approach in order to offer different kinds of options to the people in dispute through fostering ADR mechanisms. This paper harnesses to objectively discuss access to justice and how the same can be enhanced through ADR mechanisms in Bangladesh as an alternative to formal adjudication system.

2. Purports of Alternative Dispute Resolution (Adr)

Instrumental facet of ADR spells out that the parties can reach to a harmonious settlement of the dispute which is opposed to the win-lose outcome of the legalistic and formalistic approach of litigation. These methods are an informal, non-binding, confidential and non-adversarial manner on the basis of mutual cooperation and understanding of all concerned. ADR is usually considered to be alternative to litigation. The phrase Alternative Dispute Resolution (ADR) refers to all those decisionmaking processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. It also can be used as a colloquialism for allowing a dispute to drop or as an alternative to disagreement or violence.

Actually, ADR is a process of resolving disputes outside the ordinary judicial process. So, it is informal methods of settling disputes other than by court actions. It also includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation outside the court. Its means and methods are voluntary and not compulsory. Consequently, this dispute resolution system is getting increased momentum for early and consensual disposal of litigations.

Evidently, apart from courts' initiatives, the process of ADR is mainly regulated by the nongovernmental organizations (NGOs). So, the role of NGOs in implementing ADR mechanism in Bangladesh is to be marked. Optimistically, it is worth mentioning that despite historic resistance to ADR by some quarters and their advocates, ADR has gained widespread acceptance among both the general public and the legal professionals in recent years.

3. Approaches of Alternative Dispute Resolution (ADR)

As stated earlier, ADR is a name given to the process where parties in a dispute come to a compromise (or settle their dispute) without going to court and there are divergent forms of ADR mechanism. Mediation is where a neutral person who acts as a facilitator (the mediator) helps the parties to reach a compromise. The mediator doesn't offer an opinion. Mediation is most suitable where there is some chance that the parties themselves will co-operate. Conciliation is similar to mediation. However, the conciliator plays a more active role in the process. Arbitration is the most formal of the methods used to settle disputes without using the courts. Negotiation is the simplest form of ADR. Med-Arb, as its name suggests, combines mediation and arbitration. Minutrial is finding its greatest use in resolving large-scale disputes involving complex questions of mixed law and fact, such as Product Liability, massive construction, and antitrust cases.

A settlement conference is a meeting between opposing sides of a lawsuit at which the parties attempt to reach a mutually agreeable resolution of their dispute without having to proceed to a trial. Case evaluation refers to presenting the facts and the issues to a neutral case evaluator who advises the parties on the strengths and weaknesses of their respective positions, and assesses how the dispute is likely to be decided by a jury or other adjudicator. Neutral fact-finding is a process where a neutral third party investigates an issue and reports or testifies in court. The neutral fact-finding process is particularly useful for resolving complex scientific and factual disputes. Other form of ADR, *inter alia*, includes Early Neutral Evaluation, Expert Determination: Family group conference etc. Although these are not institutionalized throughout the globe, but both the community members and the disputants accept it. It is submitted that particularly concerns illiterate and/or poor population who cannot afford to navigate conventional legal channels.

4. Recompenses of Alternative Dispute Resolution

As underscored earlier, the disputing parties through ADR can reach to a harmonious settlement of the dispute which is opposed to the win-lose outcome of the legalistic and formalistic approach of litigation. These methods are an informal, non-binding, confidential and non-adversarial manner on the basis of mutual cooperation and understanding of all concerned. Settling a dispute using ADR is usually much quicker than using the court system. A specialist from within a particular trade or industry is able to suggest a reasonable solution which will be acceptable to the parties involved. A judge is unlikely to have specialist knowledge, other than in the law. ADR is conducted in private, therefore avoiding publicity from the media. The aim of ADR is to find a compromise solution which is acceptable to both parties.

Court proceedings create a winner and a loser. Using ADR to settle a dispute means businesses can remain on good terms and continue to trade with each other once their dispute is resolved. Besides, all forms of ADR are far cheaper than taking a case to court. Every case solved through ADR saves the Government money and stops the courts being over burdened with cases.

It is true that ADR system plays an important role in speedy disposal of dispute but there are some limitations of this system too. Unequal bargaining powers a hindrance to reap its desired benefits. In certain cases, one side is able to dominate the other, i.e. employment and divorce cases that make Courts a better option for the weak. Where a dispute involves difficult legal points, a mediator or arbitrator is unlikely to have the same legal expertise and knowledge as a judge. Besides, it isn't easy to predict the outcome of a dispute decided through ADR as there is no system of precedent. So, uniform verdicts even on similar cases may not be given. Moreover, decisions of ADR are not legally binding, making any award difficult to enforce. Unpleasantly, if using ADR fails to resolve the parties' dispute, court action may still be needed. This adds to the costs and delays compared to taking a dispute direct to the courts in the first place.

5. Access to Justice & the Constitution of Bangladesh: Convergent Points

Justice is the foundation and object of any civilized society. Access to justice refers to any type of hindrances for the citizens to have a practical and usable way to realize their legal rights. As depicted earlier, rule of law and access to justice are important elements for the stability and development of states. It is argued that governments gain significant legitimacy, both domestically and internationally, when rights are respected and promulgated. Access to justice is a particularly important aspect of the rule of law in the context of development work. In fact, one reason is that access to justice has been a principal objective in many programs of international cooperation. Since 'rule of law provides effective protection and advancement of constitutional rights and entitlements', securing access to justice in Bangladesh is understood as a constitutional mandate. Bangladesh Constitution holistically guarantees justice to all. All Bangladeshi citizens are guaranteed equal rights of life and personal liberty besides many other fundamental rights. Article 27 of the Constitution ensures equality before law and the equal protection of law. Article 31 ensures that 'to enjoy the protection of law, and

to be treated in accordance with law and only in accordance with law is the inalienable right of every citizen.’ Article 32 guarantees protection of right to life and personal liberty. Article 44(1) ensures the right to move to the High Court Division under Article 102(1) is itself a fundamental right. All these constitutional provisions are thought to be instrumental avenues for providing all access to justice.

In *Mohiuddin Farooque vs. Bangladesh*,¹⁰ the Appellate Division observed [i]f justice is not easily and equally accessible to every citizen, there then can hardly be any rule of law. If access to justice is limited to the rich, the more advantaged and more powerful section of the society, then the poor and deprived will have no stake in the rule of law Ready and equal access to justice is a *sine qua non* for the maintenance of rule of law. But ironically, access to justice in Bangladesh is being hampered by many factors. Some of these factors are the high court fees, geographical location, complexity of rules and procedure and the use of legalese. Court’s role is also dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves. There is also lack of awareness of ADR mechanisms. These reasons make access to justice in Bangladesh difficult and shadow rather than reality to many people.

6. Alternative Dispute Resolution and Access to Justice

Of course, access to justice is a social good that is enhanced through active government participation. As such, by providing access to justice, governments enhance their legitimacy, improve their ability to create social change, and facilitate economic development. Access to justice is much more than improving an individual’s access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable. Effective reforms leading to access to justice require an integrated approach that includes alternative dispute resolution mechanisms. This is because ADR mechanisms such as arbitration, mediation and negotiation are predicated on the principles of party autonomy and voluntariness which give the parties wider roles in decision-making and in resolution of their disputes.

As such, ADR mechanisms results in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness as well as accountability in dispute management. Some like mediation and negotiation are informal and not subject to procedural technicalities as does the court process. They are thus effective to the extent that they will be expeditious and cost-effective compared to litigation. Additionally, it fosters relationships, non-coercive and results to mutually satisfying outcomes. These are thus thought to be most appropriate in enhancing access to justice as this way less disputes will get to the courts and this will lead to a reduction of backlog of cases.

However, there are some potential barriers to access to justice which are frequently weakened by long delays; prohibitive costs of using the system; lack of available and affordable legal representation, abuse of authority and powers and severe limitations in existing remedies provided either by law or in practice. It is opined that they does not cover all hindrances citizens are facing. There are many other problems than lack of legal aid, backlog of cases, formalistic rules and lack of processes suited for collective interests. The public might not be aware of the legal rights or which procedure to use; the laws are increasingly more inaccessible as they are too detailed, too open or too technical; and there might be overlapping systems of regulation on an international, national or local level. Hence, formalistic and expensive legal procedures can best be eschewed with the aid of ADR.

7. Prevalence of ADR Mechanisms in Bangladesh

Bangladesh has had a long tradition of community-based alternative dispute resolution (ADR) system, widely known as *shalish*. Formally, the ADR mechanism was first inserted in the Family Court Ordinance of 1985 encompassing provisions for compromise or reconciliation even before pronouncement of judgment. Subsequently, the great success in realization of dower money and maintenance as well as amicable, peaceful

and quick settlement of disputes through ADR in the Family Courts inspired the government and the policy makers as well to widen the scope of ADR through other legislations.¹⁷

Accordingly, for non-family civil suits and cases, the 1908 Code of Civil Procedure got amended in 2003 with provisions of Mediation u/s 89A, Arbitration u/s 89B, Mediation in Appeal u/s-89C in 2006; and the Artha Rin AdalatAin in 2003 with Settlement Conference u/s 21 and Mediation u/s 22. The use of ADR in Artha Rin cases is a success story. Besides, ADR is gradually progressing and becoming a popular forum for the litigants of civil cases. Both the 2006 Village Court Act and the 2004 Conciliation of Dispute (municipal areas) Board Act have incorporated the spirit of the mediation process to deal with both civil and criminal matters. However, the scope to use ADR in the criminal justice system is still very limited.¹⁹

Hopefully, as a platform for the initiation of ADR services, the District Legal Aid Officers (DLAO) now can settle disputes through mediation at the District Legal Aid (DLA) offices if the cases are referred to them by any court or tribunal. An estimation shows that net growth rates of mediation for the last two years have been 143% and 270% respectively. Among the cases attempted for mediation, 75% in 2015 and 81% in 2016 were successfully resolved.

8. Development & Popularity of ADR in Bangladesh

ADR cannot be the substitute option for adjudication system in general. It has value and importance as compliment to the adjudication system in a country. It is believed here that speedy disposal of cases and delivery of quality justice is an enduring agenda for all who are concerned with administration of justice. The Bangladesh Government has taken aforesaid measures to ensure the access to justice for the people through strengthening the ADR mechanism. Now a days, the justice seekers are getting legal support & being able to resolve their disputes through these laws & Legal Aid Offices. In addition, the Ministry of Law has undertaken different measures to motivate and sensitize judges, lawyers and the litigant public about the merits and advantages of the ADR. Workshops, seminars, training programs have been organized for judges, lawyers and court support staff in the divisional headquarters and selective districts. A widely acclaimed documentary film titled “Settlement of Disputes through Mediation” has been made and shown to the participants and the stakeholders all over the country.

ADR system is gaining popularity. This procedure will help to reduce the huge backlogs of civil cases as well as criminal cases in courts. Public confidence in the judiciary will thereby increase. Access to justice will be expanded. It is argued that access to justice systems refers to the creation of paths to resolve conflicts that are within the purview of the formal legal structure by using differentiated strategies such as mediation, early neutral evaluation, arbitration, and the many combinations of other methodologies all designed to promote early swift resolution of conflicts.

The provisions will also help develop a new culture of consensual settlement of disputes doing away with the existing adversarial procedure. It will help protect and preserve cohesion and fraternity in society. ADR has been both; increasingly used alongside, and integrated formally, into legal systems internationally in order to capitalize on the typical advantages of ADR over litigation. Nonetheless, it is opportune to opine that unless something was done with the volume of cases, progress toward judicial reform would be difficult.

9. Conclusion

In Bangladesh, Courts are overwhelmingly overburdened with huge pending cases. The trial life span is inordinately long & the incurring expenditures very high. Abnormal delay in the disposal of trials & appeals causes great concerns not for the state only but for socio-economic phenomenon also. Therefore, promoting ADR would likely to reduce this horrendous number of pending cases as other various countries has resulted

in tremendous success. Disposal of litigations through ADR would be important vehicles for promoting social harmony and peace, enhancing the quality of social justice, and thereby, contributing to meaningful development in social, cultural economic and other spheres. Our country should develop the system of ADR without any delay, and this should be of prime importance for it can be of great help in bringing about changes so that there will be enhanced access to justice and people can get justice speedier.

Laws and regulations, policies and legal frameworks on the effective implementation of ADR mechanisms should be formulated, developed, designed and entrenched well to ensure and enhance access to justice. They should be well linked with the courts to avoid disputes. Funding from the government and the development partners should be directed towards operationalization and implementation of ADR at all levels. In this regard, guidelines should be developed on the best way forward on working ADR to ensure adequate training of Judges, arbitrators and mediators.

References

- For an excellent materials, see Justice Iyer, Krishna, V.R: Law, lawyers and justice, B.R. Publishing Corporation Delhi.
- To some writers, however, the term 'alternative dispute resolution' is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true. Evidently, Article 33 of the Charter of the United Nations outlines these conflict management mechanisms in no unclear terms and is the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they States or individuals. It outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.
- Basing on its misnomer premise, it can be argued that some conflict management mechanisms are claimed to be resolution mechanisms while others are settlement mechanisms. It is, however, collectively referred to as alternative dispute resolution or ADR.
- Trina Grillo, the Mediation Alternative: Process Dangers for Women, 100 Yale Law.J. (1991). Available at: <http://digitalcommons.law.yale.edu/ylj/vol100/iss6/1> Accessed 20 Nov 2018
- Justice S.B.Sinha, ADR and Access to Justice: Issues and Perspectives, <http://tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf> Accessed 20 Nov 2018. For more on this premise, see Broadbent Nigel, (2009) Alternative Dispute Resolution, Cambridge journals, Legal information management 9 (2009) the British and Irish Association of Law Liberations, p-195-97.
- Laura Ervo – Anna Nylund (eds.): The Future of Civil Litigation – Access to Courts and Court-annexed Mediation in the Nordic Countries. Springer, Cham 2014, p. 325-26.
- William Davis and Helga Turku, Access to Justice and Alternative Dispute Resolution, Journal of Dispute Resolution. (2011) Available at: <https://scholarship.law.missouri.edu/jdr/vol2011/iss1/4>; accessed Nov 27, 2018.
- William Davis and Helga Turku, Access to Justice...Ibid. For more see United Nations, Rule of Law, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, <http://www.un.org/cn/rulcoflaw/index.shtml> (accessed Oct. 1, 2018).
- DLR (AD) (1997) para-71.
- In Kenya, ADR is a constitutional norm. Article 189 (4) of Kenyan constitution states that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These are the key provisions that form the constitutional basis for the application of ADR in dispute resolution in Kenya, whose import is that ADR can apply to all disputes and hence broadening the applicability of ADR and enhancing access to justice. It is also a clear manifestation of the acceptance of ADR as a means of conflict resolution in all disputes.
- Symposium, What is Access to Justice? Identifying the Unmet Legal Needs of the Poor, April 6, 2000; 24 Fordham It'l Law. J. S187 (2000).

See Access to Justice and Legal Needs Project, Background Paper, Understanding access to justice and legal needs, The report access to justice Roundtable Proceeding of a Workshop, July 2002, organized by Law and Justice Foundation of NSW, Australia.

For more see Hasan, Mr. Justice K.M. (2005) Alternative Dispute Resolution, Bangladesh Institute of law and International Affairs (BILIA) (edited). Wali-ur- Rahman and Mohammad Shahabuddin, at 125-27.

Alam, M. Shah. (2001) Alternative Dispute Resolution by early judicial intervention: A possible way out of delay and backlog in our judiciary. Manual for clinical legal education, p-54

The Family Court Ordinance, 1985 (Pre-trial Proceeding u/s 10 & Post-trial Proceeding u/s 13) 17 Muslim Family Laws Ordinance, 1961, [Polygamy u/s 6, Divorce u/s 7 and Maintenance u/s 9].

The Labor Code, 2006 [Negotiation u/s 210(1,2,4), Conciliation u/s 210(6) and Arbitration u/s 210(16)] 19The Criminal Procedure Code, 1898, (Compounding offences u/s 345.)

The section 21A of the Legal Aid Services Act (LASA) 2000 (amended in 2013) has, thus, created new hope. It has made the ADR system an essential part of the government legal aid.

In 2014, attempts for mediation were made in 290 cases, of which 58% were resolved and Tk4.6 million were realized. In 2015 and 2016, the numbers of cases attempted for mediation were 705 and 2,609 respectively. See Munir Uddin Shamim, A wider scope for justice, The Daily Dhaka Tribune, available at <http://www.dhakatribune.com/opinion/oped/2017/04/27/wider-scope-justice/> Accessed April 27, 2017

Justice S.B. Sinha, ADR and Access to Justice: Issues and Perspectives, <http://tnsja.tn.nic.in/article/ADR%20SBSinha.pdf> Accessed 20 Nov 2018.

For more, see William Davis and Helga Turku, Access to Justice and Alternative Dispute Resolution, Journal of Dispute Resolution. (2011) Available at: <https://scholarship.law.missouri.edu/jdr/vol2011/iss1/4/>; accessed Nov 27, 2018.

For excellent materials, see Linn Hamnergren, Uses of Empirical Research in Refocusing Judicial Reforms: Lessons from Five Countries, January 2011, <http://www.argenjus.org.ar/argenjus/articulos/tn.pdf>, Accessed 20 Nov 2018.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal. This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).