



The Role of Alternative Dispute Resolution to Ensure Access to Justice in Bangladesh: A Practical Approach

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Abstract

Social conflict is inevitable, and everyone has the right to state justice. For the rule of law to be established in a society, one of the essential prerequisites is effective access to justice. There is a distinction between “access to justice” and “justice.” It is sometimes claimed that “access to justice” is the route to “justice,” which is the end in itself. In a narrow sense, the access to justice means access to litigation. Article 27 of our Constitution provides for a fundamental right that all citizens are equal before law and are entitled to equal protection of law [1]. When an impoverished person finds themselves in police or jail custody and is unable to defend themselves by paying for a counsel, the Constitution’s guarantees of equality before the law and equal access to the law become almost meaningless. Due to their inability to pay for transportation, our impoverished litigants are deprived of their rights. Alternative Dispute Resolution is known as ADR. Through this method, a mediator or an arbitrator is an impartial third party assists the disputing parties in reaching a consensus. The most popular ADR methods are negotiation, arbitration, mediation, and so forth. To ensure access to justice we need a proper use of ADR mechanism.

Subject Areas

Law and Legal Studies, Alternative Dispute Resolution

Keywords

ADR, Access to Justice, Judiciary, Litigation, Rule of Law, Human Rights

1. Introduction

The protection and progress of human rights are now seriously threatened by the

extreme nature of our judiciary's litigation delays. In violation of the objectives of social justice, our procedural laws, which provide provisions for delays and have been abused by the party or parties, have turned procedurally unfriendly toward those on the margins. Upholding these rights and delivering justice to the general public are the responsibilities of the legal system, particularly the courts. Access to justice, however, has proven to be a broken constitutional promise for many people for a variety of reasons. Nowadays, ADR is a variety of procedures that help the parties to a dispute resolve it harmoniously and amicably. ADR provides a solution to the issue of citizens' access to justice in many nations, which is caused by three factors: the number of court-brought disputes is rising, the length of the proceedings is expanding, and the costs associated with these actions are rising. Litigation's volume, intricacy, and technological opacity further impede access to justice. Since ADR is a voluntary and consensual method, it gives the parties the chance to fully engage in the process and assists them in telling their own story. When someone says they have access to justice, they usually mean that they can use the state's legal and judicial processes, including going to formal courts. Such information should be available to everyone since it is essential to the establishment of human rights. Due to the formal governmental structure, the vast majority of Bangladeshis living in poverty are usually unable to obtain justice. A person's ability to use the state's judicial and legal processes, including their ability to appear before formal courts, is often reflected in their access to justice exorbitant costs, protracted delays, backlogs, and a lack of information or resources are just a few scenarios.

2. Access to Justice

Access to justice is a fundamental right in nearly all democratic nations worldwide. The Constitution of Bangladesh affirms that the Republic will be a democracy where basic freedoms and human rights, as well as the rights to dignity and equality before the law, are guaranteed, and the right to a fair trial is safeguarded. Article 27 of the Constitution guarantees equality before law and equal protection of law [1]. Article 31 ensures that to enjoy the protection of law for all citizens and persons within Bangladesh, ensuring no action detrimental to their life, liberty, body, reputation, or property shall be taken except in accordance with law [2]. Article 32 guarantees protection of right to life and personal liberty [3]. Under Article 44(1) of the right to move the High Court Division under Article 102(1) is itself a fundamental right [4]. All these are essential for providing access to justice.

The term "access to justice" denotes various mechanisms by which an individual may seek legal assistance [5]. It includes the whole range of laws, procedures and institutional arrangements through which justice can be delivered to the people in efficient and effective manner and which citizens can reach the Courts, lawyers, legislatures, judges and administrative agencies for both substantive and procedural justice [6]. According to the Access Justice Advisory Committee of the Commonwealth Government access to justice involves following:

- 1) Equality of access to legal service;
- 2) National equity; and
- 3) Equality before law [7].

Washington State access to Justice Board states that access to justice includes meaningful opportunities, directly or through other persons:

(i) To assert a claim or defense and to create, enforce, modify or discharge a legal obligation in any forum; (ii) to acquire the procedural or other information necessary; (iii) to participate in the conduct of proceedings as witness or juror; and (iv) to acquire information about the activities of the courts or other dispute resolution bodies [8]. Regardless of wealth, it is assumed that everyone should have equal access to justice and that these rights should be easily, quickly, and effectively obtained. But for many reasons, our legal system was unable to ensure that everyone received justice in an equitable manner. In *Mohiuddin Farooque vs Bangladesh* [9], the appellate Division observed: “if justice is not easily and equally and accessible to every citizen there can be hardly 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.”

3. Barriers to the Way of Access to Justice

1) Delay in disposing the dispute: According to Gladstone “Justice delayed justice denied”. The biggest obstacle to achieving justice is delay. Delays in our legal system have gotten to the point where they are the primary cause of unfairness and human rights violations.

2) Prohibitive cost of litigation: Fairness for all is the main goal of the legal system. In the regular court of law, which costs a lot of money, the best equal justice is not achievable. Costs associated with the formal system include court fees, lawyer fees, and the cost of obtaining certified copies of judgments, decrees, and orders. Equal access to justice is thus rendered impossible.

3) Procedural complexities: The primary impediment to delivering justice is the complexity of the legal process.

4) Gender Bias and other barriers in the law and legal systems: The current legal framework is insufficient to protect women, children, the poor, and other vulnerable groups, including people with disabilities and low reading levels. There is a major obstacle like this all around the country. This traditional *salish* is a reflection of the unequal gender and class structures that define social connections in rural Bangladesh. People that sit on a *salish*, such as village elders, are almost always men and are frequently selected from the wealthiest and most powerful segments of society. In addition to the fact that women cannot speak up during a traditional *salish*, it is also highly discouraged for them to participate in any kind of public hearing. Low-income men also find it difficult to express their opinions freely. In our country the formal court is over crowded, so female disputants cannot share their own thought properly. ADR is absolute maintaining of privacy because privacy is a key value which underpins human dignity. In ADR process they can

share their thought easily because there are only few people who are involved in this process.

5) Backlogging of cases: The backlog of cases or suites in Bangladesh's legal system is overwhelming it.

6) Corruption in judiciary: The main reason the judiciary isn't operating effectively is corruption. Our legal system is now in ruins.

7) Want of efficient, independent and dutiful judges and lawyers: In order to ensure that justice is properly maintained, judges and lawyers must be trustworthy, effective, dependable, and obedient to their obligations. People may not profit from even strong laws if a nation's judges and lawyers lack integrity, effectiveness, independence, and duty.

4. Access to Justice, Legal Empowerment and Rule of Law

The people living in poverty and distant areas have difficulty in using justice institutions because of inaccessibility and unavailability of affordable legal representative. Resource constraint and inexperience in dealing with formal justice institutions also obstruct them in seeking legal redress [10]. The legal empowerment of the poor occurs when the state or non-state actors by "employing legal and other means create rights, capacities, and/or opportunities for the poor which give them new power to use law and legal tools to escape poverty and marginalization" from [11]. When poor people's rights are not protected, poverty spreads widely. When the impoverished are unable to claim their rights or fail to source their rights, they become worse destitute. When legal protection is available, the impoverished's income and welfare rise.

4.1. ADR

Generally, Alternative Dispute Resolution (ADR) means solving the dispute outside the court. ADR has attracted a great deal of attention as a method of reducing both financial and emotional costs of litigation [12]. Ex-Chief Justice Mustafa Kamal described ADR as "a non-formal settlement of legal and judicial disputes as a means of disposing of cases quickly and inexpensively" [13]. Article 33 of the UN Charter expressly deals with the ADR process for peaceful settlement of international disputes. As per Article-

a) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

b) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute [14].

4.2. Types of ADR and Statutes in Context of Bangladesh

Conflicting parties can use Alternative Dispute Resolution (ADR) to reach a

compromise with the assistance of a third party. Additionally, ADR is becoming more and more popular as a dispute resolution strategy. The demand of plaintiffs who are unable to access the court gave rise to this new dimension in our system. The informal systems of justice through resolution can be improved and transformed with its help. Similar to an umbrella system, it operates through conciliation, arbitration, mediation, and negotiation. Together with the hybrid ADR, all four types of ADR were essential to resolve the conflict instead of using the formal system.

Negotiation: The least formal approach is negotiation, which is carried out by the disputing parties directly.

Mediation: A mediator, a third party who is impartial, helps the parties in dispute come to an agreement but is unable to assess the parties' strengths and weaknesses. In Bangladesh, this sort of alternative conflict resolution is most frequently used in business issues, family problems, neighbor disputes, and job disputes.

Conciliation: The impartial third party, known as the conciliator, has a more active role in this procedure, which is comparable to mediation.

Arbitration: In arbitration, the third party, known as the arbitrator, may make a decision known as the award, which the parties must abide by.

Hybrid ADR: Med-Arb, Arb-med, MEDALOA and Mini trial are the hybrid models of dispute resolution methods which are also used nowadays.

ADR has been also classified in three ways:

1) Formal ADR:

This dispute resolution process is described in law. The following Bangladeshi rules govern the formal procedures for ADR:

- a) The Code of Civil Procedure, 1908
- b) The Family Courts Act, 2023
- c) The Artho Rin Adalat, 2003

2) Semi-formal ADR:

- a) The Arbitration Act, 2001
- b) The Muslim Family Laws Ordinance, 1961
- c) The Village Courts Act, 2006
- d) The Code of Criminal Procedure, 1898
- e) The Bangladesh Labour Act, 2006

3) Non-formal:

In essence, non-governmental organizations (NGOs) are responsible for handling civil and criminal cases for parties that seek their help in resolving conflicts.

4.3. ADR and Access to Justice

Development of ADR in different countries of the world, especially in developing countries, is a step towards the proper administration of civil justice for all equally. It has successfully opened the door of justice equally for rich and poor, which the ordinary legal system has failed to do. Through ADR parties can reach to a harmonious settlement of the legalistic and formalistic approach of litigation [14].

Usually, the win lose situation becomes the parties. As its sequels win-win situation which not only settles the dispute but also brings peace and healing that preserve the future relationship between the parties. Avoiding all kinds of legal procedural complexities, technical legal principles, it follows the process which the parties and their appointed mediator think best of settlement of their issue. In ADR the parties select and control the process of it for smooth, correct, effective efficacious remedy and they are under the liberty to appoint any expert in the subject matter of the dispute [15]. One important positive side of ADR is absolute maintaining of privacy because privacy is a key value which underpins human dignity and it is a basic human right and the reasonable expectation of every person [16]. Community members at the grassroots level and marginalized men and women were able to participate in local adjudication because of the informality of ADR and NGO-sponsored dispute resolution activities, especially mediation. ADR's benefits have led to the introduction of judicial mediation and arbitration in several countries, including Bangladesh. In Bangladesh, the majority of Family Court proceedings entail financial claims. It takes a lengthy time to serve the process when a civil suit is filed in a court with the necessary jurisdiction, as a practical example. Legal rights in the courts are thus restricted by a large backlog of cases, lengthy case resolution processes, and expensive litigation. Access to justice in Bangladesh can therefore only be guaranteed by ADR assistance.

4.4. Weaknesses of ADR in Bangladesh

Although Alternative Dispute Resolution (ADR) is a useful tool for expanding access to justice, there are certain flaws that prevent it from working well, including

- 1) In Bangladesh public's ignorance and lack of consciousness is a major problem. People who belong to underprivileged backgroups are less likely to possess the skills or self-assurance necessary to successfully negotiate a complicated legal system.
- 2) Insufficient contributions made by legal experts.
- 3) Lack of legal knowledge is a major barrier to formal justice system.
- 4) Insufficient institutional and suitable framework.
- 5) A shortage of workers is one of the most alarming obstacles to delivering proper justice. The quantity of judges required to hear and interpret the cases. The paucity of manpower makes it impossible for the legal system to function swiftly. There are lack of qualified lawyers and judges in relation to mediation.
- 6) ADR is perceived negatively by the lawyers.
- 7) The administration of justice is complicated by outdated legislation. The majority of Bangladesh's existing legal framework was created during the British Empire.

5. Experience from other Countries

In South Asian nations like India, Pakistan, Sri Lanka, and Malaysia, as well as Bangladesh, the Supreme Court and the High Court have constitutional mandates

to provide remedies related to the enforcement of basic rights. Many forms of alternative dispute resolution (ADR) have also been adopted in these nations to provide access to justice.

5.1. ADR in India

ADR mechanisms in India like arbitration, conciliation and mediation etc. offer better and timely solution for resolution of a dispute. In India, one of the most popular modes of ADR is arbitration, conducted as per the provisions of the Arbitration and Conciliation Act, 1996. The Indian International Arbitration Centre Act, 2019 provides for establishment of an institution of national importance, namely the India International Arbitration Centre for creating an independent and autonomous regime for institutional arbitration [17]. But there are several issues attached to it, such as lack of a regulatory body, unclear procedural guidelines, lack of awareness, poor quality infrastructure, inconsistencies, overburdened ADR institutions, and lack of qualified mediators/arbitrators make ADR unsuccessful in India.

5.2. ADR in Pakistan

A variety of techniques, such as mediation, arbitration, and negotiation, are available in Pakistan through Alternative Dispute Resolution to settle disputes outside of the court system with the goal of achieving justice more quickly and affordably. The Khyber Pakhtunkhwa ADR Act, Arbitration Act, 1940, Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act, 2011, the Punjab Alternative Dispute Resolution Act, 2019 (amended in 2023), Civil Procedure Code (CPC) Amendment for Mediation, 2020, Sindh Alternative Dispute Resolution Act, 2017, Family Courts Act, 1964 and International Arbitration Act, 2017 are among the laws in Pakistan that support Alternative Dispute Resolution (ADR) and offer a basis for settling conflicts outside of the official court system.

5.3. ADR in Malaysia

The dispute resolution process in Malaysia included arbitration, conciliation, mediation, and adjudication. Dispute resolution techniques like those ADR procedures are growing in popularity. In 1952, they passed the Arbitration Act. This law covers arbitration both domestically and internationally. The Kuala Lumpur Regional Arbitration Center, also known as KLRCA, is a renowned arbitration organization that promotes arbitration in Malaysia.

5.4. ADR in Sri Lanka

Arbitration, conciliation, mediation, and other techniques are all included in Sri Lanka's alternative dispute resolution process. The judicial system is used for both civil and criminal dispute resolution. The MB Act, also known as the Mediation Board Act, No. 17 of 1988 as amended, serves as the legal foundation for the establishment of mediation boards. Disputes are brought before this board by the

disputing parties or the court, and it has the authority to settle them through mediation. In Sri Lanka, the Arbitration Act No. 11 of 1995 regulates how arbitration processes are conducted. An important function in this nation is played by the Sri Lanka National Arbitration Centre (SLNAC). Example of ADR in Sri Lanka:

National Mediation Programme: A well-established program that resolves conflicts through mediation at the community level.

Sri Lanka International Alternative Dispute Resolution Center: A center that offers ADR materials and training.

USAID Support: ADR in Sri Lanka is supported by the United States Agency for International Development (USAID), which also funds ADR centers and student and lawyer training programs.

It is therefore possible to state that the identical ADR procedures are used in our neighboring nations. However, we are in dire need of new training programs for judges, lawyers, and law students.

6. Challenges of ADR in Bangladesh and Few Recommendations towards an Effective ADR System

When someone says they have access to justice, they usually mean that they can use the state's legal and judicial systems, including going to court. The gap between official rights and real access may be quite large, regrettably most people live in poverty and cannot access justice through the official legal system. A person's ability to use the state's judicial and legal processes, including their ability to appear before formal courts, is often referred to as their access to justice. Long wait times, high costs, backlogs, and a lack of information are all examples of this. Following are the challenges that majority of people encounter while seeking justice through a formal adjudication:

Challenges in Family Courts

Independent Family Courts were created and established to handle family matters with approval from the Family Courts Act of 2023. The Assistant Judge Court has been used as the Family Court Judge, who is already overworked with other civil cases, which is surprising given the lack of distinct Family Courts.

Challenges in Civil Courts

The pre-trial and appellate mediation provisions of the Code of Civil Procedure, 1908, were not included into the CPC until the verdict was rendered. After the trial is over, it is a well-established fact that the parties are usually aware of the strength of their case.

Challenges among the lawyers

It has also been claimed that lawyers keep their clients from using Alternative Dispute Resolution (ADR) because they are concerned about losing money.

Even after ADR methods were integrated into the criminal and civil court systems for over ten years, Bangladesh was still unable to institutionalize and make them fully functioning. So here I give some suggestions that will improve access to justice through the efficient ADR system are as follows:

- 1) Need more effective Laws.
- 2) The ADR may be widely promoted in Bangladesh with the help of local government agencies, the media, and other civil society organizations.
- 3) The legitimacy of the ADR may be significantly influenced by the civil and criminal courts.
- 4) There are distinct mediation institutions for civil and criminal matters to carry out ADR activities.
- 5) Judges and lawyers' mindsets need to shift in order for ADR to be successful.
- 6) The creation of a legislative body charged for creating policies, organizing, marketing, and overseeing the whole ADR system.
- 7) Need more amendments in our laws.
- 8) Need sufficient court staff, modern technological facilities for good court administration.

7. Conclusion

Alternative Dispute Resolution is thought to be a cooperative method of resolving conflict that avoids the unmanageable formality of the adversarial trial system. It is characterized as informal, private, quick, efficient, emotionally and financially efficient, mutually participatory, fostering peace and social harmony by removing animosities, and helping to break the current backlog of cases. In our society, the use of Alternative Dispute Resolution methods is not new; during the Muslim era in this subcontinent, the ancient *salish* system was used at the local level to settle conflicts. In our society, the use of Alternative Dispute Resolution methods is not new; during the Muslim era in this subcontinent, the ancient *salish* system was used at the local level to settle conflicts. They were used to settle petty conflicts in the neighborhood during the British era and are still used today throughout Bangladesh. NGO mediation is particularly helpful in family-related cases in our nation. With the growth of Alternative Dispute Resolution (ADR) in civil cases both the trial and appeal stages, as well as newly added ADR provisions to several Bangladeshi laws, everyone now has the chance to access justice, particularly the underprivileged and impoverished groups who are unable to appear in court. The improvement of access to justice through the avoidance of various procedural and other complications is greatly aided by ADR. Alternative Dispute Resolution (ADR) continues to play a successful role in promoting access to justice, in contrast to traditional courts.

Conflicts of Interest

The author declares no conflicts of interest.

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