Chapter 1
INTRODUCTION

Alternative dispute resolution or ADR is an umbrella term used to describe a variety of methods for resolving disputes outside of traditional methods such as litigation. Sometimes the "A" in ADR is defined as "appropriate" rather than "alternative" as a way of indicating that ADR relates to finding the most fitting way to resolve disputes. Sometimes there is no "A" used and simply the phrase "dispute resolution" is used, as a way to indicate that all approaches to dispute resolution are potentially considered[1]. Whichever way the acronym is spelled out - alternative, appropriate, or just dispute resolution - the concept of ADR is based on expanding the tools available for resolving disputes.[2]

Beyond a simple grouping of approaches, ADR also is conceived of as an idea, a philosophy. For many proponents of ADR, using different approaches to conflict resolution has a meaning or a larger goal. For example, there are those who see the use of ADR as part of the effort to bring peace to the world or heal a damaged community. Many prize the potential for results of ADR processes that go beyond what a court can order. There are others who see it as a way to improve the equality of parties in dispute. Yet others value the potential economies of ADR processes for courts, parties and society. Certainly not all participants in ADR or even those who develop ADR programs would consciously avow such lofty concepts, but there is generally some under girding, though often unarticulated, set of beliefs, for any ADR effort[3].Alternative dispute resolution encompasses a range of means to resolve conflicts short of formal litigation. The modern ADR movement originated in the United States in the 1970s, spurred by a desire to avoid the cost, delay, and adversarial nature of litigation. For these and other reasons, court reformers are

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[1] http:// www. courtadr.org/pocketguide/ , Last accessed on February 14, 2010.
[2] *Ibid*
[3] *Ibid.*

seeking to foster its use in developing nations. The interest in ADR in some countries also stems from a desire to revive and reform traditional mediation mechanisms.

1.1 Scope and Objective of the Study

The object of the study to compare the ADR system of Bangladesh. In this sector Bangladesh are new but the government of Bangladesh try to make an impact of ADR in our judicial system. By studying about ADR try to find out the lack in this sector and try to solve this problem and also find out the away by which system it may be solved.

1.2 Limitation of the Study

This study was greatly held back as there is massive lacking of information on this issue. Information was inadequate. Especially the government agencies like lower court; statistics has a lack of tendency to update information regularly and still using the conventional or manual system for information storing and supply. These are a great malfunctioning and contradiction among supplied data from govt. agencies. On the other hand they are not interested for sharing their information related that is necessary for this research work.

Although ADR programs can play an important role in many development efforts, they are ineffective, and perhaps even counterproductive, in serving some goals related to rule of Law initiatives. In particular ADR is not an effective means to:

(a) Define, refine, establish and promote a legal framework.

(b) Redress pervasive injustice, discrimination, or human rights problem.

(c) Resolve disputes between parties who possess greatly different levels of power or authority.

(d) Resolve cases that require public sanction.

(e) Resolve disputes involving disputants or interested parties who refuse to participate, in the ADR process.[4]

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[4] http://www. usaid.gov/our_work/democracy_and.../pnacb895.pdf, Last accessed on February 14, 2010.

Chapter 2

ADR- DEFINITION, KINDS, IMPORTANCE ETC.

2.1 Definition of Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) has attracted a great deal of attention as a method of reducing both the financial and emotional costs of litigation. It appears that simply moving cases from the courts, and away from the adversarial process, allows some cases to be resolved quicker and to the greater satisfaction of the parties.

Dispute arises when interest of more than one-person clashes with each other[5]. Disputes are a reality of life. In order to resolve this worldwide problem, different countries have introduced various methods in their legal system in the form of Alternative Dispute Resolution (ADR), which is not meant to be a replacement for adjudication but a complementary mechanism to reduce the workload or pressure on the courts. Sit does not also mean that the use of ADR is in some way 'second-best' to going to court.[6] Mr. Justice Mustafa Kamal described the ADR thus: "The newness of ADR is the purpose behind its adoption. The purpose of alternative dispute resolution is not to substitute consensual disposal for adversarial disposal or to abolish or discourage informal.

The generic term Alternative Dispute Resolution (ADR) is a real, practical and traditional approach of outside court justice system, saves time and money, uses simple common sense of the common people of the society with the guidance of the experts, respects community beliefs & values, acts to preserve peace and harmony among the parties, resolves disputes with assistance of neutral persons, involves with a range of processes like negotiation, mediation, arbitration, conciliation, ombudsman or even malpractice screening panel as appropriate; and creates an innovative

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[5] S.K Golam Mahbub, *Alternative Dispute Resolution* (ADR) 1st Edition 2005.
[6] *Ibid.*

dimension in legal profession for better effectiveness of the over-all justice delivery system.[7]

Mr. Justice Mustafa Kamal, Former Chief Justice of Bangladesh described ADR in a workshop,[8] as: 'The newness of ADR is the purpose behind its adoption. The purpose of alternative dispute resolution is not a substitute consensual disposal for adversarial disposal or to abolish or discourage informal mediation or arbitration outside the courts, but to make alternative dispute resolution a part and parcel of the formal legal system, preserving the trial court's statutory authority and jurisdiction to try the case should ADR fail'.

ADR is nothing new. This informal quasi judiciary system is as old as civilization. Different forms of ADR have been in existence for thousands of years. The first Arbitration (a form of ADR) Act was passed in 1698 under William III. This was an Act for 'rendering the award of arbitrators more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others'. In 1854, Common Law Procedure Act expressly empowered courts to remit an award for reconsideration by the arbitrators. It also empowered courts to stay (stop) an action in court if the parties had agreed to take the dispute to arbitration.[9]

ADR today falls into two broad categories: court-annexed options and community-based dispute resolution mechanisms. Court-annexed ADR includes mediation/conciliation—the classic method where a neutral third party assists disputants in reaching a mutually acceptable solution—as well as variations of early neutral evaluation, a summary jury trial, a mini-trial, and other techniques. Supporters argue that such methods decrease the cost and time of litigation, improving access to justice and reducing court backlog, while at the same time preserving important social relationships for disputants.[10]

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[7] http:// www.bila-bd.com/link%20pages/research_view.php? rid=1, Last accessed on February 17, 2010.
[8] A Workshop for ADR, Organized by the British Council on 7th and 8th March 2004.
[9] http:// www. bila-bd.com/link%20pages/research_view.php? rid=1, Last accessed on February 17, 2010.
[10] *Ibid.*

Outside the sub-continent legal cultures in Singapore, Hong Kong, Australia, England and many other countries have already introduced different Alternative Dispute Resolutions methods to settle disputes outside the court. By updating their systems they have made their judicial systems more efficient, more service oriented, to provide speedy relief to the parties. Like in our country there was a time when the civil justice system in those countries confronted serious crisis for lack of discipline. The examples of these countries make us aware that Bangladesh is not alone in addressing the problem. Other countries including, some in the sub-continent, like Pakistan, with comparable problems have been successful in implementing reforms in similar manner.[11]

2.2 Method/ Kinds of ADR

Article 33 of UN Charter lists six methods of peaceful settlement of disputes:

2.2.1 ***Negotiation:*** Negotiation heads the list of methods in Article 33 of UN Charter. It is argued that it is not accidental but deliberate because negotiation opens up a dialogue between the parties and provides the parties withy the first opportunity to know each other's position.

The traditional and often mode of resolving disputes peacefully is through negotiation. Negotiation is essentially a process of bargaining between the two parties in search of a solution of disputes.

Negotiation presumes that at some point of time compromise may be made of each other's first stated position. The basic of technique of negotiation is persuasion and in some instances, it is compared to a game, where the ball is always on the move and all efforts are made for the ball not sit with one side.

Negotiation can be done orally across the table or through written communications. Negotiation is an art and involves inspiring confidence and trust in

[11] http://www.abanet.org/dispute/draftbrochure.pdf, Last accessed on February 17, 2010.

the minds of other party in placing the point of issues that are involved in disputes as fairly as possible. It requires coolness, patience and appreciation of other's views.

2.2.2 ***Enquiry:*** Often disputes can be an emotive nature and thus objectivity may be lost in perceiving real issues in a disputes. What the enquiry does it to elucidate the points of difference and agreement to both sides. This method may facilitate the understanding of the issues of disputes.

The Hague Convention of 1899, created this method of settling disputes. Later it was incorporated in the League of Nations. The general Assembly of the UN has over the years sent many fact-finding missions as part of enquiry in the field to determine the issues involved.

The US and Chile in 1992-93 set up a Enquiry Commission to determine the amount of damages to be paid to the US by Chile for allegedly killing two persons in Washington by Chilean intelligence officers and the disputes was settled.

The UN empowered to call the parties concerned to explain their position on a dispute and may attempt to narrow their differences, reconcile their opposing views and if necessary recommend a just and fair solution.

2.2.3 ***Mediation:*** Mediation is adopted by parties because in some disputes the degree of bilateral relationship reaches a point that direct negotiation in unlikely to resolve disputes. Mediation is an active involvement of a third party to offer solution to a dispute. A mediator act as a "middle person" to suggest the term of settlement to a dispute. A mediator examines the issues and offers his or her suggestion and ways to settle a dispute. The function of a mediator consist of reconciling the opposing claims and reducing the differences between the parties.

The mediator must have the full confidence and trust on the impartiality of the mediator if any success can be achieved.

In 1978, US President Jimmy Carter mediated between Egypt and Israel and achieved the Camp David Agreement in March 1979. Under the Agreement Egypt recognized diplomatically Israel and in return Israel withdrew its troops from Sinai Peninsula, occupied by Israel in the 1967 war.

2.2.4 ***Conciliation:*** Conciliation is a method that combines the characteristics of both enquiry and mediation. While mediation is ordinarily carried out by one person, conciliation is usually conducted by an organization such as ASEAN or SAARC or NATO or by a group of states (Bangladesh, Malaysia and Pakistan were given the task by OIC to broker peace between Iran and Iraq war during the 80s).

The General Assembly of the UN adopted and circulated all member-states Draft Rules for the Conciliation of Disputes in 1990, the rules deal with the initiation of conciliation proceedings and the selection of number of conciliators from an organization or group of states.

2.2.5 ***Arbitration:*** Arbitration is a quasi-judicial method of settlement of disputes. Parties agree to select arbitrators to resolve the disputes.

Arbitration has a long history, during the first part of the 19th century, arbitration was popular partly because there was a widespread belief that arbitration is a form of diplomacy. However modern arbitration takes places where a tribunal, manned by three or five arbitrators, come to a view based on Law.

In South Asia, India and Pakistan agreed to arbitration to resolve the land border dispute of Rann of Kutch (a marshy land between Sind and Rajasthan) on 1968 and agreed to abide by the decision. Other arbitration cases include the Channel Continental Shelf Case between the France and Britain 1978 and Taba Arbitration between Egypt and Israel.

2.2.6 ***Judicial Settlement:*** Judicial Settlement is a decision by a court. The Court is an independent body and state parties may refer to Courts. The International Court of Justice is an integral part of the UN and the Court, located at the Hague [the Netherland], decides inter-states disputes.

States must agree to refer to the Court for decision. However there is reluctance of states to refer disputes to the Court. Many cases were decided by the International Court of Justice (ICJ) and the decisions have significant impact on rules of international law.

Some of the important cases are, Anglo-Iranian case 1950, Anglo-Norwegian Fisheries case 1951, and North Sea Continental Shelf case 1969 between Germany and Netherlands and Denmark.

2.3 Importance of the Emergence of ADR

All countries, following the common law system, have faced this problem of delay and excessive expenses in the disposal of a civil cases at some point or the other in their respective legal history, as also the problem of apathy of judges and lawyers developed countries like the USA, Australia and Canada have witnessed a few decades back huge backlog of cases, excessive legal costs and expenses and litigations' misery, as we are witness now in our country. Lawyers and judges of developed countries did not look upon the Government to solve what was essentially a problem of administration of justice that concerned lawyers and judges themselves. In many area of these countries, some thirty plus years back, public-inspired judges and lawyers put their heads together and devised a common strategy to solve the problem of huge backlog of cases, delay in the disposal of cases and excessive expanses in litigation.[12]

2.4 How it Come

The adoption of the ADR system is a system of alternative but not substitute. Beyond the territory of complicated questions of fact and law there lies a vast area of litigation where the adversarial system must yield to a consensual type of dispute resolution, even though there are complicated technical legal problems in this vast area as well. The consensual type is essential a type and a process of dispute resolution that requires judges, lawyers and the litigant public to change their centuries old mind-set and to adjust gradually to play a combined and co-operative role in the resolution of disputes. In an adversarial system a judge has a passive role to play. He/she will take the evidence as it comes, hear the parties and deliver his/her judgment without getting involved in the entire dispute resolution process. In a consensual system the judges,

[12]http://www.abanet.org/dispute/draftbrochure.pdf, Last accessed on February 17, 2010.

the lawyers, litigants and the outside mediator or evaluator are all active parties to the resolution of disputes. It is informal, confidential, speedy and less expensive. It preserves the jurisdiction of the trail Court to try the case on merit, if ADR fails.[13]

2.5 Importance of ADR Under Muslim Law

According to section-5 of the Family Courts Ordinance, 1985 we know that the Jurisdiction of the Muslim Family Courts. Muslim Family Laws deals with the family matter like -

(a) Divorce
(b) Talaq
(c) Maintenance
(d) Restitution of Conjugal Rights
(e) Dower
(f) Guardianship and
(g) Child Custody etc.[14]

[13] *Ibid.*
[14] Obaidul Huq Chowdhury, *Hand Book of Muslim Family Laws*, 2004 (DLR), p - 15

Chapter 3

ADR AT A GLANCE

3.1 Concept Of Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) means solving the dispute outside the court. Alternative Dispute Resolution (ADR) has attracted a great deal of attention as a method of reducing both the financial and emotional costs of litigation. It appears that simply moving cases from the courts, and away from the adversarial process, allows some cases to be resolved quicker and to the greater satisfaction of the parties. D.M. Walker defines arbitration as the adjudication of a dispute or controversy on fact or law or both outside the ordinary civil courts, by one or more persons to whom the parties who are at issue refer the matter for decision.

Alternative dispute resolution includes dispute resolution processes and techniques that fall outside of the government judicial process. Despite historic resistance to ADR by both parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried. The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute.

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Alternative dispute resolution is usually considered to be alternative to litigation. It also can be used as a colloquialism for allowing a dispute to drop or as an alternative to violence.

ADR can increasingly be conducted online or by using technology. This branch of dispute resolution is known as online dispute resolution (ODR). It should be noted, however, that ODR services can be provided by government entities, and as such may form part of the litigation process. Moreover, they can be provided on a global scale, where no effective domestic remedies are available to disputing parties, as in the case of the UDRP and domain name disputes. In this respect, ODR might not satisfy the "alternative" element of ADR[16].

3.2 Object of the Alternative Dispute Resolution

Object of ADR to solved the dispute outside the court and reduce huge number of the case from the court system. The causes of backlog and delay in our country are systemic and profound. The legal system’s failure to impose the necessary discipline at different stages of trial of cases allows dilatory practice to protract the case life. As a result, the current backlog and delay problem in our country has reached such a proportion that it effectively denies the rights of citizens to redress their grievance.

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[15] http://www.abanet.org/dispute/draftbrochure.pdf, Last accessed on February 17, 2010.
[16] *Ibid.*

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3.3 Advantages of Alternative Dispute Resolution

For many reasons, advocates of ADR believe that I am superior to lawsuits and litigation. First ADR is generally faster and less expensive. It is based on more direct participation by the disputants, rather than being run by lawyers, judges, and the state. In most ADR processes, the disputants outline the process they will use and define the substance of the agreements. This type of involvement is believed to increase people's satisfaction with the outcomes, as well as their compliance with the agreements reached.

Party autonomy Because of its private nature, ADR affords parties the opportunity to exercise greater control over the way their dispute is resolved than would be the case in court litigation. In contrast to court litigation, the parties themselves may select the most appropriate decision-makers for their dispute. In addition, they may choose the applicable law, place and language of the proceedings. Increased party autonomy can also result in a faster process, as parties are free to devise the most efficient procedures for their dispute. This can result in material cost savings.[17]

***Neutrality*:** ADR can be neutral to the law, language and institutional culture of the parties, thereby avoiding any home court advantage that one of the parties may enjoy in court-based litigation, where familiarity with the applicable law and local processes can offer significant strategic advantages.[18]

***Confidentiality*:** ADR proceedings are private. Accordingly, the parties can agree to keep the proceedings and any results confidential. This allows them to focus

[17] http://www.wipo.int/amc/en/center/advantages.html , Last accessed on February 23, 2010.
[18] *Ibid.*

on the merits of the dispute without concern about its public impact, and may be of special importance where commercial reputations and trade secrets are involved.[19]

Less costly: Normal process of litigation involves a high cost. It includes the costs of attorney, advocate, and many other forms of costs. But the processes of ADR reduce the cost then the general process. In normal process the parties have to spend a lot of money for the advocate, some other extra court fee and many other extra charges.

Satisfactory Remedy: this process can give any parties the most satisfactory remedy rather than the other dispute resolving process.

Flexible: It's a very flexible way to resolve any disputes without any extra major hassle. ADR is enough flexible in case of ordinary litigation, many formalities are to be fulfilled and the process is very much strict and rigid. Moreover, there are various method of ADR i.e.; arbitration, conciliation etc. Therefore parties can choose any of the method which they like.

***Easier Procedure*:** The procedure in ADR is very much simple in case of other ordinary litigation the parties have to go through many types of complex procedure which make them too much bored to the legal procedure. ADR dose not involve any such complex procedure.

3.4 Disadvantages of Alternative Dispute Resolution

ADR does have my potential advantages, but there are also some possible drawbacks ad criticisms of pursuing alternatives to court-based adjudication. Some critics have concerns about the legitimacy of ADR outcomes, charging that ADR provides "second-class justice' It is argued that people who cannot afford to go to court are those most likely to use ADR procedures. As a result, these people are less likely to truly 'WIN' a case because of the cooperative nature of ADR. ADR may not be suitable for every dispute.

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[19] *Ibid.*

If the ADR process is binding, the parties normally give up most court protections, including a decision by a judge or jury under formal rules of evidence and procedure, and review for legal error by an appellate court.

The neutral may charge a fee for his or her services. If the dispute is not resolved through ADR, the parties may then have to face the usual and traditional costs, such as attorney's fees and expert fees.

Lawsuits must be brought within specified periods of time, known as Statutes of Limitations. Parties must be careful not to let a Statute of Limitation run while a dispute is in an ADR process:

Unequal Bargaining Power - In certain situations one side is able to dominate the other, for example, employment and divorce cases, making the courts a better option for a weak party.[20]

Lack of Legal Expertise - Where a dispute involves difficult legal points a mediator or arbitrator is unlikely to have the same legal expertise and knowledge as a judge.[21]

No System of Precedent - It isn't easy to predict the outcome of a dispute decided through ADR as there is no system of precedent.[22]

Enforceability - Most forms of ADR are not legally binding, making any award difficult to enforce.[23]

A Court action may still be required - 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.[24]

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[20] http://www.helpwithlawexams.co.uk/adr.html, Last accessed on February 23, 2010.
[21] *Ibid.*

[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*

3.5 Why Alternative Dispute Resolution in the Vagaries of Civil Litigation

Alternative Dispute Resolution mostly applied to civil cases. When a civil case is instituted in a court of competent jurisdiction, the scenario usually is, that a long time is taken to serve the process, the defendants beat the law and submit their written statement/s after a long delay beyond the permissible statutory period of two months, lawyers and judges do not take any interest in screening out a false and frivolous case at the first hearing of the case under Order X CPC (in fact no such first hearing takes place), they seldom try to shorten the disputed questions of fact and law by application of Orders XI and XII of the CPC and mostly ignore the elaborate procedure of discovery, interrogatories, notice to produce etc. contained in those Orders, the issues of a case are seldom framed following the Code of Civil Procedure, the case takes several years to reach a settlement date and on the date of positive hearing half a dozen or more ready cases are fixed for hearing, resulting in the hearing of none. In the meantime years roll by, presiding judge of a single case is transferred a number of times, witnesses of a single case may be heard by more than one presiding judge, arguments are listened to may be by another presiding judge and judgment may be delivered by a presiding judge who had had no connection with the case ever before.[25]

Our legal system has thus been rendered uncaring, non-accountable and formalistic. It delivers formal justice and it is oblivious of the sufferings and woos of litigants, of their waste of money, time and energy and of their engagement in unproductive activities, sometimes for decades. When they win a case the result is much worse than winning it. When they lose a case they lose not only the subject matter of the dispute, but also a good part of their fortune. If interlocutory matters are dragged up to the appellate or revisional courts, there was known no bounds and their agonies are prolonged for an indefinite period. Appeals from trial court decrees may reach unto the Appellate Division by which time the parties are thoroughly drenched in misery. When a decree is thus obtained after protracted litigation, it does not end

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[25] Mustafa, Kamal, J, (former CJ of Bangladesh), "*Introducing A.D.R in Bangladesh*" organized by the Ministry of Law, Justice &Parliamentary Affairs, 31 October 2002

there. Execution proceedings then re-starts a fresh litigation between the parties or even their successors which may take years or decades to come to a conclusion and which may end up with no real or positive benefit to the decree-holder plaintiff. This is the experience of a common litigant in Bangladesh. Added to this inherent and in-built delay and expenses, corruption and often terrorism at almost each stage of litigation is eating into the vitals of the justice delivery system. Most of us who are or were in the judiciary and were or are practicing in the Bar think that nothing can be done about it, or, at least, we have no role to play in the matter, either individually or collectively. We are drifting into a stage of aimlessness, inertia, inaction and helplessness. Many conscientious judges and lawyers have done what they could under the circumstances, but their sincerity has been drowned into the general morass of malfunctioning of the court system[26].

3.6 Achievements of Alternative Dispute Resolution

The civil court started mediation in non-family dispute since the 1 July 2003,a survey shows that after the introduction of the provision of mediation in the civil justice system as of 31 July 2004, 3432 non-family litigation have been disposed of by using this mechanism. In money loan cases the loan court has disposed of 13157 cases from 1 May 2003 to 31 July 2004. During this period the money loan court have realize Taka 996 crores and 5 Lakhs from the defendants and handed over the same to the plaintiffs who are mainly banks and finance institution. It is found that this realization is 10 times higher than the realization by execution cases over the last 10 years[27]. Mr. Justice Mustafa Kamal conclude that "the wind is blowing in the right direction .ADR is catching up the peoples imagination"[28]

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[26] Mustafa Kamal ; Paper read at Third working session of the conference of Alternative Dispute Resolution. New Delhi and High Court in Bombay on 20th and 21st November 2004
[27] *Ibid.*
[28] *Ibid.*

Chapter 4
BACKGROUND OF ADR

4.1 History and Development of ADR

Alternative dispute resolution has grown rapidly in the United States since the political and civil conflicts of the 1960s.The introduction of new laws protecting individual rights, as well as less tolerance for decimation and injustice, led more people of file lawsuits in order to settle conflict .For example, the Civil Rights Act of 1964 outlawed "discrimination in employment or public accommodations on the basis of race, sex, or national origin"

Laws such as this gave people new grounds for seeking compensation for ill treatment. At the same time, the women's movement and the environment movements were going as well, leading to another host of court cases. The result of all these changes was a significant increase in the number of lawsuits being filed in U.S court. Alternative Dispute Resolution (ADR) is an increasingly popular option that allows people to resolve disputes outside of court in a cooperative manner. ADR can be faster, cheaper and less stressful than going to court. Most importantly, the use of ADR can provide greater satisfaction with the way disputes are resolved.

ADR has been gradually evolving within the Fresno Superior Court for the past several years. In 1999 the Court recognized a need for greater public access to dispute resolution for cases and established an ADR Department. This department assists parties by providing information regarding ADR processes and services.

4.2 History and Development of Alternative Dispute Resolution In Bangladesh

Alternative Dispute Resolution first adopted in Bangladesh in 1989. The judicial system of Bangladesh is jammed by a huge backlog of suits and cases. The backlog of cases causes wearying delays in the adjudicative process, which is, as described by

Professor M. Shah Alam, "eating Bangladesh Judiciary".[29] While delay in the judicial process causes backlog, mounting backlog puts a tremendous load on present cases. The present rate of disposal of cases is shocking for justice. It is detrimental to the rule of law and is damaging the economic growth of the country. This situation goes on with no plain solution in view.[30]

At present the people of Bangladesh think that they cannot get their grievances redressed by the court during their lifetime only because of superfluous delays, which take place during the court proceedings. Where it should take one to two years for the disposal of a civil suit, a case is dragged out for 10 to 15 years, or even more. By the time judgment is pronounced the need for the judgment in most cases is no more required. It is said that delay in disposal of cases in Bangladesh has reached a point where it has become a part of injustice, a violator of human rights.[31]

Professor M Shah Alam thinks that in a society of class differentiation the prolonged process, which is adversarial and belligerent in nature, places the financially stronger party at an advantageous position. If the judicial system functions substantively and in accordance with the procedural laws, the increasing scope for delays can transform it into a system which may become procedurally hostile towards marginalized sections of its people, defeating the goals of social justice.[32]

Mr. Justice Sayed JR Mudassir Husain observes that, "in our present legal system, increasing expenses of litigation, delay in disposal of cases and huge backlogs have virtually shaken the confidence of the people in the judiciary. In this backdrop, we cannot but ponder about the device like ADR which is potentially useful for reducing the backlogs and delay in some cases of our courts". He also mentions that

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[29] M. Shah Alam, 'A Possible Way out of Backlog in Our Judiciary', in *The Daily Star*, Dhaka, 16 April 2000.
[30] *Ibid.*
[31] *Ibid.*

[32] M. Shah Alam , 'A Possible Way out of Backlog in Our Judiciary', in *The Daily Star*, Dhaka, 16 April 2000.

alternative dispute resolution (ADR), being much cheaper and speedier than the existing legal system, can greatly mitigate the sufferings of poor litigants'[33]

ADR in Bangladesh not very new we have some laws about ADR before introducing ADR by retired Chief Justice Mustafa Kamal In June 2000, formalized ADR was introduced in Bangladesh by means of court annexed judicial settlement pilot projects, in an effort to decrease delays, expenses, and the frustrations of litigants laboring through the traditional trial process. The pilot program began in a collaborative effort with ISDLS in a series of Bangladeshi legal studies of Californian ADR systems. Three Pilot Family Courts were established in the Dhaka Judgeship, which exclusively used judicial settlement to resolve family cases including: divorce, restitution of conjugal rights, dower, maintenance and custody of children. An amendment to the Code of Civil Procedure was not necessary due to an existing 1985 Family Courts Ordinance, which authorized the trial judge to attempt reconciliation between parties prior to and during trial. The pilot courts were staffed by 30 Assistant Judges selected from all over Bangladesh, lawyers and non-lawyers, who were given training by a United States mediation expert (organized by ISDLS). During this assignment, the Assistant Judges were relieved of all other formal trial duties.[34]

All three pilot programs were fully functioning by January 2001. Once judges had begun successfully settling cases, the program was expanded slowly to additional courts throughout the country. By the end of the first year of the program, the judicial settlement procedure in family disputes had effectively been introduced in 16 pilot family courts in 14 districts of Bangladesh. Due to the high settlement rates these courts were achieving, the Law Minister convened a conference in 2002 in order to spread awareness of the achievements 106 Paper presented on the conference organized by (ISDLS) Institute for the Study and Development of Legal Systems (2005). Report on the Turkish Civil Justice Conference: ADR Learning Program.107 as Bangladesh uses a system of judicial credits for the career advancement of judges

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[33] Chief Justice of Bangladesh, speech given in the concluding session of the South Asian Regional workshop on ADR organized by the British Council, Bangladesh on 7th& 8th March 2004.

[34] S.K Golam Mahbub, "*Alternative Dispute Resolution"* , 1st Edition 2005, p - 45

(based on number of cases settled by trial), a similar credit system was enacted for cases settled through mediation.

Chapter 5
ADR IN FAMILY MATTER

5.1 Alternative Dispute Resolution In Family Matters

For hundreds of years clients, judges, and lawyers have complained about the cost, inefficiency, acrimony, and risk of litigation. Everyone involved with civil litigation realizes its harmful side effects, but until recently no one has done much about it. The time for change is upon us.

Historically, lawyers were trained exclusively in the adversarial method. The adversarial system of jurisprudence is based on the concept that justice will emerge best if competing parties, represented by lawyers, present their admittedly biased version of a case to a judge or jury. The evidence is then subjected to the vital process of cross-examination in which each side has the opportunity to expose the flaws in an opponent's position. In fact, the system works quite well in some cases, particularly when cost and relationships between opponents is not a major concern. In many cases, however, the cost of litigation is prohibitive, the fighting and acrimony inherent in the process destroys relationships that otherwise could be preserved, and the complexity of litigation has caused overloaded court caseloads and major delays. [35]

Sophisticated parties, particularly corporations that may experience a great deal of litigation, now realize the huge costs involved in the adversarial process. To reduce time, money, and exposure to a litigious atmosphere, people are looking for alternatives to the traditional approach. The purpose of this chapter is to help business decision makers understand the current status of alternatives to litigation. In the modern civil litigation environment, the knowledgeable decision maker can and must insist on using options that have the potential to reduce some of the present problems of litigation. The chapter addresses how to choose the type of alternative dispute resolution that will be most effective in a particular matter and will discuss the

[35] http://www.abanet.org/dispute/draftbrochure.pdf, Last accessed on February 17, 2010.

characteristics of an effective mediator, arbitrator, or other neutral party. There will be many exceptions to the general statements of this chapter, however, and readers should always make dispute resolution decisions only with the advice and counsel of their lawyers, whose enthusiastic participation is essential to the success of any alternative to traditional litigation.[36]

5.2 Object of the ADR in Family Court

Object of ADR to solved the dispute outside the court and reduce huge number of the case from the court system. The causes of backlog and delay in our country are systemic and profound. The legal system's failure to impose the necessary discipline at different stages of trial of cases allows dilatory practice to protract the case life. As a result, the current backlog and delay problem in our country has reached such a proportion that it effectively denies the rights of citizens to redress their grievance.

5.3 Family Matters

All matters relating to family laws are given due focus stressing on the humane aspects. Problems relating to marriage, divorce, dower, maintenance, custody of child, inheritance etc. are solved through negotiation, arbitration, conciliation proceedings, and in the last resort, by applying to the family court. There are a considerable number of cases dealing with expatriate Bangladeshi families. The Firm has expertise and experience on matters relating to Bangladeshi minorities residing overseas[37].

5.4 Alternate Dispute Resolution

ADR is in its budding state in Bangladesh. In recent years, the firm very successfully broadened its capacity to deal with negotiations, mediation and arbitration. Our experience in conducting arbitration cases under the local laws is combined with our understanding of the mores and cultures of multinational companies[38].

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[36] http://www.abanet.org/dispute/draftbrochure.pdf, Last accessed on February 17, 2010.
[37] http://www.sahmedassociates.com/practice.html , Last accessed on February 23, 2010.
[38] *Ibid.*

5.5 Importance of Alternative Dispute Resolution in Family Court

The Muslim family laws ordinance 1961, and the Muslim family laws rules 1961 this two is most sensitive law for the Muslim people. To solve the dispute arising out of this law is batter to solve outside the court. Because there are many personal and internal matter are involve in this family dispute. ADR give batter solution then court in this family matter.

They were also told that as Family Court judges they shall have to perform mediation as and when a case is assigned to them. The cases involving family matters are first filed in the court of the Assistant judges with territorial jurisdiction. After issuance of summons, the District Judge transfers the cases to mediation court under Section 24 of the Code of Civil Procedure. Section 24 provides that the District judge on the application of the parties or of his own motion may transfer any suit for trial or disposal to any court subordinate to it and competent to try and dispose of the same.

5.6 Divorce Conciliation

Without the intervening of the Court and Built in Conciliation in Family Court Proceedings:

Divorce is the most detestable thing in Islam, nevertheless these do happen and Chairmen of Union Parishad often receive notice of divorce. The provisions of sections 7 and 8 of the Muslim Family Laws Ordinance, 1961 enable the Chairmen to make conciliation between the disputant parties without the intervention of the court. The Family Courts Ordinance, 1985 also provides for conciliation between the disputants in the midst of the court proceedings but these statutory provisions have not been so far properly understood and practiced. The intention of these statutory provisions is to maintain harmony with the spirit of Quranic sanctions relating to divorce. This article focuses on conciliation facilities and the process of its proper utilization through the creation of right-awareness among the disputants, the Chairmen of Union Parishad and Family Court Judges.

Conciliation or mediation (the terms are interchangeable) is a process of joint decision making by the disputants themselves with the help of a third party. In conciliation or mediation, there is no surrender by the disputing parties to the third party intervener of the power to make any decision (unilateral or otherwise) which is

intended to have a binding effect. Conciliation/mediation is the key component in arrangement for the dissolution of families. It is argued in favour of mediation/conciliation that other forms of dispute resolution share the objective of agreement rather than judgment. However in conciliation it is the parties who are deemed to be in control. It is seen as a space which allows the parties to work out their own problems in their own way.

Conciliation to resolve marital conflicts can be traced back to Quran and Sunna (tradition of Prophet). When the husband and wife cannot live together in peace and harmony, they are given the option to separate,[39] but before such a separation it is recommended that there is an attempt at reconciliation. The Quran (IV: 35) counsels arbitration between spouses:

If we fear a breach between them twain, appoint (two) arbiters. One from his family and the other from hers; If they wish for peace God hath full knowledge and is acquainted with all things.

Ali, commenting on the verses, states that it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression given is that a capricious use of talaq is a grave distortion of the Islamic institution of divorce[40].

It can be argued that Islam condemns the husband giving talaq to his wife unreasonably and encourages reconciliation between the couple before a hasty decision is made by the husband. Ali has pointed out that the Prophet restrained the husbands' power of talaq he gave to women the right of obtaining a separation on reasonable grounds; and towards the end of his life he went so far as practically to forbid its exercise by men without intervention by arbiters or a judge.

The Muslim Family Laws Ordinance, 1961 was enacted with the object to give effect to the sanction of the Quranic verse cited. The Ordinance incorporated provisions for conciliation to resolve marital disputes without the intervention of the court. The provisions are equally applicable to both husband and wife exercising their right to divorce. Apart from the Muslim Family Laws Ordinance, 1961, the Family

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39 K.N. Ahmed, *Muslim Law of Divorce*,(New Delhi, Kitabe Bhavan) 1978, p -184.
[40] *The Dhaka University Studies*, Part-F Vol. XII (1); June-2001 p -1

Courts Ordinance, 1985 went a step further in resolving marital disputes through conciliation, during the progress of the family suits.

5.7 Women and Divorce

Of all religions, Islam was the first to recognize the right of women to seek the dissolution of marriage on various grounds, including incompatibility of temperament rendering it impossible for the husband and wife to live within the limits ordained by Allah. Islam emphasis's the importance of the happiness of both spouses. It ordains that every attempt should be made to maintain the marriage tie, but once it is established that the marriage has broken down, the Quranic law allows the parties to dissolve the marriage in order to avoid a greater evil. Despite the freedom of the parties to divorce, Islam warns both parties against the unscrupulous use of this right. It says that divorce is the most detestable thing even when lawfully allowed or permitted.

The modernists proclaim that the nature of divorce under the Quranic law is based on the so-called 'breakdown theory'[41]. According to this theory divorce is available to both the spouses without the need to establish any specific grounds for the divorce. It allows for the dissolution of the marriage at the instance of husband (by talaq) or the wife (by khula) and by mutual consent (by Mubara'at). The modernists reject the orthodox view that a husband enjoys under the Quranic law, unlimited authority to dissolve the marriage whereas a wife has a limited or no right to do so and argue that the orthodox view is against the spirit of the Quran and Sunna.

Under the Quran and Sunna (i.e. non-statutory law of divorce) a wife can exercise her right to divorce, either by talaq-e-tafweez or khula, without the intervention of Court. A Muslim wife can at the time of marriage or subsequent to marriage, reserve in the kabinnama (marriage contract deed) a right to dissolve the marriage in specified circumstances. This is called talaq-e-tafweez (the right to divorce delegated by the husband to the wife), which can be effected without the intervention of the court. Irrespective of the inclusion of conditions in the kabinnama,

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[41] *The Dhaka University Studies*, Part-F Vol. XII (1); June-2001 p -3

the wife has a right of khula (divorcing her husband by forgoing dower). In the khula form of divorce, the wife has to compensate the husband or forgo her dower [marriage consideration I for her release from the marital bond. If the husband consents to the compensation the khula takes effect extra-judicially, but if the husband tries to maintain the marriage the wife can ask for a judicial khula. Despite these Quranic rights, women's rights have continued to be undermined due to the conservatism of the orthodox jurists[42]. The scholarly debates on the orthodox law have led to modern legislative reforms in many Muslim countries, including Bangladesh.

The reforms have had two main objectives. First, they have tried to prevent the husband from abusing his power to affect a unilateral talaq (as popularly understood by the orthodox jurists). Secondly, they have tried to enhance women's rights to divorce.

The first step towards legislative reform of the Muslim Family Laws of British India came with the enactment of the Muslim Personal Law Application (Shariat) Act; 1937, followed by the Dissolution of Muslim Marriages Act, 1939. The Act of 1939 was considered one of the most important enactments of the British Indian legislature for safeguarding the rights of Muslim women in the Sub-continent. This Act allowed women to obtain a decree for the dissolution of marriage from a court on certain grounds which they could not ordinarily do without a right delegated to them by the husbands or without their husbands' consent.

Although the Act gave more options to women exercising their right to judicial divorce, it did not protect women from the threat or abuse of talaq by their husband. This led the reformers to pass a procedural law; the Muslim Family Laws Ordinance,

1961. This Ordinance aimed to minimize the practical complexities of a court hearing, viz, the lengthy procedure and cost. Since most women are barely in a position to support them the cost and time of court proceedings the same acted as a strong deterrent against making use of their rights.

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[42] *The Dhaka University Studies*, Part-F Vol. XII (1) ; June-2001 p -4

Chapter 6

ADR IN BANGLADESH

6.1 Bangladeshi Law Relating ADR

In Bangladesh there are many laws for end the dispute outside the court. The government of Bangladesh want to make settle the dispute outside the court. For that reason they passed many law, which make end the suit outside the court. This laws are given below.

1 The Family Court Ordinance, 1985

2 The Salish Ain 2001(the arbitration Act 2001)[43]

4 The Salish Ain (amendment) 2004[44]

5 The Code of Civil Procedure (amendment) Act 2003[45]

6 The Artha Rin Adalat Ain 2003[46]

7 The Artha Rin Adalat(amendment) Act 2004[47]

8 The Conciliation of Dispute (municipal areas) Board Act 2004

6.2 Alternative Dispute Resolution For Civil Cases And Benefits of Alternative Dispute Resolution

Using ADR may have a variety of benefits, depending on the type of ADR process used and the circumstances of the particular case. Some potential benefits of ADR are summarized below.

(a) Save Time

(b) A dispute often can be settled or decided much sooner with ADR; often in a matter of months, even weeks, while bringing a lawsuit to trial can take a year or more.

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[43] *Published in Bangladesh Gazette Extraordinary Dated 24th January 2001*
[44] *Published in Bangladesh Gazette Extraordinary Dated 19th February 2004*
[45] *Published in Bangladesh Gazette Extraordinary Dated 27th February 2003*
[46] *Published in Bangladesh Gazette Extraordinary Dated 10th march 2003*
[47] *Published in Bangladesh Gazette Extraordinary Dated 30th march 2004*

(c) Save Money

(d) When cases are resolved earlier through ADR, the parties may save some of the money they would have spent on attorney fees, court costs, experts' fees, and other litigation expenses.

(e) Increase Control over the Process and the Outcome.

6.3 Some Problem of Alternative Dispute Resolution in our Country

(a) Injustice

(b) Lack of Knowledge about the process to resolve the dispute.

(c) ADR Procedure does not codify as others procedural Law.

(d) Lack impartial third party facilitator – The third party neutral, the mediator, is the person who makes the entire process work. As long as there is a neutral facilitator, the parties can trust that they have some safety and are not being abused by an interested party. All of these programs work because the mediator in them is known to either be neutral or supportive of the parties and not an involved party.

(e) Third party who protects the integrity of the proceedings.

(f) Good faith from the participants.

(g) The presence of the parties.

(h) An appropriate site or venue.

Chapter 7

CONCLUSION

7.1 Concluding Suggestion to make Alternative Dispute Resolution more Effective :

To make ADR more effective, extensive, and pro-active, coordination is needed among different agencies. Other initiatives are given below:

Creating awareness about ADR.

Make ADR mandatory in some specific law like (family dispute)

Make clear about the advantage of ADR

Spreading the success story of ADR.

Encouraging NGOs to become involved in ADR.

Involving the Bar Associations in ADR.

Providing training for mediators.

Matching Government and NGO efforts.

Good court administration has been defined and described in many different ways. In simple terms it may be described to imply:

(a) Good record-keeping and systematic filing of the cases;

(b) Subject wise classification of the cases;

(c) Good monitoring so as to classify the cases on the basis of the stages they have reached;

(d) To identify and to rid the docket of 'dead' or moot matters in order to prevent them from clogging the schedules;

(e) monitoring and case-flow tracking in such a way as to know the status of each case, to know its procedural position, to locate documents and records more easily and to reflect everything in transparency plate.

7.2 Conclusive Note

The Family Courts set up to adjudicate on family matters were supposed to be specialist and exclusive courts to ensure effectiveness and at the same time privacy, where mediation or conciliation as well as other informal procedure in aid of resolution of family disputes were expected to be utilized frequently to make those regular practice of the court which could encourage the disputants to opt for these procedures to their advantage. In practice the Family Courts also has ordinary civil and even criminal jurisdiction, which tax upon the working hours of the presiding judge, who either does not feel encouraged to insist or prevail upon the disputant parties to opt for mediation or conciliation or does it mechanically due to pressure of other non-family matters. The desired specialization in disposing of family matters and the practice of mediation or conciliation during family court proceedings are waiting and the atmosphere or tradition of it is virtually non-existent. Probably social movement is necessary to motivate the disputant parties to invoke mediation or conciliation as a means to resolve family disputes._

However, there are also some arguments against the concept of ADR. It is said that moving dispute resolution from the public to the private sphere, will prevent the law from developing to meet changing circumstances. Keeping information about the details of settlements out of the public domain prevents its use as a comparator and may lead to an increase in the number of claims, which are disputed. It is also possible that private settlements may not take into account the wider implications of the dispute.

Critics believe that ADR encourages compromise. Compromise can be good way to settle some dispute, but it is not appropriate for others. In serious justice conflicts and cases of intolerable moral difference, compromise is simply not an option because the issues mean too much to the disputes. Another concern is that ADR settlements are private and are not in the public record or exposed to public scrutiny.