

# RAJSHAHI UNIVERSITY LAW JOURNAL



FACULTY OF LAW  
RAJSHAHI UNIVERSITY  
2007

## ARTICLES

Heritage of British Colonial Press Laws and Regulations: A critical overview

Revisiting Domestic Violence as a Gross Violation of Women's Fundamental Rights to Freedom from Torture

Reviewing the Interpretation of the Inheritance Law with Special Reference to Kalala

Right to Reasonable Investigation Process in Criminal Justice in Bangladesh

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দাপ্তরিক গোপনীয়তা আইন ও তথ্য-অধিকার

ISSN 1991-8976

# **Rajshahi University Law Journal**

**Volume 04 2007**



**Faculty of Law  
University of Rajshahi**

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**Rajshahi University Law Journal**  
**Faculty of Law**  
**University of Rajshahi**

**Volume 04 2007**

**Published by**  
**Dean**  
Faculty of Law  
University of Rajshahi  
Rajshahi-6205  
Bangladesh

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**Cover Design & Printed by**  
Text Dot Com (TDC)  
Farmgate, Motihar, Rajshahi-6212

**Printed at**  
Padma Offset Printers, Rajshahi

**Subscription Rates**

For Individuals : TK 100.00 US\$ 20 (without postage)  
For Organisation : TK 150.00 US\$ 30 (without postage)

[Published in November 2008]

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## **Alternative Dispute Resolution (ADR) in the Legal System of Bangladesh: Successes and Challenges**

Mostafa Mahmud Naser\*  
Mohammad Sarwar Alam\*\*

### **1. Introduction**

The British adversarial system of adjudication is a distinct feature of our legal system where the litigation is controlled by the parties. Under this system the battle in the field is brought in a court room where the dispensation of justice culminates to a legal battle fought by the lawyers engaged by the parties. Ultimately one party becomes a winner and the other is put in the position of the defeated. A judge sits merely as an umpire to enforce the rule of law by delivering a judgment in accordance with law. As a result, the winner party leaves the court with a sense of pride and the defeated one with a sense of bitterness, humiliation and frustration.<sup>1</sup> Besides, backlog and delay in the disposal of cases are rooted in our justice delivery system. Dilatory practice at different stages of trial of cases protracts the case life to 15 to 20 years or even more where it should take one to two years. Delay in litigation has become a tool of repression denying the rights and remedies of the litigant parties and thereby exacerbating the sufferings of the parties. Justice Iyer rightly says, "Delayed Justice is the means of inflicting injustice through process of law."<sup>2</sup> But Bangladesh is not the only country to face these problems, even the developed countries such as the United States and the United Kingdom suffer from the same, albeit on a lesser scale. The USA, and following its inspiration, several countries, including Australia, Canada, Germany, Holland, Hong Kong, New Zealand, South Africa, Switzerland and the United Kingdom have been using over the last 20 years or so what is popularly known as 'Alternative Dispute Resolution (hereafter as ADR)' that encouraged the disputants to arrive at a negotiated understanding with a minimum of outside help.<sup>3</sup> Taking [his view in mind, the ADR system has been introduced and developed in our legal system

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\* Assistant Professor, Department of Law, University of Chittagong, Bangladesh. The author can be reached at mnaserbd@yahoo.com

\*\* Senior Lecturer, Faculty of Law, Eastern University, Bangladesh. The author can be reached at sarwareu@yahoo.com

<sup>1</sup> Ahmed Ali, "Settlement of Dispute by Compromise", 54 DLR (2002) Journal section, pp. 31-32 at p. 31.

<sup>2</sup> Quoted by Md. Nur Islam, "Informal Justice System: Bangladesh Perspective", 54 DLR (2002), Journal section, pp. 36-38, at p. 36.

<sup>3</sup> F.C. Rao, "Alternatives to Litigation In India" In the writer & Sheffield, William's book Alternative Dispute Resolution: What It Is and How // Works? New Delhi, 1997, p. 24.

beside the formal justice system in order to eliminate the endless sufferings of the common litigants of our country. Recently with the amendment in certain laws of our country the ADR has become the integral part of formal legal system. Though the ADR system outside the courtroom was in practice from long before in our society, its introduction in formal legal system is a recent phenomenon. This article attempts to justify the usefulness of ADR mechanism as an effective means of dispute resolution in Bangladesh. This article also aims to study the ADR mechanisms in various laws and find out the challenges before it.

## 2. ADR Mechanism: Means and Methods

ADR is a name for several dispute resolution processes and techniques, which while believed by some to be outside the traditional mainstream of state jurisprudence, have gained acceptance among both the general public and the legal profession in recent years.<sup>4</sup> ADR includes practices, techniques and approaches for resolving and managing conflicts short of, or alternative to, full-scale court process.<sup>5</sup> ADR can be defined as any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. It refers to means of settling disputes outside of the courtroom. Though the term ADR typically includes arbitration, mediation, early neutral evaluation and conciliation it is not used consistently. As for example, in the United States it usually includes arbitration, whereas in England it usually does not.

In its philosophical perception, ADR process is considered to be the mode in which the dispute resolution process is qualitatively distinct from the judicial process. It is a process where disputes are settled with the assistance of a neutral third person generally of parties' own choice; where the neutral person is generally familiar with the nature of the dispute and the context in which such disputes normally arise; where the proceedings are informal, devoid of procedural technicalities and are conducted by and large in the manner agreed by the parties; where the dispute is resolved expeditiously and with less expenses; where the confidentiality of the subject matter of the dispute is maintained to a great extent; where decision-making process aims at substantial justice, keeping in view the interests involved and the contextual realities.<sup>6</sup>

<sup>4</sup> See <http://www.answers.com/topic/alternative-dispute-resoluion> <last visited 12.05.2006>

<sup>5</sup> Alternative Dispute Resolution Practitioners Guide, at p. 6, see [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacb89.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb89.pdf) <last visited 12.05.2006>

<sup>6</sup> Sarvesh Chandra, "ADR: Is Conciliation the Best Choice?" In Rao, P.C., & Sheffield, William, (eds), *Alternative Dispute Resolution: What It Is and How It Works?* New Delhi, 1997, p. 83.

## 2.1. Different methods of ADR

The variety of ADR models found in developed and developing countries may be described in two fundamental ways: Basic ADR Processes, which include negotiation, conciliation, mediation and arbitration; and Hybrid ADR Processes, in which specific elements of the basic ADR processes have been combined to create a wide variety of ADR methods (e.g., mediation is combined with arbitration in med-arb). Hybrid ADR processes may also incorporate features found in court-based adjudication; for example, the mini-trial mixes and adjudication like presentation of arguments and proofs with negotiation. The discussion of various modes of ADR techniques will help to develop insight into it.

### 2.1.1. Mediation

The most common type of ADR practised institutionally in judicial system of Bangladesh is mediation. In mediation, the mediator, a neutral third party, assists two or more parties in order to help them negotiate an agreement, with concrete effects, on a matter of common interest.<sup>7</sup> Unlike a judge or arbitrator, the mediator has no power to impose a solution on the disputants; instead the mediator assists them in shaping solutions to meet their interests.<sup>8</sup> Mediators can employ a wide range of techniques, e.g.; assist parties to communicate effectively and to develop a co-operative, problem-solving attitude, identify parties' underlying interests; identify and narrow issues; transmit messages between parties; explore possible options for agreement and consequences of non-settlement.<sup>9</sup> Mediation is an informal, flexible, confidential, non-adversarial and consensual procedure in which the Code of Civil Procedure or any law of evidence does not apply. The proceedings are immune from disclosure in any court of law.<sup>10</sup>

### 2.1.2. Conciliation

Conciliation is a process in which the parties to a dispute with the assistance of a neutral third party (the conciliator) identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have

<sup>7</sup> See <http://www.answers.com/topic/alternative-dispute-resolution> <last visited 12.05.2006>.

<sup>8</sup> The Roots of ADR at p. 9. see [http://media.wiley.com/product\\_data/excerpt/63/07879679/0787967963.pdf](http://media.wiley.com/product_data/excerpt/63/07879679/0787967963.pdf) <last visited 12.05.2006>.

<sup>9</sup> Ibid.

<sup>10</sup> Shamir, Yona, Alternative Dispute Resolution Approaches and their Application, Israel Center for Negotiation and Mediation (ICNM). See [http://webworld.unesco.org/water/wwap/pccp/cd/pdf/negotiation\\_facilitation/alternative\\_dispute\\_resolution\\_approaches.pdf](http://webworld.unesco.org/water/wwap/pccp/cd/pdf/negotiation_facilitation/alternative_dispute_resolution_approaches.pdf) <last visited 14.05.2006>

an advisory role on the content of the dispute or the outcome of its resolution but not a determinative role. The conciliator may advise on or determinate the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.<sup>11</sup>

### 2.1.3. Arbitration

Arbitration is an adjudicative process in which an arbitrator or a panel of arbitrators issues a non-binding award on the merits of the disputes in question after an expeditious, time-bound and adversarial hearing. Lawyers of each party will face each other in the proceeding as in any other adversarial proceedings. The arbitrator has no role as a mediator. He or she has a passive role to play. He or she will hear the evidence and peruse the oral and documentary evidence, hear arguments of both sides and give his or her award according to his or her best judgment. Each party has the option to reject the award. If both parties accept the award both of them will sign the award or put their thumb impressions on it, as the case may be, and their respective lawyers, if any and the arbitrator/s will also sign the award before the trial court makes it a decree of the court. Parties have been given the option to reject the award because if the award has not been satisfactory to either or both of them, they have the right to fall back upon the trial court for a decision on merit. Like mediation this is also a confidential proceeding that is immune from disclosure in any court of law. Arbitrators are nominated in the same manner as mediators.

### 2.1.4. Early Neutral Evaluation (ENE)

Early Neutral Evaluation is a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, argument and evidence to a neutral third party who makes a determination as to the key issues in dispute, and most effective means whereby the dispute may be resolved without making any determination as to the facts of the dispute. In the words of Robert A. Good in, "Early Neutral Evaluation is a technique used in American litigation to provide early focus to complex commercial litigation, and based on that focus, to provide a basis for sensible case management or offer resolution of the entire case, in the very early stages."<sup>12</sup> A senior lawyer called the evaluator or neutral with expertise and experience in the subject-matter of litigation and in case management conduct ENE, when called upon

<sup>11</sup> Alternative Dispute Resolution Definitions, Canberra March, 1997. a paper prepared by the National Alternative Dispute Resolution Advisory Council, see <http://www.ag.gov.au/adr/Definitions.htm> <last visited 05.06.2006>

<sup>12</sup> Ibid.

by trial court to do so.

#### **2.1.5. Settlement Conference/Judicial Conference.**

Settlement Conference or Judicial Conference may be held at any time during the life of a civil case upon request of a party or recommendation of a trial judge. The judge who is assigned to adjudicate the dispute in question is not involved in this method of ADR. Another judge of coequal jurisdiction is requested to involve him/herself in this method. The settlement judge acts as a mediator or facilitator at the Conference, promoting communication among the parties, holding one-on-one sessions with each side, offering an objective assessment of the case and suggesting settlement options. The settlement judge does not have the power to enforce settlement and does not communicate any information about the case to the trial judge. If settlement is reached, the parties sign an agreement, thereby avoiding the cost of trial or other litigation. If no settlement is reached, the case proceeds to trial before the previously appointed trial judge.<sup>13</sup>

#### **2.1.6. Negotiation**

A non-binding procedure involving direct interaction of the disputing parties wherein a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each other's position.<sup>14</sup>

#### **2.1.7. Mini-trial**

A non-binding procedure where the disputing parties present their respective cases before their executives who are competent to take decisions and who are assisted by a neutral third party.

Thus, the executives have an objective assessment of the dispute and if possible, they can mutually arrive at an amicable settlement.<sup>15</sup>

#### **2.1.8. MEDOLA**

A procedure in which if the parties fail to reach agreement through mediation, a neutral person, who may be the original mediator or an arbitrator, will select between the final negotiated offers of parties, such selection being binding on the parties.<sup>16</sup>

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<sup>13</sup> Ibid.

<sup>14</sup> Supra note 26, at p.84.

<sup>15</sup> Ibid.

<sup>16</sup> Supra note 3, at p. 26.

### 2.1.9. Fast-track Arbitration

A form of arbitration in which the arbitration procedure is rendered in a particularly short time and at reduced cost.<sup>17</sup>

### 2.1.10. Mediation Arbitration (MED-ARB)

A procedure where the parties agree to settle their dispute first by attempting conciliation within a specified time, failing which by arbitration. This is distinct from conciliation in the course of arbitral proceedings where, if a settlement is reached, the arbitration proceedings are terminated by making an award on agreed terms.<sup>18</sup>

## 3. Historical Background of ADR in Bangladesh

There is a long and old tradition of encouragement of dispute resolution outside the formal legal system in the Indian sub-continent. In fact, settlement of disputes by mediation was a distinguished feature of the informal legal system. In the absence of any historical evidence it is difficult to specify the period during which mediation of disputes started among the people of this region.<sup>19</sup> Nevertheless, the assumption is that certain local bodies to govern the villages were the basic forms of government till the 6<sup>th</sup> century B.C. or even before.<sup>20</sup> It has been said that village self-government in this sub-continent is as old as the villages themselves.<sup>21</sup> Presence of Panchayat<sup>22</sup> and Headman seem to have existed since that time. However, some concrete evidence of the existence of Panchayat system among the Muslim population of Dhaka is found from the beginning of Moghul rule till the advent of 20th century. Such Panchayat was consisted of five members and was popularly known as the committee of *Pane Laeq Birader* (committee of five respected, trusted and obeyed elder brethren).<sup>23</sup> The Panchayats decided almost all kinds of cases except "those pertaining to serious

<sup>17</sup> Ibid, at p. 25.

<sup>18</sup> Supra note 26, at p. 84.

<sup>19</sup> Farmanul Islam, "Towards a Brief History of Alternative Dispute Resolution in Rural Bangladesh" at p.100 in Bangladesh Journal of Law, Vol. 4:1& 2 (2000) published by Bangladesh Institute of Law and International Affairs (BILIA).

<sup>20</sup> Kamal Siddique, "United Nations: Ensuring Human Security in Bangladesh: A Precondition for Democracy and Development", Local Government in South Asia: A Comparative Study, Dhaka, 1992, p. 15; Prepared for the Government of Bangladesh by the United Nations Department of Economics and Social Affairs, Acting as Executing Agency for the United Nations Development Programme. New York. 1998.

<sup>21</sup> *Kudrat-E-elahi Panir V Bangladesh*, 44 (1992) DLR (AD) 319 at P.326.

<sup>22</sup> Panchayat was a Council of five or more members arising among the fellow villagers.

<sup>23</sup> Supra note 26, at p. 102.

crimes.<sup>24</sup> Later on during the period of British rule *Panchayat* system was replaced by the Union Board. The President of the Union Board had powers to adjudicate matters related to petty civil and criminal cases.<sup>25</sup> In Pakistani period, Union Board was replaced by the Union Council. Later on, the Conciliation Court was created under the Conciliation Court Ordinance, 1961 which dealt with petty civil and criminal matters. With the emergence of Bangladesh as an independent state it has enacted almost the same laws to resolve petty disputes outside the formal judicial system.

#### 4. Laws on ADR forming the parts of formal judicial system

There are a number of legislations encouraging ADR in Bangladesh in various means and forms. The laws relating to ADR in Bangladesh are broadly divided into two. Firstly, laws relating to ADR forming the parts of informal judicial system and secondly, laws forming the parts of formal judicial system.

##### 4.1. The Family Courts Ordinance, 1985<sup>26</sup>

The Family Courts under this law deals with some family matters like dissolution of marriage, restoration of conjugal rights, custody of children, recovery of dower money and maintenance.

The Family Courts Ordinance 1985 (hereinafter 1985 Ordinance) provides for settlement of family disputes at the pre-trial hearing of the suit at the initiative of the courts by compromise or reconciliation between the parties and also to take such initiative again after the conclusion of trial and before the delivery of judgment for the purposes of restoration of domestic peace and harmony by adopting ADR methods.<sup>27</sup>

The provisions for mediation are illustrated in sections 10 and 13 of the 1985 Ordinance. Section 10 of the Ordinance provides that when the written statement is filed, the family court shall fix a date ordinarily of not more than thirty days for a pre-trial hearing of the suit.<sup>28</sup> On the date fixed for pre-trial hearing, the court shall examine the plaint, written statement (if any) and the summary of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties.<sup>29</sup> At the pre-trial hearing, the court ascertains the points at issue between the parties and

<sup>24</sup> M.P. Jain, *Outlines of Indian Legal History*, 5<sup>th</sup> ed., Nagpur, 1999, at p. 31, in supra note 43, at p. 103.

<sup>25</sup> Ibid. at p. 106.

<sup>26</sup> Ordinance No. XVII of 1985

<sup>27</sup> Kazi Rbadul Hoque, *Administration of Justice in Bangladesh*, Dhaka: Asiatic Society of Bangladesh, 2003, pp. 54-55.

<sup>28</sup> Section 10 (1) of the Family Courts Ordinance, 1985.

<sup>29</sup> Section 10(2), Ibid.

attempt to effect a compromise or reconciliation between the parties.<sup>30</sup> Again, Section 13 provides that after the close of evidence of all parties, the family court shall make another effort to effect a compromise or reconciliation between the parties.<sup>31</sup> If such compromise or reconciliation is not possible, the court shall pronounce judgment and, on such judgment, a decree shall follow.<sup>32</sup>

Thus, The 1985 Ordinance provides effective tools to exercise jurisdiction relating to ADR in suits pending before court both at the pre-trial stage and after close of evidence following framing of issues and fixing a date of preliminary hearing.

#### 4.2. *Salish Ain* 2001<sup>33</sup> (The Arbitration Act, 2001)

Bangladesh has recently enacted *Salish Ain* 2001 (the Arbitration Act, 2001) which came into effect on 10<sup>th</sup> April 2001, repealing the Arbitration Act of 1940. The preamble specifically mentions that it is "An Act to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations." However, the Act is also applicable to domestic arbitration. The Act not only provides for arbitration arising from arbitration agreement by an arbitration tribunal to be constituted with a sole arbitrator or multiple arbitrators to be appointed by the parties in terms of such agreement but also in the absence of any such number of arbitrators in the arbitration agreement by three arbitrators. In the case of an arbitration tribunal to be constituted with three arbitrators, if the parties do not agree otherwise, each of the parties shall appoint one arbitrator and such appointed arbitrators shall appoint the third arbitrator who shall be chairman of the arbitration tribunal. If the parties do not agree otherwise in case when parties would appoint equal numbers of arbitrators such arbitrators collectively shall appoint an additional arbitrator who shall perform the responsibility of the Chairman of the arbitration tribunal.<sup>34</sup> In the absence of any agreed mode of appointment on the failure of one of the parties to agree to the appointment of a sole arbitrator or one of the arbitrators to be appointed by each of the parties within thirty days from the receipt of a request from the other party or when appointed arbitrators fail to agree to the appointment of the third arbitrator within next thirty days of their appointment on the application on any of the parties, the Civil Court shall appoint such arbitrator except in respect of International Commercial arbitration in which case the Chief Justice or any

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<sup>30</sup> Section 10(3), Ibid

<sup>31</sup> Section 13(1), Ibid

<sup>32</sup> Section 13(2), Ibid

<sup>33</sup> Act No. 1 of 2001.

<sup>34</sup> Section II of the Arbitration Act, 2001.

other judge of the Supreme Court nominated by the Chief Justice shall appoint such arbitrator.<sup>35</sup> If all the parties agree, the tribunal may use mediation, conciliation or any other procedures at any time during the arbitral proceedings to encourage settlement.<sup>36</sup> Subject to the parties' agreement, the tribunal may appoint experts, legal advisers or assessors to assist it on specific issues.<sup>37</sup> Award of the arbitration tribunal is binding on the parties.<sup>38</sup>

#### 4.3. The *Artha Rin Adalat Ain* 2003

*Artha Rin Adalat Ain* of 2003 has become effective from 1<sup>st</sup> May, 2003. It has repealed the previously enacted *Artha Rin Adalat Ain* of 1990. In chapter V of the *Artha Rin Adalat Ain* 2003 provisions have been made for ADR through Settlement Conference and Arbitration.<sup>39</sup> Section 21 of this Act provides for Settlement Conference<sup>40</sup> while section 22 deals with arbitration.

According to the provision of the *Artha Rin Adalat Ain* 2003, Settlement Conference shall be called by the presiding judge of the *Artha Rin Adalat* after filing of written statement by the defendant in the suit for recovery of loan with interest, filed by a financial institution to be attended by the parties, their lawyers and representatives after staying all further proceedings of that suit.<sup>41</sup> Settlement Conference shall be held in camera and the judge of the *Artha Rin Adalat* shall preside over such conference.<sup>42</sup> The Court shall explain the points of disputes between the parties, their lawyers and the representatives and shall streamline his endeavours in arriving at a settlement, but in such efforts, the Court shall not exert any influence upon the parties to accept his own proposal.<sup>43</sup> If any settlement is reached in such conference between the parties, an agreement incorporating the terms of settlement shall have to be signed by the parties and attested by the lawyers and representatives present and an order or decree shall be passed by the Court on the basis of the same.<sup>44</sup> The process of settling the of dispute

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<sup>35</sup> Section 12, *ibid.*

<sup>36</sup> Section 22, *ibid.*

<sup>37</sup> Section 32, *ibid.*

<sup>38</sup> Section 39, *ibid.*

<sup>39</sup> *Supra* note 5 at p. 56.

<sup>40</sup> According to explanation to Section 21 Settlement Conference means the conference consisting of parties to the suit, their lawyers and representatives and presided over by the judge of the *Artha Rin Adalat* for disposing disputes in an informal, non-binding confidential, non-adversarial manner.

<sup>41</sup> Section 21(1) of the *Artha Rin Adalat Ain* 2003.

<sup>42</sup> Section 21 (2), *ibid.*

<sup>43</sup> Section 21 (3), *ibid.*

<sup>44</sup> Section 21 (4), *ibid.*

shall be completed within 60 days of passing order by the Court for settling the dispute through Settlement Conference and such time can be extended not exceeding 30 days on the basis of written representation of the disputed parties or courts' own initiatives.<sup>45</sup> If no settlement could be reached in such a conference there, unless the presiding Judge of that Court has been transferred in the meantime, the suit shall be transferred to another Court having jurisdiction in the matter to be proceeded with from the stage at which settlement conference commenced as if there had been no proceeding for holding Settlement Conference.<sup>46</sup>

It is further enunciated that any suggestions, advice or counseling amongst the parties, their lawyers and the representatives, comment or deposition shall be considered to be strictly confidential and at later stage the aforesaid matters cannot be cited or shall not be accepted as evidence.<sup>47</sup> It is also mentioned that if the dispute is settled through Settlement Conference the court shall order to refund the court fees deposited with the plaint and written statement upon the application of any of the parties.<sup>48</sup> No appeal or revision shall lie in the higher court against any order or decree passed by the court for the settlement of dispute at the Settlement Conference.<sup>49</sup>

Again Section 22 of the said Act provides that if no order for holding a settlement is made after filing of written statement by the defendant in the suit then the court may *suo motu* or shall at the instance of the parties send the suit to a neutral lawyer, retired judge or retired officer of a Bank or financial institution or to any other suitable person appointed as arbitrator for settlement after staying all further proceeding of the suit. It is important to mention here that if the parties submit petition to the court and agree that they are interested to settle the case through arbitration, it shall be compulsory to the court to send the case for settling through arbitrating efforts.<sup>50</sup> The court shall not specify any procedure of settlement or fix any remuneration for the lawyers. The lawyers, the parties and the arbitrator shall finalise the system of settlement and the fee of the arbitrator and the lawyers on the basis of mutual discussion.<sup>51</sup>

Such arbitration shall be completed within a period of 60 days and on certain ground within a further period of 30 days from the date of order for such arbitration. It has

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<sup>45</sup> Section 21 (5), *ibid.*

<sup>46</sup> Section 21 (6), *ibid.*

<sup>47</sup> Section 21 (8), *ibid.*

<sup>48</sup> Section 21 (9), *ibid.*

<sup>49</sup> Section 21 (10), *ibid.*

<sup>50</sup> Section 21 (1) & (2), *ibid.*

<sup>51</sup> Section 22 (3), *ibid.*

been stated that the parties shall communicate the court in writing within 10 days of arbitration order whether they have been agreed to take step for settling the dispute through arbitration and who has been engaged for settling dispute. Where the parties fail to communicate the court within 10 days of passing the order for settlement of disputes through arbitration, such order shall be cancelled.<sup>52</sup> After arbitration, the arbitrator shall submit report to the court about his arbitration activities without leaking out the secrecy of the parties.<sup>53</sup> If any settlement is reached between the parties in such proceeding an agreement incorporating the term of settlement shall have to be signed by the parties and attested by the arbitrator and lawyers and an order or decree shall be passed by the court on the basis of the same.<sup>54</sup> If no settlement is reached between the parties in such arbitration proceeding, the hearing of the suit shall commence from the stage at which arbitration started as if no preceding for such arbitration had ever taken place.<sup>55</sup> The proceedings of such arbitration shall be confidential and any communication made or conversation etc. held therein shall be deemed privileged and shall neither be referred to nor admissible in evidence in subsequent proceeding of that suit or in any other proceeding.<sup>56</sup> No appeal or revision against any order passed by the court on the basis of such agreement between the parties shall lie before any higher court. When the suit is compromised the court shall order refund of court fees paid to the parties.<sup>57</sup>

#### 4.4. The Code of Civil Procedure (Amendment) Act, 2003

In line with the application of ADR system in the Family Courts and Artha Rin Adalat, Sections 89-A and 89-B have been inserted in the Code of Civil Procedure by the Code of Civil Procedure (Amendment) Act, 2003 for settlement of civil disputes through ADR. The two terms namely, 'Mediation'<sup>1</sup> and 'Arbitration' have been mentioned in Sections 89 A, 89-B respectively.

The newly inserted Section 89-A of the Code empowers the Civil Court, after filing of written statement in the suit, if all the contesting parties are in attendance in the court in person or by their respective pleader and they are willing to settle the dispute through mediation to mediate or refer the dispute or disputes in the suit to the engaged pleaders or fee parties, or to the party or parties where no pleader or pleaders have

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<sup>52</sup> Section 22 (4), *ibid.*

<sup>53</sup> Section 22 (5), *ibid.*

<sup>54</sup> Section 22 (6) & (7), *ibid.*

<sup>55</sup> Section 22 (8), *ibid.*

<sup>56</sup> Section 22 (9), *ibid.*

<sup>57</sup> Section 22 (10), *ibid.*

been engaged or to a mediator from the panel prepared by the District Judge in consultation with the president of the District Bar Association by adjourning the hearing of the suit for settlement through mediation.<sup>58</sup> When the reference is made through the pleaders of the parties., they shall with the consent of their clients appoint a neutral pleader, retired judge, or a mediator from the name prepared by the District Judge or any other suitable person for settlement.<sup>59</sup> Within 10 days from the date of reference for mediation, the parties shall inform the court in writing as to whether they have agreed to try to settle the disputes or disputes in the suit through mediation, failing which the reference will stand cancelled and the suit shall be proceeded with for hearing by the Court. If the parties inform the Court about their agreement to try to settle the disputes through mediation and appointment of mediator, the mediation shall be concluded within 60 days from the day on which the court is so informed unless court extends the period for further 30 days.<sup>60</sup> The mediator shall submit a report to the court about the result of the mediation proceeding and if the results is of compromise of the dispute or disputes in the suit, the terms of such compromise shall be reduced into writing in the form of an agreement bearing signatures or left thumb impressions of the parties as executants and signature of the pleaders and mediator as witnesses and then the Court shall pass an order or decree on the basis of the same.<sup>61</sup> If the mediation fails unless the mediation is by the court itself, the suit shall proceed with the hearing from the stage at which, mediation commenced as if there had been no decision for mediation.<sup>62</sup> If the Court itself was the mediator then on the failure of meditation another Court having jurisdiction in the matter shall proceed with further hearing of the suit.<sup>63</sup> The proceedings of such mediation shall be confidential and any communication etc. made or conversation etc. held therein shall be deemed privileged and shall not be referred to and admissible in evidence in any subsequent hearing of the same suit or any other proceeding.<sup>64</sup> No appeal or revision against any order or decree passed by the Court in pursuance of such settlement shall lie.<sup>65</sup> When a suit is settled or compromised by mediation the court shall order refund of the courts fees paid by the parties.<sup>66</sup>

<sup>58</sup> Section 89- A (1), of the Code of Civil Procedure (Amendment) Act, 2003.

<sup>59</sup> Section 89- A (2), *ibid.*

<sup>60</sup> Section 89- A (4), *ibid.*

<sup>61</sup> Section 89- A (5), *ibid.*

<sup>62</sup> Section 89- A (7), *ibid.*

<sup>63</sup> Section 89- A (9), *ibid.*

<sup>64</sup> Section 89- A (8), *ibid.*

<sup>65</sup> Section 89- A (12), *ibid.*

<sup>66</sup> Section 89- A (11), *ibid.*

Similarly provision of Section 89-B of the Code empowers the Civil Court to allow withdrawal of the suit on the application of the parties for reference of the dispute or disputes into arbitration. Such an application shall be deemed to be an arbitration agreement under section 9 of *Salish Ain* 2001. If no arbitration takes place or arbitration fails then the parties shall be entitled to re-institute the suit withdrawn earlier.

#### **4.5. The Code of Civil Procedure (Amendment) Act, 2006**

Recently a new provision has been inserted in the Code of Civil Procedure for mediation in appeal. The Code of Civil Procedure (Amendment) Act, 2006 provides that an appellate court may mediate in appeal or refer the appeal for mediation in order to settle the dispute or disputes in that appeal, if the appeal is an appeal from original decree under Order XLI, and is between the same parties who contested in the original suit or the parties who have been substituted for the original contesting parties.<sup>67</sup> In mediation under this provision, the Appellate Court shall, as far as possible, follow the provisions of mediation contained in section 89-A with necessary changes as may be possible.<sup>68</sup>

### **5. Successes of ADR in Bangladesh**

The adoption of ADR system is new in the sense that it has been the part and parcel of the formal legal system only for two decades. But insertion of ADR mechanism by The Code of Civil Procedure (Amendment) Act of 2003 and 2006 has contributed much in the way of development of ADR in Bangladesh. Although there are several hurdles in the way of ADR in civil litigation, it has attained some successes.

#### **5.1. Successes of ADR in Family Court**

Family court was established by the Family Courts Ordinance, 1985. The provision for mediation has been contained in sections 10 and 13 of the Family Courts Ordinance, 1985. This provision was reluctantly need by the Judges of Family Courts bank till adoption of a pilot project in 2000 by the Government headed by the former Chief Justice Mostafa Kamal in co-operation with the Institution for the Study and Development of Legal Systems (ISDLS), a USA agency, to settle family disputes in selected Family Court by negotiation, mediation and arbitration. Under the project three pilot courts were set up at Dhaka judgeship. Accordingly two pilot course started functioning from 01 June, 2000 and the other from 1 January, 2001 at Dhaka

<sup>67</sup> Section 89- C (1) of the Code of Civil Procedure (Amendment) Act, 2006.

<sup>68</sup> Section 89- C (2), *ibid*.

judgeship. Later on more pilot courts were set up in many district headquarters. Now there are 3 Pilot courts at Dhaka, 2 at Chittagong and 1 each at Sylhet, Rajshahi, Khulna, Bogra, Jessore Rangpur, Kushtia, Comilla, Faridpur, Barisal, and Mymensingh. Out of 64 districts, only 16 have pilot courts. From 1985 to 2000 the total money realized in connection with Family Court cases of the three pilot courts at Dhaka is Tk. 61,99,759.50 whereas the total realization through mediation since the introduction in the same courts from June 2000 up to 16<sup>th</sup> May 2001 i.e. twelve months is Tk. 50,94,501.00.<sup>69</sup> According to another statistics from 1995 to 1999, the total money realized in connection with Family Court cases by the Dhaka Judgeship is Tk. 30,27,130.00 whereas the total realization through mediation since the introduction of mediation from June 2000 up to 28 February 2002 i.e. in twenty months is Tk. 89,68,202.00.<sup>70</sup> On 12-02-2001 a Family Court started functioning in Chittagong with 570 cases. Out of which 117 cases have been disposed of through mediation and Tk. 73,55,000.00 have been realised. Previously the average yearly realization through execution cases was only Tk. 12,38,224.00.<sup>71</sup>

### Case study

In *Mst. Ajufa Begum V Md. Ataur Rahman*,<sup>72</sup> the fact of the case is that the plaintiff and the defendant made a marriage contract in 1981 by a registered *Kabin Nama* and the dower money was fixed at Tk. 100,000. The defendant took Tk. 100,000 from the plaintiff's father and went to Malaysia for doing job there. As he could not earn sufficient money there, he came back home on 02.03.1999. After return, he further asked the plaintiff to give him Tk.- 100,000 to start a business. The plaintiff having failed to pay the said amount of money, the defendant was misbehaved with the plaintiff and beat her up brutally for several times. Then she came back to her father's house on 05.10.99. On 29.11.99, the defendant brought the plaintiff to his house again. But the defendant continued the same brutal torture as earlier. Then the plaintiff returned back to her father's house again and filed the suit on 24.02.03 for realisation of money for maintenance. On 30.09.03 the trial court succeeded to mediate the disputes between the parties. According to the terms of the mediation Tk. 50,000 was realized from the defendant and the case was disposed of.

<sup>69</sup> Quoted by Hasan, Justice K.M., A Report on Mediation in the Family Courts: Bangladesh Experience, presented in the 25<sup>th</sup> Anniversary Conference of the Family Courts of Australia held in Sydney, 26-29 July 2001.

<sup>70</sup> Quoted by Islam. Md. Nur, see supra note 2.

<sup>71</sup> Ibid.

<sup>72</sup> Family Suit no. 169 of 2003, 2<sup>nd</sup> Assistant Judge & Family Court, Dhaka (unreported).

Thus, it is clear that the disposal of cases in the family court by the mediation of the court is effective.

### 5.2. Successes of ADR under the Code of Civil Procedure

The ADR system introduced in the Code of Civil Procedure is cost-effective and time-saving. Such provision will help the judiciary to relieve it from the backlog of cases and reduce the workload. In Section 89-A it is said that mediation is possible only when all the contesting parties in the suit through application or pleading state to the court that they are willing to settle the dispute. Again, in case of mediation the court cannot dictate the procedure to be followed by the mediator and the parties. Thus, mediation in the Code of Civil Procedure is a flexible and an adaptable procedure. Here, parties can settle their disputes through mediation in their favourable way since it is a non-binding procedure. Moreover, if the parties settle their disputes through mediation, the court fees shall be refunded. So, the provision of newly ADR system in the Code of Civil Procedure deserves admiration. The procedure relating to mediation is not cumbersome. Needless to say, it will ensure access to justice for all and facilitate to get justice expeditiously without suffering for a long time.

To show the efficacy of the newly enacted law we can refer to a statistics which reveals that 7974 civil suits were disposed of during the last two years from July 2003 to June 2005 through ADR across the country.<sup>73</sup> For better understanding of the successes of ADR in civil court governed by the Code of Civil Procedure (Amendment) Act, 2003 some case studies are mentioned below.

#### Case study

In *Shamur Begum v Rashida Parvin Monee and others*<sup>74</sup> the fact of the suit was that one Shamsul Hoque (Salim) was the owner of the schedule land mentioned in the plaint. He was killed by an unknown assailant. He left behind his mother Shanur Begum, wife Rashida Parvin Monee, a son and two daughters. Rashida Parvin, the defendant no. 1 along with her son and daughters was in possession of the said property and enjoying it after the death of her husband said Shamsul Hoque (Salim). The plaintiff, the mother of the dead Shamsul Hoque (Salim), had a share of 1/6 in the undivided property of Shamsul Hoque (Salim). As a dispute arose regarding the share

<sup>73</sup> Barrister Moudud Ahmed. Former Minister for Law, Justice Parliamentary Affairs while addressing in a press conference, The Bangladesh Observer, 27<sup>th</sup> July 2005, Internet edition, see <http://www.bangladeshobserveronline.com/new/2005/07/27/front.htm> <last visited 12.05.2006>

<sup>74</sup> Civil Suit no. 159 of 2003, Senior Assistant Judge 6<sup>th</sup> Court, Dhaka (unreported).

in the property the plaintiff filed the suit on 07.01.03 for partition of the property. The suit was finally settled through mediation on 03.01.04 and Shanur Begum achieved decree in her favour and got 1/6 of the property.

### 5.3. Successes of ADR under the *Artha Rin Adalat Ain 2003*

The successes of ADR under the *Artha Rin Adalat Ain 2003* deserve admiration. In chapter V of the *Artha Rin Adalat Ain 2003*, provisions have been made for ADR through Settlement Conference and Arbitration. Section 21 of the Act deals with Settlement Conference while section 22 deals with Arbitration as a means of resolving disputes in alternative way. Both the procedures are flexible and hence conducive enough to put the ADR mechanism into practice in the *Artha Rin Adalat* effectively. Here the judge cannot exert any influence upon the parties to accept his own proposals. Only what he can do is that he can streamline his endeavours in arriving at a settlement. Since both the Settlement Conference and Arbitration is held in camera, the confidentiality of the parties' case is preserved which tend to encourage the parties in arriving at settlement. Such conference or arbitration proceeding shall be completed within 60 days which can be extended on the basis of certain grounds a further period of 30 days from the date of order for such conference or proceeding. By inserting such provision in the *Artha Rin Ada* at Ain, 2003, the time is saved and delay has been reduced. Again, it has been enunciated that if any settlement is reached the court fees will be refunded to the parties. Since the ADR procedure reduces cost and saves time in litigation, it has been proved effective and fruitful ensuring access to justice in *Artha Rin Adalat*.

The ADR system in *Artha Rin Adalat Ain* has also earned a tremendous success in recovery of loan money. Till June, 2005, the Government has recovered Tk. 214,9,53, 101.33 by applying ADR methods. Of the total 21,587 *Artha Rin* cases settled from the enactment of new *Artha Rin Adalat Ain*, 2003 till April 30, 2005, some 3,354 cases were disposed under Section 13, 1,097 cases under Section 21 and 177 cases under Section 22 through ADR, which is a major part of the new law that came into effect from May 1, 2003.<sup>75</sup> Again, both the public and private banks and financial institutions recovered default loans of Taka 2,059.93 crore or 22.27 percent of the claimed amount of Taka 9,250.73 crore during the last two years after enactment of the *Artha Rin Adalat Ain 2003*.<sup>76</sup> According to another statistics, from May 2003 to April 30, 2005 a total default loan of Taka about 2360 crore was recovered. During the period, a total of 21778 loan cases were disposed of. A total of Taka 1420.35 was recovered in Dhaka

<sup>75</sup> The Bangladesh Observer, June 2005, Internet edition, see <http://www.bganlade.shobserveronline.com/new/2005/06/01/front.htm> <last visited 26.05.06>

<sup>76</sup> Ibid

Division against the demanded default loan of taka 5035.30 crore, taka 348.86 crore in Chittagong Division against taka 1720.78 crore, taka 278.51 crore in Rajshahi Division against taka 1301.66 crore, taka 239.76 crore in Khulna Division against taka 1207.54 crore, taka 36.44 crore in Barisal Division against taka 99.75 crore and taka 35.97 crore in Sylhet Division against taka 51.68 crore.<sup>77</sup>

## 6. Obstacles to effective ADR mechanism

Towards institutionalised ADR mechanism there are many hurdles which impede the effective application of this system. Some problems and barriers can be identified in the following manner.

### 6.1. Anomalies in legislation

According to Section 89-A of the Code of Civil Procedure (Amendment) Act, 2003, after filing of written statement, if all the contesting parties are in attendance in the court in person or by their respective pleaders, the court may by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit or refer the dispute or disputes in the said suit to the pleaders, or where no pleaders have been engaged to mediator for undertaking efforts for settlement through mediation. But in proviso to section 89A (1) it is said that the court can take initiatives for settlement of dispute through mediation only when the parties state to the court that they are willing to try to settle the dispute through mediation. So, unanimity of the parties is the precondition of mediation. Therefore, when the parties are not agreed mediation will not be effective. Furthermore, Sec. 89-B stipulates that the dispute shall be settled in accordance with *Salish Ain* 2001 (the Arbitration Act, 2001) so far as may be applicable. But the procedure of the Arbitration Act is cumbersome. As a result, it frustrates the aim of ADR method.

Another significant procedural flaw is that where according to *Artha Rin Adalat Ain* 2003 the Settlement Conference must be held in camera but in the newly enacted the Code of Civil Procedure (Amendment) Act, 2003 contains no such provision which dishearten the parties to settle dispute through mediation.

Both the Code of Civil Procedure (Amendment) Act, 2003 and the *Artha Rin Adalat Ain* 2003 provides provisions for refund of the court fees paid by the parties in respect of plaint or written statement. It can be argued that since the judicial sector has yet not been declared as 'Service Sector' the Government may face heavy loss in respect to procurement of court fees.

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<sup>77</sup> Ibid.

## 6.2. Corruption and mismanagement

Our judiciary and other related institutions are still not efficient and organised enough to put the ADR mechanism into action effectively. So it has been facing obstacles due to introduction of the ADR system in the *Artha Rin Adalat Ain* and other legislations mentioned above. To commence ADR in *Artha Rin Adalat*, agreement between the parties is essential as per the law. Moreover, both the parties has to come forward with pro-active and problem solving attitude during the ADR proceeding in order to settle dispute amicably through mediation. But, some corrupt government officials or employees in the financial sectors are pampered to indulge themselves in corruption and irregularities and, as such, the government may incur severe financial loss, injury and irregularities. The obvious result is failure of ADR proceeding due to abuse of this unique legal novelty.

## 6.3. Lack of pro-active attitudes among related actors

The lawyers and judges in common law tradition and adversarial system has always been very suspicious of ADR as a competing system of dispute resolution, considering a threat to the proper dispensation of justice and seeking to restrict its use.<sup>78</sup>

From the conventional perspective of most modern legal culture like ours, judges are supposed to judge (not mediate), to apply law (not interest), to evaluate (not facilitate), to order (not accommodate) and to decide (not settle).<sup>79</sup> Judges may see mediation as potentially undermining their authority to make public judgments and normative pronouncements. Furthermore, professional incentives may discourage judicial support for ADR. For example, judges may feel they will lose the professional satisfaction of issuing judgments if cases settle and also may be evaluated on the number of "legal" dispositions they reach, excluding settlements. Judges quickly see, however, that effective ADR depends on (while complementing) the core function of adjudication. Furthermore, many judges will take as much satisfaction, some even more, from settling difficult cases, particularly in ways that please both parties (rather than only one, as in litigation). Already the methodologies for evaluating judicial performance have been adjusted to take the relative value of settlements into account. A circular to this effect already have issued that every successful mediation by the judges concerned would get two credits and for every failed mediation one credit.<sup>80</sup>

<sup>78</sup> Abdullah-Al-Faruque, "Promoting Access to Justice Through Judicial Mediation" : The Bangladesh Experience. Paper presented in the "Commonwealth Legal Education Association Regional Conference 2006, July 28-30, 2006, New Delhi, pp. 46-53, p. 48.

<sup>79</sup> Hiram E. Chodosh, 'Judicial Mediation and Legal Culture' in Issues of Democracy > IIP Electronic Journals, Vol. 4, No. 3, December 1999

<sup>80</sup> Justice K. M Hasan, "A.Report On Mediation In The Family Courts: Bangladesh Experience"

The other related actor lawyers also may be understandably concerned that ADR threatens their livelihood by reducing the number of matters they handle or fees they charge. If more disputes are to be mediated, lawyers might view ADR as nothing more than an "alarming drop in revenues." They may encounter pricing problems in how to charge for their role in ADR. Additionally, they may wonder about the value of their own role in a party-dominated process and how they will act as zealous advocates when their parties do not want to settle and engage in a process that calls for cooperation (which may be a sign of weakness in trial).

### **7. Towards a better and effective ADR mechanism**

Being the delay is a common phenomenon in Bangladeshi legal system, the ADR techniques have been adopted recently in order to find out a way to get rid of it. Although ADR mechanism in Bangladesh is yet to become institutionalized but it may facilitate our justice delivery process, which is observed to be highly appreciated as it will open a new horizon in our legal firmament. Multi-faceted approach is to be taken since implementing any plan to introduce mediation will require taking number of actions in parallel, from appropriate legislation, court rules to training and awareness courses. For successful functioning of ADR system the following measures can be suggested.

#### **7.1. Generating pro-active attitude among related actors**

Legal resources have to be developed among the rural poor by providing them with pro-active lawyers and judges prone to rights of marginalized section of the people. It is necessary to change the attitude of the lawyers. They should have the will to suggest the disputing parties to resolve the dispute by ADR techniques. They have to uphold their morality. They should disseminate among the people about the advantages of various ADR methods. Social awareness programme should be undertaken to make the common people interested to adopt ADR methods. Finally, the culture and mindset of the people should be changed to make ADR an effective method.

#### **7.2. Developing efficient human resources**

In our country, the judges and lawyers are not trained enough to deal with ADR methods. As a result, the ADR programmes have not attained to its expected success. So it is highly imperative to create an opportunity for imparting training to the judges and lawyers of the court. More and more lawyers have to be brought into the training net and a training institute for mediators should be established. The Law Commission Chairman J. Kamal opines that no one should be appointed as a mediator unless he/she

has a certificate from the institute. Retired judges who are respected by both the Bar and Bench should come forward to give leadership.<sup>81</sup>

### 7.3. Removing anomalies in legislation

An amendment in the Code of Civil Procedure is essential so that the court can initiate mediation or arbitration not only after filing of the written statement but also at any stage of the suit so that backlog of cases are reduced.

In our country, the Government is the major litigant either as a plaintiff or defendant. Under P.O. No. 142 of 1972, the Government is a necessary party in all title suits, suits for specific performance of contract and so on. In most cases the Government does not find, at any rate for the time being, any interest involved in the case. Yet when the parties in dispute compromise the matter, even without mediation, the option remains for the Government to challenge the compromise at a belated stage, claiming an interest in the subject matter of litigation. Thus the Government is responsible in many cases to prolong the litigation. To make the ADR successful, P.O. No. 142 of 1972 should be amended providing that where in a case covered by P.O. No. 142 of 1972, the Government do not enter appearance or after entering appearance do not file any written statement, or after filing a written statement do not contest the case, any resolution of the dispute through ADR or otherwise by the other parties to the dispute would be binding on the Government.<sup>82</sup>

### 8. Conclusion

ADR is not a panacea for all evils but an alternative route to a more speedy and less expensive mode of settlement of disputes. It is a voluntary and cooperative way to get out of the impasse. The ADR in Bangladesh is a step towards the access to justice for all. While the traditional legal system has, to a large extent, failed to ensure access to justice for all, the ADR has instilled hope in the minds of the litigant parties. As a result, time is saved and the cost of seeking justice has become within the reach of the common people. The success of ADR system in *Artha Rin Adalat* and other civil courts has encouraged the investment from the country and abroad and thereby the development process of the country increased. As ADR in our formal legal system is a new one, it will take some time to reap benefits from it to the fullest extent. To make the ADR a successful mechanism both the Bench and the Bar should work together.

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<sup>81</sup> This opinion is given by Justice Mostafa Kamal in a Roundtable on 'Review of the Family Courts Ordinance 1985' at the CIRDAP Auditorium on April 28, 2007, cited in The Daily Star, April 29, 2007.

<sup>82</sup> Ibid.