

**PROBLEMS OF ALTERNATIVE DISPUTE RESOLUTION  
MECHANISMS AND PROPOSALS FOR IMPROVEMENT: A STUDY  
IN BANGLADESH**

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**Abstract**

*Alternative Dispute Resolution (ADR) is an alternative to a full-scale court proceeding and is applied in different situations in different ways, both formally and informally, mostly in civil cases in Bangladesh. Traditionally, people in rural areas have preferred to settle their disputes by the ADR process particularly, negotiation, mediation, conciliation and arbitration because this process is less time consuming and cheaper as well. An ADR process is very popular in Bangladesh as both the plaintiff and the defendant get their benefits from this process and as a matter of fact, the ADR reduces the work load of a formal judicial system in Bangladesh to a great extent. However, the laws relevant to the ADR processes are inadequate in various legal and litigative aspects and perspectives and there is no uniform law for the ADR in Bangladesh. Therefore, this research will critically analyze the existing laws relevant to the ADR and will suggest some guidelines to improve the existing process in Bangladesh by adopting qualitative research method.*

Keywords: ADR, Alternative, Bangladesh Court, Dispute, Resolution.

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## **INTRODUCTION**

ADR is a term generally used to refer to informal dispute resolution processes in which the parties meet with a professional third party who helps them resolve their dispute in a way that is less formal and often more consensual than is done in the courts.<sup>1</sup> While the most common forms of ADR are mediation and arbitration, there are also many other forms, in particular, judicial settlement conferences, fact-finding, ombudsmen, special masters and others.<sup>2</sup> Albeit often voluntary, the ADR is sometimes mandated by the competent courts. An ADR can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini trials that look and feel very much like a courtroom process. Processes designed to manage a community tension or to facilitate community development issues can also be included within the rubric of the ADR, the systems of which may be generally categorized as negotiation, conciliation, mediation, or arbitration systems.<sup>3</sup> Negotiation systems create a structure to encourage and facilitate a direct negotiation between parties to a dispute, without the intervention of a third party. Mediation and conciliation systems are very similar in that they interject a third party between the disputants, either to mediate a specific dispute or to reconcile their relationship.<sup>4</sup> Mediators and conciliators may simply facilitate communicative interchange, or may help direct a speedy structure settlement, but they do not have the authority to decide or rule on a settlement. Arbitration systems authorize a third party to decide on how a dispute should be amicably resolved without recourse to further litigation.<sup>5</sup>

It is important to distinguish between the binding and the non-binding forms of the ADR. Negotiation, mediation, and conciliation programs are non-binding, and scrupulously depend on the willingness of the parties to reach a voluntary agreement. Arbitration programs may be either binding or non-binding.<sup>6</sup> A binding arbitration produces a third party decision that the disputants must follow even if they disagree with the result, similar to a judicial decision. A non-binding arbitration produces a third party decision that the parties may reject. It is also important to distinguish between the mandatory processes and the voluntary processes wherein some judicial systems require litigants to negotiate, conciliate, mediate, or arbitrate prior to a court action. ADR processes may also be required as part of a prior contractual agreement between the parties. In voluntary processes, submission of a dispute to an ADR process depends entirely on the will of the parties.<sup>7</sup>

## **EXISTING LAWS RELATED TO ADR IN BANGLADESH**

### **Amendments of Civil Procedure Code 1908**

Sections 89A and 89B of the Code of Civil Procedure, 1908, deal with the provision for mediation. The application for a mediation may be submitted by both parties at any stage after filing the written statement that they will mediate the dispute after which the court would adjourn the proceeding for mediation. The Judge himself can mediate on the dispute under this section. The fee of the mediator shall be fixed by the parties and if the court mediates the dispute itself, the judge cannot claim any fee or charge for it. Within ten days after the order for mediation, both parties will serve notice in writing to the court on the progress of initiation for mediation and the mediation procedure will have to be completed within 60 days which can be extended to a further 30 days if necessary. If the mediation

becomes successful, the mediator will draft an agreement on such terms and conditions as the parties have mutually agreed upon. The parties will sign on the established agreement after which the lawyers and representatives will then sign as witnesses. This agreement will be submitted to the court which will pass a decree. If the Judge mediates the dispute, he will also follow the same procedure as explained above. If the mediation procedure fails, the proceedings of the suit will start from the stage it has been stopped before mediation. If the mediation succeeds to adduce a statement, evidence or other statements made at the time of mediation, this can then be used at the time of trial of the suit.

### **Family Courts Ordinance 1985**

When the written statement is filed by the defendant, the Family Court will fix a date normally not more than thirty days from the date of filing the written statement for a pre-trial hearing of the suit. On the date fixed for the pre-trial hearing, the Court shall examine the written statement and documents filed by the parties and shall ascertain the points in issue between the parties. If no compromise or reconciliation is possible, the Court will frame the issues in the suit and fix a date for recording evidence.<sup>8</sup>

### **The Arbitration Act 2001**

An arbitration in Bangladesh is governed by the Arbitration Act 2001. This Act repealed both the Arbitration (Protocol and Convention) Act 1937 and the Arbitration Act of 1940 and consolidates the domestic and international arbitration regime in Bangladesh. The Act provides that an arbitral tribunal may rule on its own jurisdiction that an arbitral tribunal will not be bound by the Code of Civil Procedure and Evidence Act of Bangladesh and that the arbitral tribunal shall follow the procedure to be agreed on by the parties.<sup>9</sup>

Disputes arising from contracts are usually settled through an arbitration in which these disputes are generally commercial in nature involving employment contracts, government contracts, contracts relating to business transactions, etc. The contracts must contain a clause, agreement or reference stating that the disputes will be resolved through an arbitration. As a result the arbitration must be conducted under the rules of the *Arbitration Act 2001* and the rules of the Bangladesh Council for Arbitration. The arbitrations can take place where the parties choose or at the Bangladesh Council for Arbitration.<sup>10</sup>

### **The Village Courts Act 2006**

On application of any party to any dispute or conflict, the chairman of the Union *Parishad* concerned can form a village court<sup>11</sup> which is composed of the Chairman of the Union *Parishad* and four representatives – two from each party one of whom must be a member of the *Parishad*.<sup>12</sup> Normally, the Chairman of the Union *Parishad* acts as the Chairman of the court, but whenever he is, for any reason, unable to act or his impartiality is questioned by any party to the dispute, any member of the *Parishad* can act as the Chairman.<sup>13</sup> The Village Courts have an exclusive jurisdiction to try all disputes that are enumerated in a schedule to the Act.<sup>14</sup>

**The Conciliation of Disputes (Municipal Areas) Board Act, 2004**

In every *Paurashava*, there is a dispute conciliation board. The Disputes Conciliation (Municipal Areas) Board Act, 2004 regulates the formation, jurisdiction and function of this adjudication body. The boards are structured and operated in the same way as the village courts, and have an exclusive jurisdiction to try all disputes specified in the schedule to the Act.<sup>15</sup> The list of offences is the same as that are tried by the village courts. However, commission of any of these offences by a person who had earlier been convicted for any cognizable offence falls outside the jurisdiction of the boards.<sup>16</sup> Besides, if an offence amenable to the jurisdiction of a board is committed along with another offence not amenable to its jurisdiction then a joint trial becomes necessary and the board shall not exercise its jurisdiction to try the offence.<sup>17</sup> As in the case of the village courts, the boards cannot pass any order of imprisonment or fine. The only adjudication option is the order of compensation.<sup>18</sup>

**The Artha Rin Adalat Ain 2003/ the Money Loan Court Act 2003**

Sections 21 and 22 of the Artha Rin Adalat Ain, 2003 provide for the Settlement Conference after the filing of a written statement. The Judge may request the parties and their lawyers to remain present in Court to resolve the dispute. The Judge will convene the meeting and fix up the venue, procedure and function and the conference will be in camera in which the Judge will explain the matter in dispute before the parties or representatives, identifying their issues in dispute. If the parties or their representatives agree to resolve the dispute, they will sign the agreement and the lawyers and others will then sign as witnesses after which the Judge will pass a decree on the basis of the agreement and no appeal or revision can be filed from the decree passed on the settlement conference.<sup>19</sup>

**Muslim Family Laws Ordinance, 1961**

In family disputes, an alternative to the arbitration is also possible. The *Muslim Family Laws Ordinance 1961* provides that the Arbitration Council can be set up by the Chairman of a local administrative Unit (otherwise known as Union Parishad) to resolve disputes relating to a divorce, for example. Polygamous marriages contracted without the permission of the relevant authorities are not rendered invalid, nor is there a penalty for failing to obtain the present wife's consent as long as the Council has permitted the polygamous marriage. In *Jesmin Sultana v. Mohammad Elias*<sup>20</sup> the Court ruled that section 6 of the Ordinance prohibiting the contracting of a polygamous marriage without the prior permission of the Arbitration Council is against the principles of the Islamic law.

**The Code of Criminal Procedure, 1898**

Section 345 of the Code of Criminal Procedure provides for compounding of offences. Through Ordinance Nos. XLIX of 1978 and LX of 1982 some more offences of the Penal Code have been added in the list of compounding offences but the procedure provided therein being obsolete is required to be modified otherwise it will not give the parties a chance to avoid adversarial litigation altogether.<sup>21</sup>

### **The Bangladesh Labour Act 2006**

The conciliation machinery is undoubtedly an important element of our industrial relation system. A conciliation in an industrial dispute becomes necessary mainly when the settlement of disputes fail at the bipartite negotiation level. In fact a conciliation can be taken as an extension of the function of a collective bargaining or simply as an “assisted collective bargaining” in which the conflicting parties can have a fair chance of settlement of industrial disputes through the services of expert negotiators. If a bipartite negotiation fails, any of the parties concerned may request the conciliator<sup>22</sup> in writing to conciliate the dispute within 15 days from the date of the failure of collective bargaining.<sup>23</sup> The practice of conciliation is compulsory in Bangladesh before resorting to any industrial action. The role of the conciliator is to suggest solutions that can help find a compromise between the workers and the management, but he cannot impose a solution. The success of a conciliation depends on the willingness of the two sides to resolve their differences. If a settlement of the dispute is arrived at in the course of a conciliation, the conciliator shall send a report thereof to the Government together with a memorandum of settlement signed by the parties to the dispute.<sup>24</sup> If the conciliation fails, the conciliator will try to persuade the parties to agree to refer the dispute to an Arbitrator for a settlement.<sup>25</sup> If the parties do not agree to refer the dispute to an Arbitrator for a settlement, the Conciliator shall, within three days of the failure of the conciliation proceedings, give a certificate thereof to the parties.<sup>26</sup> The conciliation proceedings may continue for more than thirty days if the parties agree.<sup>27</sup> The Director of Labour may, at any time, proceed with the conciliation proceedings, withdraw the same from a conciliator or transfer the same to any other conciliator, after which the other provisions of this section shall apply thereto.<sup>28</sup> An arbitration is a voluntary process for the settlement of an industrial dispute. When a conciliation fails, an arbitration may prove to be a satisfactory and most enlightened method of resolving an industrial dispute.<sup>29</sup> If the conciliation fails, the conciliator tries to persuade the parties to refer their dispute to an arbitrator.<sup>30</sup> If the parties agree to refer the dispute to an arbitrator for a settlement, they shall then make a joint request in writing to the arbitrator agreed upon by them. The arbitrator shall give his award within a period of thirty days from the date on which the dispute is referred to him or such further period as may be agreed upon by the parties to the dispute. After he has made an award, the arbitrator shall forward a copy thereof to the parties and to the Government. The award of the arbitrator is final and no appeal shall lie against it. An award shall be valid for a period of not exceeding two years, as may be fixed by the arbitrator. In practice, no dispute is referred to the Arbitrator due to the fact that either the dispute is settled at the time of conciliation or if it fails the parties shall have the choice to go to the Labour Court rather than going for an arbitration.<sup>31</sup>

### **EXISTING MECHANISMS OF ADR IN BANGLADESH**

#### **Arbitration**

An arbitration is a private process where disputing parties agree that one or several individuals can make a decision on the dispute after receiving evidences and hearing arguments. An arbitration is different from a mediation because the neutral arbitrator has the authority to make a decision on the dispute. The arbitration process is similar to a trial in that the parties make opening statements and present evidences to the arbitrator. Compared to the traditional trials, an arbitration can usually be completed more quickly and is less formal. For example, the parties often do not have to follow the state rules of evidence and, in some

cases, the arbitrator is not required to apply the governing law. After a hearing, the arbitrator issues an award where some awards simply announce the decision (a “bare bones” award), and others give reasons (a “reasoned award”).<sup>32</sup>

### **Mediation**

A mediation is a private process where a neutral third person, called a mediator, helps the parties to discuss and try to resolve the dispute. The parties have the opportunity to describe the issues, discuss their interests, understandings, feelings, provide each other with information and explore ideas for the resolution of the dispute. While courts can mandate that certain cases go to a mediation, the process remains ‘voluntary’ in that parties are not required to come to any agreement. The mediator does not have the power to make a decision for the parties, but can help the parties to find a resolution that is mutually acceptable. It is indeed a litigative irony that the only people who can resolve the dispute in a mediation are the parties themselves. There are a number of different ways that a mediation can proceed. Most mediations start with the parties involving together in a joint session. The mediator will describe how the process works, will explain the mediator’s role and will help to establish the ground rules and an agenda for the session. Generally, the parties then make opening statements. Some mediators conduct the entire process in a joint session. However, other mediators will move to separate sessions, shuttling back and forth between the parties. If the parties reach an agreement, the mediator can help reduce the agreement to a written contract which may be enforceable in court.<sup>33</sup>

### **Conciliation**

A conciliation is a type of mediation whereby the parties to a dispute use a neutral third party, called conciliator, who meets with the parties separately in an attempt to resolve their differences. A conciliation differs from an arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek any evidence or call witnesses, usually writes no decision, and makes no award.<sup>34</sup> A conciliation differs from a mediation in that the main goal is to conciliate, most of the time by seeking concessions. In mediation, the mediator tries to guide the discussion in a way that optimizes the parties’ needs, takes feelings into account and frames representations. In conciliation, the parties seldom, if ever, actually face each other across the table in the presence of the conciliator, instead a conciliator meets with the parties separately. Such form of conciliation (mediation) that relies exclusively on caucusing is called “shuttle diplomacy”.<sup>35</sup>

### **Negotiation**

A negotiation is a voluntary and usually informal process in which parties identify issues of concern, explore options for the resolution of the issues, and search for a mutually acceptable agreement to resolve the issues raised. The disputing parties may be represented by attorneys in the negotiation. A negotiation is different from a mediation in that there is no neutral individual to assist the parties to negotiate.<sup>36</sup>

### **Ombudsman**

An ombudsman is a third party selected by an institution in particular university, hospital or governmental agency that investigates complaints by the employees, clients or constituents.

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The ombudsman works within the institution to investigate the complaints independently and impartially. The process is voluntary, private and non-binding.<sup>37</sup>

### **Med-Arb.**

It is considered as the blending of mediation and arbitration. Sometimes the mediator shall facilitate and on some cases he may decide on the disputed issues which will be binding upon the parties to follow.<sup>38</sup>

### **Settlement Conferences**

A settlement conference is a meeting in which a judge or magistrate assigned to the case presides over the process. The purpose of the settlement conference is to try to settle a case before the hearing or trial. A settlement conferencing is similar to a mediation in that a neutral third party assists the parties in exploring the settlement options. Settlement conferences are different from a mediation in that settlement conferences are usually shorter and typically have fewer roles for participation of the parties or for consideration of non legal interests.<sup>39</sup>

## **PROBLEMS OF ADR IN BANGLADESH**

A dispute resolution outside of courts is not new in Bangladesh; non-judicial and indigenous methods have been used by the societies for a very long time. But the main problem is that there is no uniform ADR law in Bangladesh. There are a lot of legislations which contain provisions relevant to the ADR process in Bangladesh and there are some well known ADR mechanisms in Bangladesh, such as, mediation, negotiation, conciliation, arbitration and so on.<sup>40</sup> Different legislation has prescribed different ADR mechanisms and different procedures to settle the dispute. This is a problem for the person who acts as a neutral mediator or conciliator because all procedures are different in different cases. Sometimes, the people who are involved in an ADR process are not properly trained and they do not have an adequate knowledge on how to manage and convince the disputants to settle the dispute. Sometimes, the decision of an ADR is biased and politically motivated. For this reason the vulnerable party is not getting a proper justice.

## **CONCLUSION & PROPOSALS FOR IMPROVEMENT**

Although ADR programs can accomplish a great deal, however, no single program can accomplish all these goals. They cannot replace formal judicial systems which are necessary to establish a legal code, redress fundamental social injustice, provide governmental sanction, or provide a court of last resort for disputes that cannot be resolved by voluntary, informal systems. Furthermore, even the best-designed ADR programs under ideal conditions are labour intensive and require extensive management.

In the development context, particular issues arise in considering the potential impacts of the ADR. Firstly, some are concerned that ADR programs will divert citizens from the traditional, community-based dispute resolution systems. This study has found a number of instances in which

the ADR programs have been effectively designed to build upon, and in some cases, improve the traditional informal systems. Secondly, while the ADR programs cannot efficiently handle disputes between parties with greatly differing levels of power, they can be designed to mitigate class differences; in particular and third parties may be chosen to balance out inequalities among the disputants. Thirdly, there is no clear correlation between the national income distribution and the ADR effectiveness. ADR programs are serving important social functions in economies as diverse as of the Bangladesh. Finally, it is not clear from the evidence to date whether the ADR programs are more suitable for civil or common law jurisdictions. However, the ADR programs are operating effectively within both, but not enough data exists to compare the success rates under the two types of legal systems.

This Study is a first step in understanding the strengths and limitations of introducing the ADR within the rule of law programs. While past and present ADR projects have provided some significant insights into the ADR entity, there is still much to be learnt. More pragmatic analyses are needed on the range of possible strategies in using the ADR to support judicial reform, reduce power imbalances, and overcome discriminatory norms among disputants. Another important issue for study is how ADR programs may be replicated and expanded to the national level while maintaining sufficient human and financial resources.

These and other questions on the ADR's effectiveness can only be well answered by analyzing the evidences gathered from the ADR projects. Effective monitoring and evaluation of ADR systems are hard to find in developing and developed countries alike. Present and future ADR projects should have systematic monitoring and valuation processes in place to ensure not only effective programs, but also continued learning.

This study mentions the ADR's ability to advance development objectives other than the rule of law, such as facilitating economic, social and political change, reducing tension in a community, and managing conflicts hindering development initiatives. Further exploration of non-rule of law uses of the ADR is critical to complete the picture of the range of the ADR's applications. Before extension of the frontiers of ADR in Bangladesh can be established, the article would propose the following:

- a) There should be a harmonized uniform ADR legislation in Bangladesh which will be applicable for all types of the relevant cases.
- b) An intensive training of concerned judges, lawyers and the court staff should be mandatory. The training will be on a continuous basis.
- c) The ADR will have a smooth transition if it is introduced on a pilot court basis. The performances, results, reactions among pilot court judges, practicing lawyers and the litigants should be carefully monitored and recorded and suitable adjustments in the ADR project should be made at each stage of extension after an exhaustive study of the experiences gained.
- d) The mediation or non-binding arbitration, in my opinion, may not be a suitable form of ADR in big commercial cases involving heavy amounts, such as, the Artha Rin Adalat cases, the applications before the District Judges in house building loan cases, the Bangladesh *Shilpa Rin Shangstha* and the Bangladesh *Shilpa Rin* cases as well as the insolvency cases under the Insolvency Act. I have suggested Early Neutral Evaluation or Settlement Conference as the proper result-yielding method of the ADR in such cases. I would advise an amendment to the special legislations covering these types of cases enabling trial judges to refer a case or part of a case at any stage of the



suit for application of Settlement Conference, although the ideal time to start this process is after receiving the written statement.

- e) The Government is the major litigant in this country, either as a plaintiff or as a defendant. Under P.D. No. 142 of 1972, the Government is a necessary party in all title suits, suits for specific performance of contract and so on. To make the ADR successful, P.D. No. 142 of 1972 should be amended providing that the Government does not enter appearance or after entering appearance do not file any written statement, or after filing a written statement do not contest the case, as any resolution of the dispute through the ADR or otherwise by the other parties to the dispute would be binding on the Government.
- f) Labour Courts and Small Causes Court are the two areas where mediation should be introduced immediately on a priority basis, amending the two special legislations.
- g) The Government should provide an adequate and sustainable fund for recruitment of judges and staffs for technical training.
- h) It needs an adequate political support including mobilization and involvement of representatives/advocates for disadvantaged groups.

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<sup>1</sup> Md Abdul Halim, *ADR in Bangladesh: Issues and Challenges* (Dhaka: CCB Foundation, 2011), pp. 1-31.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, pp. 14-30.

<sup>4</sup> Mir Abdul Halim, *The Legal System of Bangladesh after Separation* (Dhaka: University Publication, 2008), pp.185-193 and P. C. Rao, *Alternative Dispute Resolution* (New Delhi: Universal Law Publishing Co Ltd., 2004), pp. 1-13.

<sup>5</sup> Md. Akhtharuzzaman, *Concept and Laws on Alternative Dispute Resolution and Legal Aid* (Dhaka: Shabdakoli Printers, 2007), pp. 129-147.

<sup>6</sup> Naima Huq, *ADR: Recent Changes in the Civil Process* (Dhaka: Dhaka University Press, 2004), pp. 1-18 and supra note at 1 & 4.

<sup>7</sup> Sumaiya Kahir, *Legal Empowerment for the Poor and Disadvantaged: Strategies Achievements and Challenges* (Dhaka: Colorine Publisher, 2008) and M. Mamun, *A Thesis on the Practice of Alternative Dispute Resolution in the Family Courts of Bangladesh* (Dhaka: University of Dhaka, 2008).

<sup>8</sup> Justice S.K.Sinha, *Judicial Development in Bangladesh* (Dhaka, 2010), p.3.

<sup>9</sup> See, section 1-18 of the Arbitration Act 2001.

<sup>10</sup> *Ibid.*

<sup>11</sup> Section 4(1) of the Village Courts Act 2006

<sup>12</sup> Section 5(1) of the Village Courts Act 2006

<sup>13</sup> Section 5(2) of the Village Courts Act 2006

<sup>14</sup> Section 3(1) of the Village Courts Act 2006

<sup>15</sup> Section 4(1) of the *Conciliation of Disputes (Municipal Areas) Board Act, 2004*

<sup>16</sup> Section 4(2) (a) of the *Conciliation of Disputes (Municipal Areas) Board Act, 2004*

<sup>17</sup> Section 5(1) of the *Conciliation of Disputes (Municipal Areas) Board Act, 2004*

<sup>18</sup> Section 9(1) of the *Conciliation of Disputes (Municipal Areas) Board Act, 2004*

<sup>19</sup> Supra, note at 8.

<sup>20</sup> 1997 (17) BLD 4,

<sup>21</sup> *Ibid.*

<sup>22</sup> Section 210(5) of the Bangladesh Labour Act, 2006 empowers the Government by notification in the official Gazette to appoint such number of persons as it consider necessary to be Conciliators for the purposes of the Act and shall specify in the notification the area within which, or class of establishments or industries in relation to which, each of them shall perform his function.

<sup>23</sup> Section 210(4) (b) of the Bangladesh Labour Act, 2006.

<sup>24</sup> Section 210(8) of the Bangladesh Labour Act, 2006.

<sup>25</sup> Section 210(10) of the Bangladesh Labour Act, 2006.

<sup>26</sup> Section 210(11) of the Bangladesh Labour Act, 2006.

<sup>27</sup> Section 210(9) of the Bangladesh Labour Act, 2006.

<sup>28</sup> Section 210(18) of the Bangladesh Labour Act, 2006.

<sup>29</sup> Supra note at, 1, p. 186.

<sup>30</sup> Section 210(10) of the Bangladesh Labour Act, 2006

<sup>31</sup> Nirmalendu Dhar, *Labour and Industrial Laws of Bangladesh*, (Dhaka: ReMisi Publisher, 2004), pp. 1-19.

<sup>32</sup> Supra, note at 1 & 4.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> M. Mamun, A Thesis on the Practice of Alternative Dispute Resolution in the Family Courts of Bangladesh (Dhaka: University of Dhaka, 2008), pp. 14-41.