MEDIATION UNDER THE CODE OF CIVIL PROCEDURE, 1908: LEGAL AND INSTITUTIONAL REFORMS

THIS THESIS IS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY TO THE DEPARTMENT OF LAW, FACULTY OF LAW, UNIVERSITY OF DHAKA

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I dedicate this research to my mother, Professor Tasnim Ferdousee and my late father, Dr M Eusuf, for their precious gift of support and encouragement throughout my life and to Professor Dr Jamila Ahmed Chowdhury, the supervisor of my thesis, who made this possible with her constant guidance, knowledge and inspiration.

ABSTRACT

Dispute Resolution is a notion that prevails in every society, and every society practices various forms of dispute resolution techniques to resolve their disputes. Amongst many of these dispute resolution techniques used in Bangladesh, this thesis highlights the Alternative Dispute Resolution (ADR) technique suggested under Section 89A of the *Code of Civil Procedure, 1908*, popularly known as court-connected mediation. It maps the present situation of case backlog under trial and the practice of court-connected mediation in Bangladesh. Through literature review, it investigates the history of origin and potentials of practicing mediation in civil courts of Bangladesh compared to the success of ADR mechanism practiced in other developed and developing countries in the world. Later, within the purview of Social Institution Dysfunction Theory, this research analyses the reasons behind its dysfunctional state and the possible way out to develop this mechanism for making it more functional. In order to investigate this fact, the research has conducted empirical studies following both qualitative and quantitative methods to apply a socio-legal analytical approach.

The findings as regards the efficiency of mediation in civil courts are drawn from court registry data of *all* the civil courts of Dhaka Judgeship both inside the metropolitan area and outside the metropolitan area. Then it explores individual case files through content analysis to identify the actual functionality and underlying causes of delay at different stages of civil litigation. Further, an extensive questionnaire survey and expert interview, including judges, District Legal Aid Officers, lawyer and litigants, are undertaken. The research also considers responses from court support staff and stakeholders' responses outside the court, including the Assistant Commissioner (land) sub-registrars, to take a complete view of underlying reasons for ineffective mediation under Social Institution Dysfunction Theory.

The knowledge and experience are collected from all those respondents through structured, semi-structured and unstructured questionnaire in order to explore the impact of the role of various legal professionals and beneficiaries on the performance of mediation. In this survey, the stakeholders revealed the prospects and actual benefits of mediation for resolving civil litigations, the underlying problems, and possible ways to outsource their attitudes and prevailing professional culture. For example, the judges stated that being overburdened with the trial, they require to allocate only a minimal time to conduct mediation. The lawyers and litigants are reluctant to be involved with this process. The lawyers responded that they fear losing their professional reputation and income and therefore less interested. The litigants

also revealed their ignorance and lack of support for settling the suit through mediation. Similarly, the stakeholders outside the courts stated how the civil litigations originated from 'Assistant Commissioner (land) office' and 'Sub-registry office' activities and expressed the usefulness of mediation for settling those disputes.

In conclusion, the thesis implicates that if mediation has to play a more efficacious role in civil courts, greater emphasis on its legal and institutional reforms is imperative. It makes several recommendations for the more effective use of mediation, including the promotion of compulsory mediation practice, making the mediation financially rewarding for lawyers, the establishment of exclusive mediation courts, strengthening the panel of expert mediator through training and accreditation, and awareness of prospective litigants about benefits of using mediation. This thesis contributes to the existing knowledge on reducing case backlog in the civil courts of Bangladesh. All its findings and recommendations would result in broader access to justice to the litigants in general.

DECLARATION

I do hereby declare that this thesis titled ***"Mediation in Resolving Civil Disputes under the Code of Civil Procedure, 1908: Legal and Institutional Reforms"*** submitted to the Department of Law, the University of Dhaka for the degree of Doctor of Philosophy in Law (PhD), is prepared by me under the supervision of Professor Dr Jamila Ahmed Chowdhury, Department of Law, University of Dhaka.

I further declare that this thesis comprises only my original work, and no plagiarism has occurred in this thesis. Furthermore, due acknowledgement has been made in the text to all other material used.

No part of this work has been used for the award of another degree.

Signature

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TABLE OF CONTENTS

CHAPTER 2: INSTITUTIONAL DYSFUNCTION AND CASE BACKLOG: CIVIL COURTS OF BANGLADESH IN PERSPECTIVE

CHAPTER 3 : EFFECTIVENESS OF MEDIATION IN CIVIL COURTS UNDERCPC: AN EMPIRICAL EVALUATION USING COURT REGISTRY DATA

LIST OF TABLES

LIST OF FIGURES

LIST OF STATUTES

BANGLADESH

Acts

Administrative Tribunal Act, 1980(Act No VII of 1981)

*Arbitration Act, 2001 (*Act No. I of 2001)

The Bangladesh Labour Act, 2006 (Act No. XLII of 2006)

The Bankruptcy Legislation Amendment Act, 2010 (Act No. 106 2010)

The Civil Courts Act, 1887(Act No. XII of 1887)

The Code of Civil Procedure, 1908 (Act No. V of 1908)

The Code of Criminal Procedure, 1898 (Act No. V of 1898)

The Constitution of the People's Republic of Bangladesh, 1972

The Contract Act, 1872(Act No. IX of 1872)

The Customs Act, 1969(Act No. IV of 1969)

The Disputes Settlement (Municipal Areas) Boards Act, 2004 (Act No. XII of 2004)

The Environment Courts Act, 2010(Act No. L of 2010)

The Family Courts Ordinance, 1985(Ordinance No. XVIII of 1985)

The Income Tax Amendment Act, 2011(Act No. XXII of 2011)

The Legal Aid Services Act (Act No. VI of 2000)

The Money Loan Court Act (Act no VII of 2003)

The Muslim Family Laws Ordinance, 1961(Ordinance No. VIII of 1961)

*The Registration Act, 1908(*Act No. XVI of 1908)

The Specific Relief Act, 1877(Act No. of 1877)

The State Acquisition and Tenancy Act, 1950(Act No. XVIII of 1950)

The Transfer of Property Act, 1882(Act No. IV of 1882)

The Value Added Tax Act, 1991(Act No. 22 of 1991)

The Village Court Act, 2006(Act No. 19 of 2006)

Rules

Bangladesh Registration Rules, 2014

The Bengal Record Manual, 1943

BIAC Arbitration Rules, 2019

Civil Rules and Order, 1898

Civil Suits Instruction Manual, 1935

Land Administration Manual, 1990

Land Development Tax Rules, 1976

State Acquisition and Tenancy Rules 1950

INTERNATIONAL INSTRUMENTS

Universal Declaration of Human Rights, 1948

USA

Alternative Dispute Resolution Act, 1998

Federal Arbitration Act, 1935

Civil Justice Reforms Act, 1990

Australia

Federal Civil Dispute Resolution Act, 2011

Australian National Mediator Practice Standards (2008)

Japan

Civil Conciliation Act, 1951

China

Code of Civil Procedure of China, 2017

Malaysia

Rules of Court, 1951

Practice Direction No 5 of 2010

Sri Lanka

Mediation Board Act, 1988

India

The Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2006

Legal Services Authorities Act, 1987

LIST OF CASES

Name of the cases	Year	Cited in
List of published cases		
Adamjee Jute Mills v Chairman 3rd Labor Court and others	[1987]	39 DLR, 11
Boardman v Boardman	[2013]	NSWSC 1257
Burchell v Marsh	[1858]	58 US 344
Dildar v Faruque	[1975]	27 DLR (AD) 138
Erich v Tompkins	[1938]	304 US 64
Intertrade Ltd v Trading Corporation of Pakistan Ltd	[1976]	PLD [1976] Kar 496
Masters v Cameron	[1954]	[1954] 91 CLR 353
R (Unison) v Lord Chancellor	[2017]	UKSC 51
Secy of State v Fahmidannisa	[1889]	ILR 17 Cal 590PC

List of unpublished cases

194/17 of Senior Assistant Judge, 1st Court
31/16 of Senior Assistant Judge 1st Court
467/13 of Senior Assistant Judge, 1st Court
31/16 of Senior Assistant Judge, 1st Court
228/11 of Senior Assistant Judge, 1st Court
532/14 of Senior Assistant Judge, 1st Court
3505/08 of Senior Assistant Judge, 1st Court
560/13 of Joint District Judge 1st Court
1089/12 of Joint District Judge 1st Court
230/16 of Joint District Judge 3rd Court
1089/12 of Joint District Judge 2nd Court
511/10 of Joint District Judge 2nd Court
903/14 of Joint District Judge 1st Court
181/13 of Senior Assistant Judge Court, Nawabganj
868/13 of Senior Assistant Judge Court, Nawabganj
172/13 of Senior Assistant Judge Court, Nawabganj
325/17 of Senior Assistant Judge court, Dhamrai
210/16 of Senior Assistant Judge court, Dhamrai

LIST OF ACRONYMS

AC	Assistant Commissioner
AD	Appellate Division
ADR	Alternative Dispute Resolution
BIAC	Bangladesh International Arbitration Centre
CEDR	Centre for Effective Dispute Resolution
CJ	Chief Justice
CJM	Chief Judicial Magistrate
CMM	Chief Metropolitan Magistrate
CPC	The Code of Civil Procedure, 1908
DLAO	District Legal Aid Office
DLR	Dhaka Law Report
ILR	Indian Law Report
KLCMC	Kuala Lumpur Court Mediation Centre
MFLO	Muslim Family Laws Ordinance
MMC	Malaysian Mediation Centre
NPL	Non Performing Loan
PLD	Pakistan Law Digest
Reg-Neg	Regulatory Negotiation
SAT	State Acquisition and Tenancy Act
SIAC	Singapore International Arbitration Centre
WIPO	World Intellectual Property Organization
UK	United Kingdom
US	United States

LIST OF APPENDICES

MEDIATION UNDER THE CODE OF CIVIL PROCEDURE, 1908: LEGAL AND INSTITUTIONAL REFORMS

CHAPTER 1

INTRODUCTION

1.1 Background of the study

Dispute is a notion that prevails in societies from time-immemorial and originates in short-term disagreement between individuals. However, if disputes are left unchecked and unresolved, such short-term disagreements may end up with long-term conflicts. As explained by John Burton (1990), the dispute is a disagreement between the parties that can be resolved through negotiation. Conflict, on the other hand, involves long-term, deeply rooted issues that are *'non-negotiable'*.[1]There can be no disagreement where there is no semantic conflict.[2]Therefore, every society practices different dispute resolution techniques to avoid long-term conflicts and maintain social cohesion and harmony.

Every nation-state has a judicial organ, i.e. court where disputes can be settled in different forms and ways, in accordance with the law. The traditional way of settling disputes between parties in courts is of two kinds: the inquisitorial and adversarial processes. In the judicial system of the subcontinent, including Bangladesh, the dispute settlement procedure is of adversarial nature. In adversarial dispute settlement process, parties to a proceeding submit their respective evidence before the court, and the court adjudicates the matter of dispute upon the evidence placed before it. However, such a process is time-consuming and sometimes subject to protracted delay. The prevailing scenario in Bangladesh shows that backlog of cases in courts and associated delay in disposal are sometimes so huge that cases may remain pending and litigants fail to celebrate the disposal of their cases during their lifetime.

According to Supreme Court Annual Report, 2020,[3] the consolidated case backlog in the Supreme Court of Bangladesh is increasing over the years. For instance, at the beginning of 1stOctober 2019in High Court Division, a number of 4,90,800 cases were ready for disposal, while 25,636 new cases were filed and 27,401 cases were resolved within the period of 31stDecember 2019. Thus, at the end of the year 2019, the pendency reached to the number of 4,89,068 or backlog reduced only less than one percent. As we also consider the civil

[1] John W Burton, *Conflict: Resolution and Prevention [The Conflict Series Volume 1]* (Macmillan, 1990) 166.
[2]Carl Baker, *Indexical Contextualism and the Challenges from Disagreement* (University of Aberdin 2012) 111.
[3]Bangladesh Supreme Court, *Statistical Report of litigations in Bangladesh from 1st October, 2019 to 31st December 2019 (2020).*

petition, civil review, civil miscellaneous petition, civil appeal pending the appellate division, the scenario can be shown in the Table 1.1 below:

Table 1.1: Backlog of civil litigation in the Supreme Court of Bangladesh (2019)

Nature of cases	Starting number	Institution	Total	Disposal	Pending for disposal
Civil petition	7747	935	8662	419	8263
Civil review	1453	87	1540	216	1324
Civil miscellaneous petition	3335	258	3593	115	3478
Civil appeal	2457	32	2489	21	2468
Contempt petition	177	09	186	00	186
	15169	1321	16,470	771	15,719

Thus, the rate of increase in the appellate division is 3.62 percent. Similarly, the number of civil cases in the High Court Division from 1st October 2019 to 31st December 2019 was 25,636, and the number of disposals was 27,401. Though the number of disposals was greater than institution, the number of pending cases at the end of the year was 4,89,068.

Similar backlog was observed in subordinate civil courts. According to the statistics mentioned above of High Court Division, Bangladesh Supreme Court, Dhaka, in the year of 2019, a total of 76063 cases were filed in the civil courts of the subordinate judiciary, and the number of disposals was 52,320.Consequently, from the opening balance of 13,40,991, the number of pending cases reached 13,65,678 or a 1.84 percent increase in case of the backlog at the end of the year. [4]

Apart from such case backlogs and delays, access to justice for the poor is also restrained by the high cost of litigation.[5]In Bangladesh, litigation costs are further increased by the cost of bribes that clients frequently need to provide dishonest court officials. Most parties (63 percent) have no option but to bribe court officials to accelerate their cases' disposal.[6]During

[4]Bangladesh Supreme Court, *Statistical Report of litigations in Bangladesh from 1st October 2019 to 31st December, 2019* (2020).

[5]Jamila A Chowdhury, *ADR Theories and Practices: A Glimpse on Access to Justice and ADR in Bangladesh* (London College of Legal Studies (LCLS) Dhaka, Bangladesh 2013) 21; see also
Asian Development Outlook-2002-Bangladesh, Asian Development Bank (ADB) (2002) <http://www.adb.org/documents/books/ado/2002/ban.asp> accessed14 Sept 2015,
Deborah L. Rhode 'Access to justice' (2000-01) Fordham Law Review, vol. 69 no 5, 1785-1811.

[6], Khondoker M Hasan, Chief Justice (CJ) 2001, 'A report on mediation in the family courts: Bangladesh experience', paper presented to 25th Anniversary Conference of the Family Courts of Australia, Sydney, 26-29 July. **See also** A.B.M Mahmudul Huq, *Alternative Dispute Resolution in Bangladesh Challenges and Prospects* (1st Ed. Dhaka) 115 See more on Transparency International 2007, p.181.

interviews conducted by Transparency International Bangladesh, 88.55 percent of respondents agreed that it was almost impossible to get quick access to justice from the court without utilizing financial or other pressure.[7]Delay in the disposal of cases, corruption and prosecutors' tactics are responsible for the dreadful situation in case backlogs in the judiciary. [8]As stated by a former Chief Justice of Bangladesh:

> "Our legal system has thus been rendered uncaring, non-accountable and formalistic. It delivers formal justice, and it is obvious to the sufferings and woes of the litigants, of their waste of money, time and energy and of their engagement in unproductive activities, sometimes for decades"[9]

A survey of literature conveys that the present situation is caused mainly by procedural flaws of the judicial administration system. Every stage of a court proceeding is hampered due to various reasons including protracted delayed initiated or in some cases encouraged by parties and their lawyers.[10]A large number of cases compared to the limited number of existing judicial officers and the inefficiency of different stakeholders related to the judicial system are primarily accountable for the dreadful situation of case backlog in courts.[11]

Delayed justice reduces the value of a judgment considering its cost in terms of time, money, social harmony and so on. Like regular suits, execution suits also take years to be disposed of. Given this situation, when people are finally granted to hearing, the end result may not be just, because *"the longer the period from the time of the events which are the subject matter of the action to the time of the trial, the harder it may become to prove the facts of the case".*[12]

[7]Khondker M Hasan CJ 2001, 'A report on mediation in the family courts: Bangladesh experience', paper presented to 25th Anniversary Conference of the Family Courts of Australia, Sydney, 26-29 July, Para 10.

[8] Pranab Panday, Mr. Anwar Hossain Mollah; 'The Judicial System of Bangladesh: An Overview from Historical Viewpoint' (2011) International Journal of Law and Management 53(1) 25, 26, 27.

[9]Mustafa Kamal. C.J *Alternative dispute resolution, Judicial training in the new millennium: An anatomy of BILIA judicial training with difference*, (W Rahman & M Shahabuddineds, Bangladesh Institute of Law and International Affairs BILIA Dhaka 2005) 137.

[10] M Zahir *Delay in courts and court management*(Bangladesh Institute of Law and International Affairs, Dhaka 1988) 176.

[11]Jamila A Chowdhury *Women's Access to Justice in Bangladesh through ADR in Family disputes*; (Eldakak. Dr. M. Shokry - Justice and Chairman of the High Court of Appeal, Alexandria, Egypt ed (Modern Bookshop, Mansoura, Egypt, 2005).

[12] Hillary Astor, Christine Chinkin: *Dispute Resolution in Australia* (Butterworths, Sydney. 1992) 33.

In this backdrop, extensive research work needs to be done for suggesting an effective case management method for the civil courts of Bangladesh for reducing the case backlog.[13]

1.2 Mediation in Resolving Civil Disputes: Perspectives from selected developed and developing countries

The laudable and praise-worthy trend is visible in case of disposing civil suits, especially land disputes through mediation worldwide. The term, 'mediation' due to language as well as national legal standards and regulations is not identical in contents rather has specific connotations.[14]

The comparative analysis of any system in the perspective of various nations provides an opportunity to examine that system from different angles. Theoretical and practical knowledge of foreign legislation and the court system, therefore, help us to verify the efficiency of our national system in comparison with those other countries.

As an alternative means of dispute resolution, the practice of Alternative Dispute Resolution (ADR) is not out of the realm to this global convergence. For instance, the UNCITRAL model law on Arbitration is now being followed by many countries to enact their domestic arbitration laws to resolve international trade disputes with minimum disagreement on procedural issues.[15]And arbitral decisions are widely recognized by almost every domestic jurisdiction.[16]When the people around the world, being tired of and shocked at the defects of the formal adjudication system were searching for solutions, they started to realize the significance of incorporating and institutionalizing the informal dispute settlement mechanisms into the formal adjudication system make the latter truly functional.[17] Press has analyzed worldwide mediation practice through institutionalization as well as legislation.[18] He explained its institutionalization as co-option of mediation into court programs,

[13], Umme S Tahura, Margaret .R. L.L Kelly: *Procedural Experience from Civil Courts of Bangladesh: Case Management as a Potential Means of Reducing Backlogs*,(Macquary Law School 2015) 1.

[14]Alphen aan den Rijn, *Essays on Mediation – Dealing with Disputes in the 21st Century;, chapter12* (Lan MACDUFF, Singapore Management University 2016) 177 – 192.

[15] About UNICITRAL United Nations Commission on International Trade Law < unicitral.un.org.> accessed 21 August, 2019.

[16]Bryan Druzin, *Anarchy, Order and Trade: A Structuralist Account of why a Global Commercial Legal Order is Emerging* Vanderbilt (2014) Journal of Transnational Law 49, 1057.

[17] Steven P Croley, ' Civil Justice Reconsidered: Toward a Less Costly, More Accessible Litigation System' (2017) New York: NYU Press. < https://muse.jhu.edu/- book/56538> accessed 18 December, 2018.

[18] St. M Press 'International Trends in Dispute Resolution', (2000) Alternative Dispute Resolution Bulletin, Issue 3 21, 21-22.

government agencies, community organization, and legislation in particular country and region.[19]

Figure 1.1: A global view on selected countries performing well is mediation

The figure above demonstrates some selected developed and developing countries around the glove that having well functioned mediation mechanisms with high disposal rates. At this backdrop, a glimpse into the existing laws relating to the resolution of civil disputes through mediation of those countries and success or failure of those mechanisms appear to be very relevant for the purpose of ensuring a fruitful research. According to the report of a reputed legal service provider[20], the development of ADR, particularly, mediation is incorporated extensively into the legal systems in both developed and developing countries like United States of America, United Kingdom, Australia, Japan, Sri Lanka, India, China etc. The purpose of sharing this success story of mediation in both developed and developing countries of the world is to highlight its potential in our country. After identifying the problems of effective implementation of mediation in the civil courts of Bangladesh, the study, therefore, derived some best practices of those counties to customize our system of mediation and associated legal provisions.

[19] St. M. Press 'International Trends in Dispute Resolution', (2000) Alternative Dispute Resolution Bulletin, Issue 3 21, 21-22.

[20] The report was produced by Mondaq Ltd., which is a content aggregated service in the legal industry with the headquarters in New York. It operates worldwide providing free expert financial and regulatory and legal information on topics such as employment, tax, litigation, healthcare etc.

1.2.1 Performance of mediation in civil courts in select developed countries: A comparative assessment

Mediation in the United States of America (USA)

As urged by Abraham Lincoln, *"Discourage litigation Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior authority of being a good man. There will still be business enough*".[21]

This speech greatly influenced the dispute resolution mechanism embraced by American people in solving their interpersonal disputes. As early as in 1768, ADR started to pay its role in the form of Arbitration in New York in settling the disputes relating to clothing, printing merchant seaman industries, and Arbitral Tribunal was established accordingly. In the year 1858, the court for the first time gave recognition of the ADR as an effective tool for resolving disputes.[22]

Following the same spirit, the merchants of USA, in the year of 1922 established Arbitration Society of USA, and in 1935, the Federal Arbitration Act came into force. This piece of legislation created the foundation of the modern age arbitration system. However, the formal ADR practice can be referred back to 1938 when the United States (US) Congress enacted the Federal Rules of Civil Procedure. In the case of *Eric v Tompkins*[23] was decided upon the principles laid down in the rules.[24] Throughout the 20th century, the mediation mechanism obtained a wide range of acceptability as a substitute for the litigation process. The Federal Courts and the State courts adopted the procedure as an effective way for mitigation of disputes between the parties to minimize time, cost, and hardship of the litigants and the courts.[25]

In the early 70s, the Federal Law Enforcement Assistance Administration came into force to implement urban-based Arbitration and mediation. As a contribution to this process, thousands of disputes could be disposed of within the minimum span of time. In continuance

[21] In 1953, the Abraham Lincoln Association published The Collected Works of Abraham Lincoln by Roy P. Basler and his editorial staff.

[22]Burchell*v* Marsh *[1858], 58 US 344 < https//www.lawpipe*.com> accessed 22.2.2020.

[23]Erich *v* Tompkins [1938] 304 US 64.

[24] Carrie Menkel-Meadow, *'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR'*(UCLA Law School 1991) 37.

[25]Michael McManus and Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States,* (1(3) CADMAS 2011) 100-105.

of this success, throughout the1980s, a good number Community Based Alternative Dispute Resolution Centers were established, and numerous government and non-government agencies successfully resolved thousands of disputes. The legislation named Civil Justice Reforms Act 1990 was passed imposing responsibilities to all the judges to mitigate the disputes among the litigants.[26]

The Columbia State voluntarily adopted the mechanism and succeeded in resolving nearly about 1000 litigations and even succeeded in resolving 60 percent appeal cases. Alternative Dispute Resolution Act of 1998 has also authorized the courts to resort to ADR mechanism to the civil litigations.[27]

In addition to that, the USA has developed a unique system called ADR Multi-Option Program that practically imposes a responsibility on the parties to choose court's ADR process over the court's proceedings, particularly for civil matters. Most civil cases are automatically assigned at filing to the ADR Multi-Option Program under ADR local Rules.[28]Another study performed by International Finance Corporation (IFC 2006) conducted a study in which it finds that the direct cost of mediation averaged U$225 about 50% of the cost of litigation.[29] Bingham and others (2009), studying outcomes of ADR use by the US federal government, estimate that ADR saved about 88 hours of staff time and about six months of litigation time per case—showing that ADR can reduce public costs as well as private.[30]

Table 1.2: Success rate of mediation in the USA

Category	2016	2015	2014	2013	2012	2011
Success Rates for ADR						
Voluntary ADR Proceedings	75% Resolved	71% Resolved	69% Resolved	75% Resolved	69% Resolved	73% Resolved
Court-Ordered	52%	58%	49%	49%	49%	53%

[26]Elena Nosyereva '*Alternative Dispute Resolution in the United States and Russia: A comparative analysis*' (7(1) Annual Survey of International & Comparative Law 2017) 19.
[27] United States Congress (1998), Public Law 105-315, 2993-98.
[28]Alternative Dispute Resolution Local Rules (United State District Court, Northern District of California 2018)<www.cand.uscours.gov> accessed 4 November 2020.
[29]Patricia Ewick, Susan S. Silbey*The Common Place of Law: Story of Everyday Life* (The University of Chicago Press 1998) 556.
[30]Ibid

ADR Proceedings	Resolved	Resolved	Resolved	Resolved	Resolved	Resolved

Source: US Department of Justice 2017[31]

Suppose the situation of Los Angeles County is taken into consideration. In that case, it seems that civil cases are to be submitted to mediation if the amount in controversy, in the opinion of the court, does not exceed U$50,000 for each plaintiff. Thus, in that county, the court determines on case by case basis suitability for mediation.[32]The World Intellectual Property Organization (WIPO), a specialized organization of the United Nations, also follows specific rules regarding criteria of determining the arbitration fee based on the value of the subject matter of dispute.[33]On the other hand, there is no Rule regarding any particular advanced degree or technical or professional experience as a prerequisite for competence as a mediator which symbolizes the state of diversity in the mediation system.[34]

Mediation in the United Kingdom (UK)

From early times to the 1960s, the litigation process was very costly, time-consuming, and complex in the UK. At the time of global upheaval of industrialization and privatization of different sectors, the UK being the driving force of such revolutionary change had to face numerous litigations concerning business and industrial disputes. As an alternative to the formalized court-based litigation process, the business partners initiated a new practice of arbitration who was parties to the suit. The situation was described by Lukas Mistelis in his article as:[35]

> "parallel to the state judicial system, a private independent but binding justice system exists and is activated at the initiation of disputants. Its statutory introduction in the late seventeenth century was justified as an alternative to a rigid and formalistic litigation system. Over the years, arbitration has been institutionalized and often judicialized."

[31]Alternative Dispute Resolution at the Department of Justice, Fiscal Year 2017 <http//www.justice.gov>olp> accessed 13 November 2020.

[32]Eric V Ginkel 'Mediation Under National Law: United States of America' *National Committee Newsletter* (Los Angeles, August 2005) 44.

[33]Schedule of Fees and Costs-WIPO <www.wipo.int>amc>mediation>fees> last accessed 4 November, 2020.

[34] California Judicial Council, 'California's Ethical Standards for Mediators' (Mediate, Com *everything* mediation, January 2013)<www.mediate.comarticles> accessed 4 November, 2020.

[35]Loukas Mistelis. 'ADR in England and Wales: A Successful Case of Public Private Partnership' *ADR Bulletin* Vol 6 No 3 Article 6 (January 2003) 53-55 <http://epublications.bond.edu.au/adr/vol6/iss3/6> accessed 13 October 2020.

Lord Chancellor Hailsham chose five types of disputes that were befitting for arbitration: personal injuries, commercial dispute, enforcement of debt, housing, and small cases.[36]

In the late '80s, the UK's dispute resolution mechanism was primarily influenced by ADR practice's upsurge in the USA.As a result of such mass awareness, Centre for Dispute Resolution (CEDR) was formed with international corporations, business organizations, international law firms, and professional and governmental bodies. Nowadays, Centre for Effective Dispute Resolution (CEDR) has access to over 3000 mediators, "with regular monitoring of an independent panel of over 150".[37]CEDR is responsible for nominating mediators, preparing the parties for arriving at a common solution through the mediation arrangements mainly in case of business transactions. Following the performance, many of the non-government organizations and private farms started to conduct the mediation program.

In 1996, the then Lord Chief Justice of England and Wales, Lord Harry Woolf (who now retired is Chair of CEDR's International Advisory Council), published his 'Access to Civil Justice Report' which encouraged the use of ADR, followed by the Civil Procedure Rules in 1999 which enabled judges to impose cost sanctions to either party when ADR was refused or ignored.[38]Currently, this practice is in force in the UK. Apart from mediation, Hogan Lovells has widely described different dispute resolution processes, such as conciliation, judicial appraisal, expert appraisal, and adjudication.[39] Conciliation usually has a statutory basis, with conciliators appointed by an outside body rather than the parties. Further, parties have an option to obtain Early Neutral Evaluation from a neutral third party- a non-binding opinion regarding the likely outcome of the dispute if it were to proceed to trial.[40]Judicial Appraisal, Expert Appraisal involves the parties to a dispute jointly putting their case to a former judge or senior barristers or independent expert to give their advice on legal position if the parties proceed for trial.

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[36] M. Akhtaruzzaman. *Bikolpo Birodh Nispottir Dharona O Ain* (Third Edition, (Razia Khatun,2010).

[36] *Recent Development in Alternative Dispute Resolution* available at https://www.scribd.com/document/71438728/Adr-.

[37]Christopher Hodges, Magdalena Tulibacka; *Civil Justice in England and Wales-beyond the courts, Center for Socio-Legal Studies,* (University of Oxford 2009) 34.

[38]SK. G Mahbub, *Alternative Dispute Resolution (ADR) and Commercial Disputes: The UK and Bangladesh Perspective* (1st ed. Dhaka [Bangladesg] 2005) 13.

[39]Hogan Lovells, *Alternative Dispute Resolution in England and Wales* (Paralympics GB January 2016)7 <https://www.hoganlovells.com/publications/alternative-dispute-resolution-in-england-and-wales>.

[40]. Jamila A Chowdhury *ADR Theories and Practices: A Glimpse on Access to Justice and ADR in Bangladesh,* (London College of Legal Studies (LCLS), Dhaka, Bangladesh. 2013) 112.

Adjudication is a well-established method of dispute resolution in the construction industry wherein an adjudicator (an independent third person) usually provides decisions on any disputes that arise during the course of a contract. On the other hand, Med-Arb is a hybrid process in which the parties initially submit their dispute to mediation on the basis that, if no agreement is reached, they will refer the matter to arbitration.[41]Apart from this mini-trial or executive tribunal, Dispute Review Board, and Online Dispute Resolution are other ways of ADR for resolving the disputes.[42] The report published by DC Associates in the year of 2006 on the success of ADR is as follows:

Table 1.3: Success rate of Mediation in the UK

	Number of cases	**Number of Settlements**	**Success Rate**	**Estimated Cost Savings**
2004-2005	127	125	75%	28.8 m
2003 2004	229	181	79%	14.6 m
2002-2003	163	Not Given	83%	6.4 m
2001-2002	49	Not Given	Not Given	2.5m

Source: ASA[43]

In the UK, the Centre for Effective Dispute Resolution (CEDR) within five years of its establishment, i.e., has handled over 1.5 billion pounds in case value. In 1995, claims totaling 300 million pounds were successfully mediated, sometimes involving disputants from several countries at once. Savings in costs are estimated to range from 50,000 to over 250,000 pounds per party.[44] The statistics in 2018, also refer to increased success rates in mediation with 74% achieving settlement on the day of the mediation session.[45]

[41]Ibid, 131.

[42] Jim P Groton, Robert A Rubin and B Quintas 'A Comparison of Dispute Review Boards and Adjudication' [2001] The International Construction Law Review 275-291.

[43]Advice service alliance, Recent Development in Alternative Dispute Resolution, update no. 18 (Alternative dispute resolution briefing, May 2006) <https://www.scribd.com/document/71438728/Adr-18> accessed 20 January, 2020.

[44]Karl Mackie and Edward Light Burn, 'International Mediation- the UK Experience' in Chandrasekhara Rao and William Sheffield *Alternative Dispute Resolution: What it is and How it works?* (International Centre for Alternative Dispute Resolution 2002) 137-142.

[45] Mediation in United Kingdom (Lexology9 September, 2019)<www.lexology.com> accessed 23rd September 2019.

Thus, the essential features of mediation in the UK can be visualized if the particular legislation is dealing mediation, namely Civil Procedure Rules, is looked into. The important features of that law are as follows;

The Courts are obligated to encourage the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating to use such procedure. [46] Moreover, there is a system of direction questionnaire in which legal representatives confirm that they have explained to their clients the need to go through the procedure of mediation and possible costs if they refuse to sit for settlement.[47] It is also the law existing in the UK that if a party refuses to mediate, ignores a request to mediate or otherwise acts in a way to frustrate the mediation process, they risk sanctions in the form of an adverse cost order being made against them, and the court has discretion as to whether costs are payable by one party to another, in what amount and when.[48]However, there is no central professional body to control the professional activity of the mediation, and there is no particular requirement to use the title, 'mediator'. Fees are also negotiated by way of taking into consideration of complexity and value of the particular dispute. The mediators also offer fixed fees on hourly basis.[49]

Mediation in Australia

The Legal System of Australia is of adversarial nature and side by side the conventional justice delivery system, mediation mechanism provides individual and corporations the avenue to resolve the dispute without litigation through mediation, conciliation, and arbitration. Industrial growth has been driven by the increasing use of mediation to solve commercial, family and workplace disputes.

Australia has initiated a national model law for developing a regulatory outcome as regards mediation[50]and the Australian Law on Mediation in Civil Cases is one of them which signify a formal legislative approach. The legislation mandates Alternative Dispute Resolution (ADR), for instance, at the federal level, the Federal Civil Dispute Resolution Act 2011 mandates that genuine steps be taken to resolve disputes before proceedings are commenced

[46] Civil Procedure Rules s 14(2)(e).
[47]Ibid
[48]Civil Procedure Rules s 44(2).
[49] Donald Lambert, Nicole Finlayson, 'Mediation in United Kingdom' (Lexology, 9 September, 2019) <www.lexology.com> accessed 20.1.2020.
[50] Robyn Carroll, *Trends in Mediation Legislation: A Comparative approach to the Legal Process'*(Yale University Press 2002), 73-88.

in court. Before the matter is brought to court, disputing parties are required to submit a statement that details the steps taken to resolve the issue and if not, why.[51] In civil matters, the employed mediator is required to have a legal education and received accreditation under the National Mediator Accreditation System. Besides being certified, these mediators regularly attend professional development sessions.[52]Australian National Mediator Practice Standards (2008) regulates competency of mediators, their relationship with participants and what is to be expected from the mediation process which is an example of the instrument of self-regulation in the mediation field.[53]

The programs which exist in Australia at present, and use ADR processes represent a five-fold movement, as follows: (a) court-based processes, (b) community agencies, (c) administration agencies, (d) private agencies, and (e) other. Each response to various criticisms of adjudication and consequently, each has somewhat different ideas and aims.[54]

Within the court based processes, there are specific different processes like court-annexed processes, family Court services, small claim court processes and building disputes. There are community agencies, either publicly or privately, for providing ADR services for resolving a large number of disputes. There are also administration agencies established under the law for providing rights to the marginalized community. There are also privatized agencies for dealing family disputes and commercial disputes through ADR mechanism.[55]

Since mid-1990's, the Australian government has supported the development of ADR schemes and organizations among whom the notables are Australian Centre for International Commercial Arbitration (ACICA), Dispute Resolution Advisory Council (NADRAC), Australian International Dispute Centre(AIDC) etc.[56]

[51]Boardman *v* Boardman 2013 NSWSC 1257; Masters*v* Cameron 1954 91 CLR 353.

[52]Sebastian Chia, Alternative Dispute Resolution Services in Australia, (2015) *IBIS World Industry Report*, no.OD4116) <https://www.resolution.institute/documents/item/1857> accessed 20 January 2020.

[53]Nadja Alexander', Mediation and The Art of Regulation' (2008) QUT Law Review, Research Collection School of Law, 15.

[54]Jain Mugford, Ed 'Alternative Dispute Resolution Seminar Proceeding' (Canberra: Australian Institute of Criminology, 22-24 July 1986) <http://www.aic.gov.au/media_library/archive/seminar-proceedings/aic-seminar-proceedings-15.pdf> accessed 20 June 2020.

[55] Ibid.

[56]National Alternative Dispute Resolution Advisory Committee (NADRAC) *ADR Statistics Published Statistics on Alternative Dispute Resolution in Australia*, (2003) ADR: Published statistics <https://www.ag.gov.au>sites>files>resourse-files > apo-nid 67080> accessed 20 June 2020.

Table 1.4: Disposal through mediation in Australian courts

	Means of disposal	1998-1999	1999-2000	2000-2001	2001-2002
Supreme Court of New South Wales	Civil arbitration	17	23	17	15
Land and Environment Court of New South Wales	Mediation conducted	52	28	30	10
	Disposed through mediation	30	18	21	8
	% Settlement rate	58	64	70	80
Federal Courts of Australia (Commonwealth)	Mediation referred	347	312	278	288
Supreme Court of Tasmania	Assisted Dispute Resolution/ Settlement Conferences/ Mediation	112	131	152	183
Supreme Court of Western Australia	Mediation	349	380	365	347

Source: NADRAC 2003[57]

Goldberg, Sander, and Rogers[58] has stated that

> "mediation is more likely than adjudication to lead to compliance with the resolution…70.6% of the mediation agreements with monetary settlement were reported to be paid in full, compared to 33.8% of the adjudications. Another 16.5 of the mediated settlements and 21.1% of the adjudicated judgments were partially paid. In other words, it was more than three times as likely after an adjudicated case as after a mediated case that no payment had been made by the defendant."

Even in those cases where the mediation attempt does not become successful, it can help everyone understand the issues from different angles and improve their relationship with each other.[59] In Austria also, Law on Mediation in Civil Cases 2003 demonstrate a dominant formal legislative approach to the regulation and practice of mediation in civil matters.[60]

[57] The Australian Dispute Resolution Research Netwark 2003 P. 10-16.

[58] Stephen B Goldberg, Frank E,A, Sander and Nancy H Rogers '*Dispute Resolution: Negotiation, Mediation and other Processes*' (Stoth Publication 1992) 265.

[59]Jamila A Chowdhury *Mediation to Enhance Gender Justice in Bangladesh* (London College of Legal Studies, South 2018)) 248.

[60]Nadja Alexander 'Mediation and The Art of Regulation' [2008] QUT Law Review, Research Collection School of Law 9.

Mediation in Japan

In Japan, there is also backlog in the court docket. In addition, however, the courts operate in the context of a strong, popular and traditional preference for resolution by compromise. As per Tang Houzhi[61]

> "Japan has a long tradition adverse to litigation and even arbitration, preferring consultation and WOXUAN (a procedure similar to mediation) in dispute resolution. About 1/3 of the civil court cases and most of the arbitration cases have been settled by the use of mediation.
>
> The main contrast between Japanese and Western dispute resolution lies in the widespread adoption of methods of ADR whose source is not the will of the disputants but the law, and whose personnel are part of the court system."[62]

From 1922, the Japanese started to go through the process of conciliation in case of resolving disputes of land and house rent. As per the statue of the land, there are two types of Japanese in-court ADR. First, the judge himself can act as a mediator; second, the court leaves it to the Conciliation Committee to resolve the matter through conciliation. The Conciliation Committee forms one judge and two commissioners and the committee either on the application of parties or *suo moto* initiate to resolve the dispute. If the parties come to a settlement, it is reduced to a written protocol, which is equivalent to the decree.[63]

The civil conciliation-in-court system covers all civil disputes; the Act classifies the cases in the following categories:[64]

(i) Immovable property (real estate),
(ii) Agriculture,
(iii) Commercial,
(iv) Mining,
(v) Traffic accidents,
(vi) Environmental pollution, and
(vii) Miscellaneous.

According to the prevailing law in Japan, "If a party is in default and not excused by the mediation committee, he/she has to pay the penalty, of up to 50,000 yen which is about 450

[61] Tang Houzhi, 'The International ADR (Alternative Dispute Resolution) (Mooting Competition , City University of Hong Kong, 5-9 July 2016).
<https://www.justice.gov/olp/alternative-dispute-resolution-department-justice> accessed 20 January 2020.
[62] Ibid.
[63] Madabhushi Sridhar, *Alternative Dispute Resolution- Negotiation and Mediation* (1st ed. New Delhi 2006)
[64] Civil Conciliation Act, 1951, Japan, chapter ii, section 1-6.

US$."[65] This law has been imposed with a view to provide a deterrence to avoiding the reluctance to mediation.[66] The 1988 figures for Japan indicate that the number of cases transferred to conciliation-in-court by trial judges is only 2,489 out of 119,566 lawsuits at the district court level (2.08 percent), of which 1,742 cases were successfully resolved by the process.[67] According to statistics published by the Supreme Court of Japan in 1988, about 33 percent of all civil cases in the district courts are disposed of by settlement-in-court, 18 percent by voluntary dismissal, and about 45 percent by the court decision.[68]

In Japan, the majority of the disputes nowadays derive from the business transaction and industrial dispute. The companies generally settle the disputes following the provisions of the contract. The Central Examining Committee in the Ministry of Construction is an official organization to conduct the alternative dispute resolution to settle the dispute relating to construction when the responsible department cannot resolve a particularly complicated dispute[69]

In case of a dispute relating to divorce, the party has to buy revenue stamp to cover the fees, and the amount is Tk. 200 in the case for mediation, and Tk 13,000 is the case of filing a divorce litigation.[70]

Mediation in France

France is considered at the forefront of International Arbitration, mainly because it has the International Chamber of Commerce in Paris. Apart from this, the ADR mechanism in France has a widespread application covering different forms of mediation, conciliation, and participatory procedure. In the mediation procedure, the mediator is a layman whereas, in conciliation proceeding, the conciliator is a professional having at least three years of experience on the court procedure. The statute of France imposes a duty upon the claimants first to take resort to particular mechanisms of ADR before taking the dispute to a judge.

[65]Adgudgment of Family Affairs 1947, Article 27.
[66]Dr. Jamila A Chowdhury, Mediation to Enhance Gender Justice in Bangladesh(London College of Legal Studies, South 2018) 173.
[67]Nobuaki Iwai., Alternative Dispute Resolution in Court: the Japanese Experience, (1991) 6(2) Journal on Dispute Resolution, 232.
[68]Ibid, 213.
[69] Walter D Gruyter 'Japan: economic success and legal system' Harald Baum (ed.) (1997) Law and Politics in Asia, Africa and Latin America, Vol 30, No 3 , 422-425.
[70]Divorce Mediation in Japan (Ohara Law Office, July 2014) <https//www.irglobal.com> accessed 20 January 2020.

Moreover, the claimant has to mention in the summons which action she or he has taken to try to amicably resolve the dispute at stake prior to initiating court proceedings.[71]

Given the easy implementation and the real efficiency of mediation (the CMAP statistics show that for the year 2005, mediation led to an agreement in 71 percent of cases; the failure rate, therefore, being 29 percent.[72]

A survey was conducted in 2010 regarding the cost of ADR processes based on two-step approaches (First using the mechanism of ADR and second go to court) on the countries of the European Union. Amongst which the scenario of France is given below:

Table 1.5: Dispute resolution through mediation in France

Mediation in general	Private mediation	Court Annexed mediation	Mandatory mediation	Mediation in public law
80%	75%	66%	50%	87%

Source: Hopt and Steffek[73]

Mediation in Singapore

Similarly, in the verge of the backlog of cases in Singapore Mediation Centre is established as a non-profit organization under Singapore Academy of Law for the purpose of resolving the disputes of commercial civil and matrimonial nature with the help of neutral thirds party. [74]Such a mediation centre is governed by a board of directors. The chair of which is presided by a justice and the centre also has a board of advisors including judges, solicitors etc.[75]Mediators perform their duties as facilitators and ensure the fairness of negotiation through the parties themselves, who determine the output of the dispute.[76] In the year of

[71] Paule Drouault-Gardrat, Marion Barbier., 'Mediation in France' (2007) *Bird & Bard* available at <https://www.twobirds.com/en/news/articles/2007/mediation-in-france> accessed 20 January 2020.

[72]Ibid.

[73]Katrin Deckert 'Mediation: Principles and Regulations in Comparative Perspective' Klaus JHopt. and Felix Steffek (eds) (Oxford: Oxford University Press 2012) 455.

[74]The Honourable Justice Andrew Phang, Judge of Appeal, Supreme Court of Singapore, 'Mediation and the Courts- The Singapore Experience' (4th Asian Mediation Association Conference Association, Beijing China, 2016).

[75] Singapore Mediation Centre, 'About Us', 'Our People' https://www.mediation.com.sg/?option=com_content&view=article&id=54&Itemid=201 accessed 20 January 2020.

76 Louisa Tang, 'Bumper number of mediation matters for Singapore Mediation Centre in 2016" (PDF). *Singapore Mediation Centre"* "Total disputed sums mediated at Singapore Mediation Centre

2016, a number of 499 cases were successfully mediated by the Singapore Mediation Centre, and the same is a72% increase in success rate in mediation from the year of 2015. In the same way, in the next year of 2017, the number of success rate was 8% than the previous year.[77] Regarding the cost of mediation service, the centre has its own rules, and according to those rules, the mediation fees vary. For example, the mediation fee per day is different in different categories such as if the value of subject matter of the suit is between $60,000/- to 1,20,000/- then the mediation fee is $963 per day. The fee fluctuates as per the variation of the value of subject matter. However, that regulation does not apply if the parties choose their own mediators or if the number of mediators is more than 2.[78] In the Singapore International Arbitration Centre (SIAC), the government has provided specific rules and regulations for determining administration cost and fees for mediators depending upon the valuation of the subject matter of the dispute.[79]

While analyzing the modes mentioned above of successful institutionalization of mediation in different countries and regions, the 'diversity-consistency dilemma'[80] becomes an important matter to be looked into. In those countries, there seems to be an effort to balance diversity in practice through flexibility and innovation and consistency through unified mediation services provision by legislation.[81]In the subsequent chapters, an effort has been made to evaluate the existing mediation system in Bangladesh in the light of those different systems and explore different ways to develop the mediation process.

1.2.2 Performance of mediation in civil courts in developing countries: A comparative assessment

In the arena of developing countries, the ADR mechanism is being integrated in order to reach the goal of reducing case backlogs.

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crosses $2.7 billion in 2017 - the highest ever in the centre's history"(PDF)". *(16 January 2018)* 'Mediation Centre to focus on Business Disputes' (2014) MediacorpPte Ltd *Singapore Mediation Centre Homepage.* <https://www.mediation.com.sg/?option=com_content&view=article&id=54&Itemid=201 accessed 20 January 2020>.

[77]Ibid

[78] 'Our Services', 'For lawyers' Mediation-Singapore Mediation Centre Homepage available at www.mediation.com.sg>out-service>for-lawyers.

[79] 'estimate-your-fees' SIAC Schedule of Fees; Singapore International Arbitration Centre, available at www.siac.org.sg.

[80]Nadja Alexander 'Mediation and The Art of Regulation' (2008) QUT Law Review, Research Collection School of Law, 1-23.

[81]National Alternative Dispute Resolution Advisory Council (NARDAC) *Framework for Standards* (Report to Attorney General's Department, 2001) 4.

Mediation in China

The specialty of the ADR system in China is that the same court or tribunal often conducts it during or after the hearing rather than by an independent organ before the hearing. Generally speaking, the dispute settlement procedure in China is divided into two parts: Litigation and non-litigation (ADR).82The arbitration mechanism has been successfully institutionalized in China, and the arbitration institutions situated there have gained worldwide acceptance through settling national and international commercial disputes.83

The Code of Civil Procedure of China authorizes the courts to conduct mediation of the civil disputes if the parties agree to go through the procedure. The formalities of a trial are, to some extent, relaxed in the mediation session in order to create a smooth and amicable environment for a successful mediation. If the parties agree to settle their dispute, it is reduced to writing and can be enforced by the court like a decree. If no agreement is reached through mediation, the court resumes the trial. The law of the state prohibits compulsive settlement.84

Tai and McDonald (2012) have explained the Chinese mediation in the following way,

> "Judicial mediation in China is not strictly speaking an ADR mechanism, but rather an integral and important part of PRC litigation procedure. Chinese judges will often undertake dual roles, with the same judge acting as both mediator and the ultimate adjudicator in the same litigation."[85]

Table 1.6: Dispute resolution through Mediation Committees in China

Year	Mediation Committees	Members of MC	Disputes mediated by MC	Civil cases tried by the Courts	Rate of mediation
1997	985313	10,273,940	5,543166	3242202	58.5
1998	983681	9175300	5267200	3360028	63.8
1999	974100	8802500	5188600	3519244	67.8
2000	964000	8445000	5031000	3412259	67.8
2001	923000	7793000	4861000	3459259	71.1

Source: Fen He. Chinese Arbitration[86]

[82] Wei Yanming, 'New Development of ADR in China' (1997) China's Presentation <http://www.stf.jus.br/arquivo/cms/sobreStfCooperacaoInternacional/anexo/BRIC_intercambio/China__New_Development_of_ADR_in_China.pdf> accessed 20 January 2020.

[83] Wei Yanming, 'New Development of ADR in China' (1997) China's Presetation<http://www.stf.jus.br/arquivo/cms/sobreStfCooperacaoInternacional/anexo/BRIC_intercambio/China__New_Development_of_ADR_in_China.pdf> accessed 20 January 2020.

[84]Code of Civil procedure of China, Article 85-90.

[85]Tai. May and Damien McDonald, Judicial Mediation in Mainland China Explained, (ADR Notes, July 2012) <https://hsfnotes.com/adr/2012/07/30/judicial-mediation-in-mainland-china-explained/> accessed 20 January 2020.

[86]Fen He.*Chinese Arbitration: A selection of pitfalls* Association for International Arbitration (ed.) *Chinese Alternative Dispute Resolution (ADR): Mediation and Arbitration, in Netherlands*: (Maklu& Association 2009) 35.

The percentage of civil cases resolved by judicial mediation at the First Instance court level has been increasing annually from 38.9% in 2008 to 62% in 2009 and 65.29% in 2010[87]

Mediation in Malaysia

In Malaysia, a mediation mechanism is being regarded as a suitable alternative to formal litigation as there is a growing trend to refer the dispute both to the private mediator and the officers of the court.[88]The Malaysian Court system comprises both superior and subordinate courts, and the courts suffer severe backlogs in civil cases in all its tiers.[89] This situation gave rise to the necessity of mediation mechanism to resolve cases through mediation, and the Malaysian judiciary introduced *"a free court-annexed mediation programme using judges as mediators."*[90] This programme was launched in Kuala Lumpur Court Mediation Centre (KLCMC) in which a judge conducted the mediation procedure. The KLCMC has a panel of mediators consisting often judges from the High Court and three sessions court judges and magistrates.[91] The KLCMC is situated inside the compound of court premise, and under this system, the litigation is first of all filed in civil court and thereafter, such case is referred for mediation to KLCMC.[92]The relevant rules and regulations contain both consistencies in session, durations, confidentiality, withdrawal, etc. On the other hand, is has flexibility as the system does not provide any guidelines regarding the procedure of conducting mediation. In such KLCMC, the practice of mediation has shown a mounting success as till 2013, a total number of 3134 cases were referred to CMC, and the success rate of mediation is almost 50%.[93]

[87]Tai. May and Damien McDonald, Judicial Mediation in Mainland China Explained, (ADR Notes, July 2012) <https://hsfnotes.com/adr/2012/07/30/judicial-mediation-in-mainland-china-explained/> accessed 20 January 2020.

[88]Alwi A Wahab, 'Court Annexed and Justice-led Mediation in Civil Cases: The Malaysian Experience' (Dphin thesis, Victoria University of Melbourne 2013) 1.

[89]Sharifah SS Ahmad, Marry George 'Dispute Resolution Process in Asia (Malaysia)' [2002] IDE,Asian Law Series, no. 17. 2-4.

[90] Chief Justice, Bernama , 'Court Annexed Mediation a Free Programme –' (Press release, Malaysia, Aug 2011). The said press release was subsequently reported in Chief Justice says court annexed mediation a free programme, BORNEO POST ONLINE (Aug. 26, 2011), http://www.theborneopost.com/2011/08/26/chiefjustice-says-court-annexed-mediation-a-free-programme/.

[91]Choong Y Choy, &, Tie F Hee and Christina O S Siang, ' Court Annexed Mediation Practice in Malaysia :What the Future Holds' ; (2016) University of Bologna Law Review 275.

[92]Ibid 276.

[93]Arifin B Zakaria, Chief Justice, Malay., Speech at the Opening of the Legal Year 2014 (Jan. 11, 2014) (transcript available in http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/UcapanTUN2014_1 5JAN.pdf).

In order to develop the Malaysian civil court system, the *Rules of Court, 2012* was introduced in which the court was given the power to provide direction for mediation for ensuring quick and expeditious justice.[94]This law was introduced to encourage the parties to pay heed to mediation.[95]Rule 2(2)(a) provides that:

> "At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including – mediation in accordance with any practice direction for the time being issued."

In addition to that, the Practice Direction No 5 of 2010 also mandated the judges of High Court, sessions and magistrates to give directions to the litigating parties. Similarly, in this law, the lawyers must co-operate and assist their clients in resolving their disputes.[96]

Apart from the judge-led mediation, mediation organized by the members of the bar council of Malaysia has gained special attention from the litigant public. The practice has been given an organizational shape through the institution of Malaysian Mediation Centre (MMC).[97]The (Malaysian Mediation Centre)MMC is recognized as a successful institution to cater settling of commercial, civil and matrimonial disputes following their own mediation rules in respect of mediation procedure, selection of mediators, such as the members of the Bar must have seven years of practice and have completed 40 hours of the training program on mediation[98]MMC provides mediation instead of charges at the rate fixed by them, including mediators fee regardless of the valuation of litigation, room rent, administrative fees etc.[99] However, in Malaysia, Judge led mediation has shown better result than lawyer oriented mediation, i.e., MMC as the statistics show that in the year 2010, out of 109 cases referred from the court, only 54 became successful.[100]According to Azmi:

[94]of Rules of Court, 2012, Order 34 Rule 2(2).
[95]Choong Y Choy, &, Tie F Hee and Christina O S Siang, ' Court Annexed Mediation Practice in Malaysia :What the Future Holds' ; (2016) University of Bologna Law Review 279.
[96]Practice Direction on Mediation section 1.1 and 2.3.
[97]Chia L Thye, Leng Boon 'The Role of the Judiciary and the Bar in Promoting Mediation' (12th Biennial Malaysian Law Conference, Kuala Lumpur, 10-12 December 2003).
[98]Alwi A Wahab, 'Court Annexed and Justice-led Mediation in Civil Cases: The Malaysian Experience' (Dphin thesis, Victoria University of Melbourne 2013) 48.
[99]Ibid
[100]ShailaKoshy '75% Success Rate for Mediation', *The Star*, (Malaysia, 2 August 2006)

> "..mediation by an independent third party who is trained mediator and judge mediators-the latter is preferred by the courts as it is more economical and time-saving."[101]

Mediation in Sri Lanka

Sri Lanka from time immemorial had the mounting arrears of litigations up to the highest court of the country. Though different mediation mechanisms were prevalent, there was no uniform legal framework and institutional structure to enforce it to resolve disputes. In response to mass dissatisfaction about the traditional and formal dispute settlement process, mediation was legally introduced to Sri Lanka in 1988 by enacting the *Mediation Boards Act*.[102]As regards, the settlement of the civil dispute through mediation, according to Saranee and Gunathilaka[103]

> "Civil matters are subject to the qualification of the dispute being related to property, debt, damage or demand not exceeding rupees 500,000. Next is the Court referral under which any Court may refer disputes for mediation with the consent of the parties. However, in this process parties are not allowed to let their legal representatives to take part in the mediation process."

The Mediation Boards consist of three members who are the retired judges of the Supreme Court, and they can attain that position only after receiving training from a permanent cadre of mediator trainers. The presence of the parties, in this case, is not mandatory, and no kind of formal procedure and technicality is observed in those sessions.[104]

At the same time, if one or other of the disputants do not appear at the mediation, the certificate of non-settlement subsequently issued by the Board will state the name of the party who did not attend the mediation. Naming the non-attending creates some kind of pressure upon the parties to participate in the mediation session and settle the dispute amicably. There is a mandatory referral of the civil dispute to mediation board.[105] As per their law, "A certificate of non-settlement purporting to be issued under section 14A and signed by the

[101] ZakiAzmi, 'Overcoming Case Backlogs, The Malaysian Experience' (Asia Pacific Court Conference, Singapore, 2010).

[102]Nadja Alexander, 'From Communities to Corporations: The Growth of Mediation in Sri Lanka', *4(1) ADR bulletin*, (2001) 8-11.< : https://ink.library.smu.edu.sg/sol_research/2762> accessed 20 January, 2020.

[103]Saranee, W.A. Gunathilak, *'Mediation in Sri Lanka: its efficacy in dispute resolution'* (Proceedings of APIIT Business, Law & Technology Conference, Colombo, 20 July , 2017).

[104] Act to Amend the Mediation Boards Act No 72 of 1988, s 8, 9, 10.

[105]Nadja Alexander, 'From Communities to Corporations: The Growth of Mediation in Sri Lanka', *4(1) ADR bulletin*, (2001) 8-11.< : https://ink.library.smu.edu.sg/sol_research/2762> accessed 20 January, 2020.

Chairman or the Chief Mediator, as the case may be, may be given in evidence in any action or proceeding instituted in any court.."[106]

The community mediation mechanism has brought a positive effect on reducing case backlog. The report by Huerta (2004) concludes that more than 2 million individual cases have been mediated, and 60% have been resolved since 1991. According to the recent research sponsored by the Asia Foundation (2014), 324 community mediation boards handle an average of 112,000 cases every year with an annual settlement rate of 54% to70%. Most users showed a high level of satisfaction (90%). [107]

The mediation boards are appointed at the community level. Disputes relating to movable or immovable property, a collection of bank loans are dealt with the mediation board. The number of cases in these boards has steadily increased from its inception from 13280 in 1991 to 101,639 in 1996.Through July 1997, a number of 459364 cases were referred to mediation out of which 295,302 cases were settled amicably.[108]

Other cases were unsuccessful for withdrawal by the parties, unsuitability for mediation or unsuccessful attempt. There are no regulated procedures or technical requirements to be complied with at any dispute hearing. However, the Mediations Boards have some drawbacks like untrained mediators, inadequate funding, solely community-based character, power imbalance while settling the disputes etc.[109]Regarding regulating the activities of mediators, the law is as follows:"*The Chairman and other members shall be paid such allowances at such rates and subject to such conditions as may be determined by the Minister with the concurrence of the Minister in charge of the subject of Finance".*[110]However, in Sri Lanka, mediation boards can be considered to have been doing an excellent job of reaching justice to the mass litigants due to having deterrence effect for avoiding mediation towards the litigants and promoting the mediators by providing allowance by an authority.

[106] Act to Amend the Mediation Boards Act No 72 of 1988, s 8(1) .

[107]Lawrence A Huerta, 'Why Mediation'(2004) available at <https://www.mediate.com/articles/huertaL1.cfm> accessed 20 January 2020.

[108] Ibid

[109]Madabhushi Sridhar, *lternative Dispute Resolution- Negotiation and Mediation*(New Delhi: Lexis Nexis Butterworth, 2006) 244-245.

[110] Act to Amend the Mediation Boards Act No 72 of 1988 s 11.

Mediation in India

The Indian legal system is often criticized because of huge case backlog from lowest to the highest court of the judicial hierarchy in every state. In order to cope up with delays and arrears in courts, the mechanisms of ADR have been integrated into different forms, like arbitration, conciliation, mediation etc. Pillai, Jaya, and Konoorayar have vividly shown the scenario of backlog of case in different courts, revealing that there is a gradual increase in the number of pending cases each year.[111]

In such backdrop, in India, ADR has been considered as one of the most effective ways for providing low cost, speedy and fair means of settlement of disputes. The arbitration mechanism is in full force there under the codified law of the state to deal with the commercial disputes. In mid-eighties, the government took the initiative to establish *Lok Adalat* for settling through conciliation and compromise the disputes relating to motor vehicle accident cases, land acquisitions case where the government is to pay compensation, commercial banks, cases against local bodies like Town Municipality, Panchayat, cases pending in labour courts, cases relating to matrimonial matters etc.[112]

Lok Adalat is closely associated with court-annexed mediation as the *Lok Adalat* has jurisdiction to settle the dispute pending before any court.[113]Being established under Local *Services Authorities Act, 1987*, a settlement arrived at by both the parties in the *Lok Adalat*s has been given the force of a decree which can be executed through Court as if it is passed by it.[114]*Lok Adalat* is constituted by a sitting or retired judicial officer as chairman and two others as members who are lawyers and social worker.[115]Law of Evidence is not strictly followed while determining the merit of the case.[116]

Lastly, in 2006, in India, court-annexed mediation has been subjected to more specific legislation for providing *"sector-specific and context-integrated regulation"*[117] in this filed. In India, there is a specific mandatory provision for directing parties to opt for alternative

[111]Pillai., K.N. Chandrasekharan, and Vishnu S. Konoorayar., (2014). ADR Status/ Effectiveness study, Indian Law Institute, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535079.

[112]A.B.M Mahmudul Huq *Alternative Dispute Resolution in Bangladesh Challenges and Prospects* (Law Book Company. 2015) 115.

[113]The Legal Services Authorities Act, 1987 s 19 ss 5.

[114]The Legal Services Authorities 1987Act s 21.

[115]Ibid s 19(1) (a).

[116]Ibid s 22D.

[117]ClayrisBaylis 'Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions' (Victoria University of Wellington Law review 1999) 279, 283-285 291-293.

modes of settlement wherein the court examines the parties for assessing the mediation elements and formulate the terms of the settlement.[118] Moreover, if the court finds that a party is absenting himself before mediator without sufficient reason, the court may take action against the said party by the imposition of cost.[119]Thus, in the legislation of India has not only mandated the party to attend the mediation, but it has also provided punishment in case of non-compliance. In the event of the expenses of the mediation are not paid by any of the parties, the court can direct the parties concerned to pay, and in case of non-payment, the court has the power to recover the said amount as if there was a decree of the said amount.[120]On the other hand, the legislation has also inserted the provision of empowering the court to fix the mediator's fees after consulting mediator and the parties. For the purpose of upgrading the qualification of mediators, there are specific provisions of training to the mediators.[121]

Table 1.7: Total disposal through *Lok Adalot* in India

Year	2004	2005	2006	2007
Cases settled in *Lok Adalat*	1,74,13,717	1,86,95,934	2,10.30.623	2,34,12,194
Total cases settled in India		1.76,48, 152	1,74,51, 381	1,63,65,096

Source: Pillai, Jaya, and Konoorayar 2014.[122]

Table 1.8: Total Number of cases settled in Karnataka, Maharashtra, and Delhi by *LokAdalat*

Year	2004	2005	2006	2007
Karnataka	644572	689891	752966	794046
Maharashtra	319819	356112	400346	446272
Delhi	113025	22909	31910	157972

Source: Pillai, Jaya, and Konoorayar 2014[123]

Table 1.9: Total number of cases settled in Mumbai by *LokAdalat*

Year	Number of cases referred	Number of cases disposed
2005	3999	865

[118]The Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2006, Rule 2.

[119]Ibid Rule 13(b).

[120]Ibid Rule 26(7).

[121]Ibid 2006 Rule 7.

[122] K.N. ChandrasekharanPillai and Vishnu S. Konoorayar, ADR Status/ Effectiveness study (Indian Law Institute 2014) 120 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535079> accessed 20 January 2020.

[123]Ibid.

2006	1974	399
2007	1667	390

Source: Pillai, Jaya, and Konoorayar, 2014[124]

in their book "ADR in India: Legislations and Practices" Chaitanya and Madhavan (2015) stated that

> "In India, mediation has not yet been very popular. One of the reasons for this is that mediation s not a formal proceeding and it cannot be enforced by courts of law. There is a lack of initiative on the part of the government or any other institutions to take up the cause of encouraging and spreading awareness to the people at large."[125]

1.3 Mediation in Resolving civil disputes in Bangladesh: A novel initiative and its aftermath

To minimize similar case backlogs and delays, the system of ADR has already been acclaimed and adopted in many jurisdictions in which an impartial third party helps disputants resolve their disputes. ADR is appreciated worldwide as it is a process where the disputes are resolved with comparatively less expenditure of time and maintaining the confidentiality and interest of the parties.[126]One of the benefits of ADR is that it addresses court backlogs by providing cheap, accessible methods of dispute resolution for poor people.[127] Unlike the suits filed for a trial, ADR is a kind of out-of-court settlement. It is a process qualitatively distinct from the judicial process.[128] It is a process where the disputes are resolved by an impartial third party usually chosen by the parties themselves where impartial third party is generally familiar with the disputes of that nature, and the proceedings are informal without procedural technicalities and are conducted in a manner agreed by the parties.[129]According to Dingle and Kelbie, [130]

[124]Ibid.

[125]Chaitanya., S. Shashank and Kaushalya T. Madhavan*ADR in India: Legislations and Practices* (KIIT School Of Law, *Bhubaneswar:* KIIT University. 2015) 118 www.lawctopus.com arbitration-adr-in-india> accessed 20 January, 2020.

[126] David Spencer and Samantha Hardy, *Dispute Resolution in Australia* (Thomson Reuters (Professional) Australia limited 2009) 147.

[127]SumaiyaKhair,, 'Alternative Dispute Resolution: How it works in Bangladesh, (2004)The Dhaka University Studies, Part F Volume xv (1) 59.

[128] Patibandla .C Rao and William Sheffield *Alternative Dispute Resolution What it is and How it works?*(Universal Law Publishing 2002) 25.

[129]Ibid

[130] Jonathon Dingle and Judith Kelbie, *The Mediation Handbook 2013-2014* (London School of Mediation 2013) 8.

> "A mediated solution is often more comprehensive and creative than a judicially imposed outcome which is limited by legal constraints rights and procedures. It can provide a win-win outcome for the participants."

As already mentioned, ADR, in its broader perspective, gains various forms including arbitration, mediation, negotiation, and conciliation. In this related vein, the ADR system has already been included in Bangladesh's multiple laws relating to civil, family, *Artha rin* matter, etc. In the same line, keeping consistency with the notion of promoting ADR in Bangladesh, the ADR system has been incorporated in 89(A)-89(E) of the Code of Civil Procedure, 1908. Pertinently, section 89(A) provides for pre-trial mandatory ADR; on the other hand, section 89(C) the procedure of post-trial mandatory ADR has been laid down. In order to carry out this procedure, the Court, the pleaders from respective sides, the lawyers from panels prepared by the District Judge as third party mediators are duly authorized to conduct the whole process of mediation.

Apart from this, (i.e. during pre-trial) the parties at any time and at any stage of the trial can resort to ADR. The same law has widened the scope of mediation even in the stage of appeal in a particular suit. In the year of 2012, the provision of ADR has been made compulsory in every suit.[131] Utilizing, improvising and implementing the idea of ADR of different countries of Asia and outside Asia, this idea is incorporated in several laws of our country for the purpose of improving the civil justice delivery system as an effective mechanism for eradicating the sufferings of the people and preventing the miscarriage of justice.

1.3.1 Major laws incorporating civil mediation in Bangladesh

As discussed already in the introduction of this chapter, ADR has been introduced in resolving different types of litigations in Bangladesh. Though the techniques of ADR used and their executing body may vary among suggested ADR techniques in various laws, the different important laws that have provision for resolution thorough ADR can be shown by the Table as below:

(a) Laws incorporating formal mediation in Bangladesh

Formal ADR means alternative techniques to resolve disputes defined under a procedural law and performed inside a court premise. For instance, Family mediation is conducted by a judge

[131] The words, 'the court shall' were substituted for the words, 'the court may', by section 2(a)(ii)of the Code of Civil Procedure (Amendment) Act, 2012 .

inside the family court. Further, the process of conducting family mediation is mentioned in the *Family Courts Ordinance, 1985*. Table 1.10 below indicates different laws that incorporate formal ADR practices in Bangladesh.

Table 1.10: Mediation as a dispute resolution technique in resolving major civil disputes in Bangladesh[132]

Governing Law (s)	Section (s)	Mode(s) of ADR	Executing body
Family Courts Ordinance 1985	10(3), 13	Conciliation Mediation	Judges
Code of Civil (Amendment) Procedure 2003 & Code of Civil (Amendment) Procedure 2006	89 (A),89(B), 89 (C), 89(D), & 89(E)	Mediation Arbitration	Judges; Lawyers; Third party
Money Loan Court Act 2010	22-25	Mediation	Lawyer; Third party
Income Tax (Amendment) Act 2011	152F-152S	Conciliation	Third party
Labour Act 2006	209-213	Negotiation; Conciliation; Arbitration	Government-appointed conciliators
Code of Criminal Procedure, 1898	298, 323, 334, 341, 342, 352, 355, 358, 374, 426 427, 447, 448, 490, 491, 492, 497, 498, 500, 501, 502, 504, 506, 508, 147, 148, 424, 325, 335, 336, 337, 338, 343, 344, 346, 347, 348, 354, 356, 357, 379, 380, 381, 403, 406, 407, 408, 411, etc.	Compounding the offence	Judges

(b) Laws incorporating quasi-formal mediation in Bangladesh

Unlike judicial ADR, these *quasi*-formal ADR are not conducted by courts/tribunals rather performed by local government representative under a statutory mandate. Different forms of quasi-formal ADR practiced in Bangladesh can be summarized as below:

[132]Jamila A Chowdhury, *ADR Theories and Practices A glimpse on Access to Justice and ADR in Bangladesh* (London College of Legal Studies 2013) 141.

Table 1.11: Practice of quasi-formal mediation in Bangladesh[133]

Law	Section (s)	Mode(s) of ADR	Executed by
Muslim Family Laws Ordinance 1961	2(a), 6, 7(4), 9(1)	Conciliation; Arbitration	Ward commissioners and UP members
Village Courts Act 2006	4,5,6,7,8 and Schedule	Arbitration	Union Parishad members
Disputes Settlement (Municipal Areas) Boards Act 2004	3,4,7,8, and Schedule	Arbitration	Ward commissioners
Arbitration Act 2001	Section 23	Arbitration	Third-party arbitrator
Customs Act, 1969	Chapter 18A	Negotiation	Third-party facilitator
Value Added Tax Act, 1991	Section 41ka-41ta	Negotiation	A representative of Value Added Tax Authority as Facilitator

Thus, it seems that along with mediation, the laws relating to arbitration are in force which has its application in resolving labour disputes and other types of commercial disputes. In order to resolve the business disputes, Bangladesh International Arbitration Centre (BIAC) has provided BIAC Arbitration Rules 2019 containing BIAC Arbitrators Code of Conduct. As per their rule of procedure, a party initiating the arbitration shall send a copy of the request to the other party[134],and the respondent shall send the copy to BIAC [135]to take necessary actions. The Arbitration Committee shall contain a list of Panel of arbitrators and appoint the arbitrators as per the procedures contained therein, and it shall form arbitration tribunal.[136]The arbitration tribunal fixes the fees bearing in mind the cost of arbitration and a portion of the cost between the parties.[137] As per the annexure of BIAC, the assessment fee, administration fee and mediation fee are determined according to the value of the subject matter of dispute shown in the chart.[138]

The arbitration cost is divided into the administrative fee, arbitrators' fee, and assessment fee and registration fee.[139]In that rule, the administrative fee and mediator's fee are determined based on the sum value of the dispute. The parties will deposit the amount as per the direction of the arbitration tribunal, and in case of non-posit in time, the proceeding shall continue ex-

[133] Ibid
[134] BIAC Arbitration Rules 2019, Rule 3(1).
[135] Ibid, Rule 4(1).
[136] Ibid, Rule 7.
[137] Ibid, Rule 26(1)(2).
[138]Annexure to BIAC Arbitration Rules, 2019.
[139]Ibid 2019.

parte against the party. The award shall require the defaulting party to reimburse the amount to the other party who had earlier paid the amount.[140]

1.4 Scope and rationale of this research

1.4.1. Scope of the research: Mediation in resolving civil disputes under The Code of Civil Procedure, 1908 (CPC)

As shown in Table 1.10 and Table 1.11 above, ADR has been incorporated to resolve several civil disputes in Bangladesh, including property disputes, family disputes, labor disputes, income tax disputes, and disputes between banks and borrowers Non-Performing Loans (NPLs). However, many of these civil suits are dealt under special laws like *Family Court Ordnance*1985 for resolving family disputes, *Income Tax (Amendment) 2011* to deal with income tax disputes, or *Money Loan Courts Act (MLCA) 2010* to deal with NPLs.

As discussed in the Table mentioned above, both Arbitration and Mediation can be applied to resolve civil cases through ADR under CPC. The scope of this thesis is, however, limited to the resolution of suits of civil nature though mediation(as enshrined in section 89A of the Code of Civil Procedure, 1908), specifically land disputes that are dealt under the Code of Civil (Amendment) Procedure 2003 & Code of Civil (Amendment) Procedure 2006. Mediation is a process where an impartial third party mediates between parties and tries to attain a consensual resolution between the parties by assisting parties to develop a win-win solution for their dispute.[141]Mediation can refer to everything in which the disputants are encouraged to negotiate with each other prior to other legal processes. [142]On the other hand, in Arbitration, a third-party arbitrator takes a more decisive role to hear parties and suggest a binding or non-binding arbitral award to resolve the disputes. Unlike a win-win solution attained under mediation, arbitral awards are made under the shadow of substantive law guiding type of dispute under consideration. However, a flexible procedure can be made in applying different procedural laws, so that arbitral awards can be made in a considerably shorter period of time than the trial.[143]

Among the above mentioned two mechanisms of resolving litigations, mediation, as envisaged in section 89A, deals with land-related disputes and other suits of civil nature.

[140] BIAC Arbitration Rules 2019, Rule 26 and 27(3).

[141]Naima Huq, *'ADR Recent Changes in the Civil Process'* (The Dhaka University Studies, Part F Volume xv (1) 2004) 37-58; **See also**, Kershen Lawrence, QC, 'Mediation in Land Dispute A United Kingdom Perspective' (British Council –South Asia ADR Symposium and Seminar , Dhaka Bangladesh March 7th and 8th , 2004) PP 1-11 at P 3 .

[142] Md. Abdul Halim, 'ADR In Bangladesh: Issues and Challenges' (CCB Foundation 2011)P 14-30.

[143]Intertrade Ltd *v* Trading Corporation of Pakistan Ltd Pakistan Law Digest (PLD) 1976 Kar 496.

Therefore, as suggested under Section 89A of CPC, exploring the reasons for ineffective mediation is taken as the scope of this research.

1.4.2 Rationale of the research: Current backlog in Civil Courts in Disposing Civil disputes

The prime reason to initiate this research originated from an enormous backlog of cases in our civil courts yet, a little practice of mediation for quick disposal of cases and consequent removal of the backlog. As retrieved from the court registry data, in January 2019, about 70,000 civil cases are pending to be disposed of in the entire courts of Dhaka Judge Court.[144]Further, the last column of the Table below indicates that each district backlog in civil disputes is increasing over time. This generalized picture of the backlog in civil cases all over the country rationalized the conduct of this research to find an effective alternative to remove this backlog in a shortest possible time.

Table 1.12: Backlog in civil courts, a general problem all over Bangladesh

District	Opening Balance	Institution	Total	Disposal	Ending Balance
Dhaka	110375	8993	120686	6742	113944
Shariatpur	13,162	783	13,955	485	13470
Mymensingh	54,038	1997	56,085	1770	54315
Brahmanbaria	16708	1350	18,215	800	17415
Barisal	26,662	2295	29,049	1115	27934
Gaibandha	15,734	1563	17455	788	16667
Kushtia	16,245	1050	17,424	1182	16242
Narail	9248	451	9712	285	9427
Cox'sBazar	21,878	1,048	22,999	685	22314
Sherpur	10956	1191	31423	834	30589
Gopalganj	16926	1117	18043	640	17403
Sylhet	17446	1511	18959	941	18018
Narayanganj	24045	830	24875	710	24165
Comilla	22385	2426	24821	1869	22952
Rajshahi	18362	1369	19731	1010	18721
Narsingdi	8370	858	9128	658	8470
Lalmonirhat	5613	702	6315	536	5779
Rangpur	21231	1240	22471	1465	21006
Noakhali	23332	1694	25026	1100	23926

Source: *Data collected from a report published by Bangladesh Supreme Court from 1st October 2019 to 31st December 2019.*

[144]Source; Court registry data, 2014-2019.

Table 1.12 regarding the backlog of civil suits shows that the disposal rate remains low not only in Dhaka district but also all over Bangladesh. A discussion in the next section further indicates that despite this heavy backlog of cases all over the country, the practice of mediation- a popular means to resolve dispute worldwide remain ineffective in Bangladesh.

1.4.3 Rationale of the research: A limited practice of mediation to fight against the backlog

As discussed above in section 1.2, mediation remains a popular means for quick disposal of cases worldwide. Nevertheless, as demonstrated in the Table below, total disposal through mediation remains an insignificant portion of total disposal not in Dhaka district rather in various districts all over the country. This vivid contradiction between widespread world practice of mediation and its general ineffective in Bangladesh constitute another rationale for conducting this research.

Table 1.13: The scenario of disposal of civil cases through court-connected mediation in some particular districts in Bangladesh (From 1st October to 31st December 2019)

District	Total cases for disposal	Disposed of cases	Disposal through ADR	
			Total	Percentage
Dhaka	1,20,686	6742	591	.48
Shariatpur	13,955	485	24	.17
Mymensingh	56,085	1770	22	0.03
Brahmanbaria	18,215	800	44	0.24
Barisal	29,049	1115	33	.11
Gaibandha	17455	788	08	.04
Kushtia	17,424	1182	27	0.15
Narail	9712	285	18	0.18
Cox'sBazar	22,999	685	05	0.02
Sherpur	31423	834	27	0.08
Gopalganj	18043	640	--	0.00
Sylhet	18959	941	27	0.14
Narayanganj	24875	710	40	0.16
Comilla	24821	1869	44	0.17
Rajshahi	19731	1010	45	0.22
Narsingdi	9128	658	24	0.26
Lalmonirhat	6315	536	15	0.23
Rangpur	22471	1465	20	0.08
Noakhali	25026	1100	34	0.13

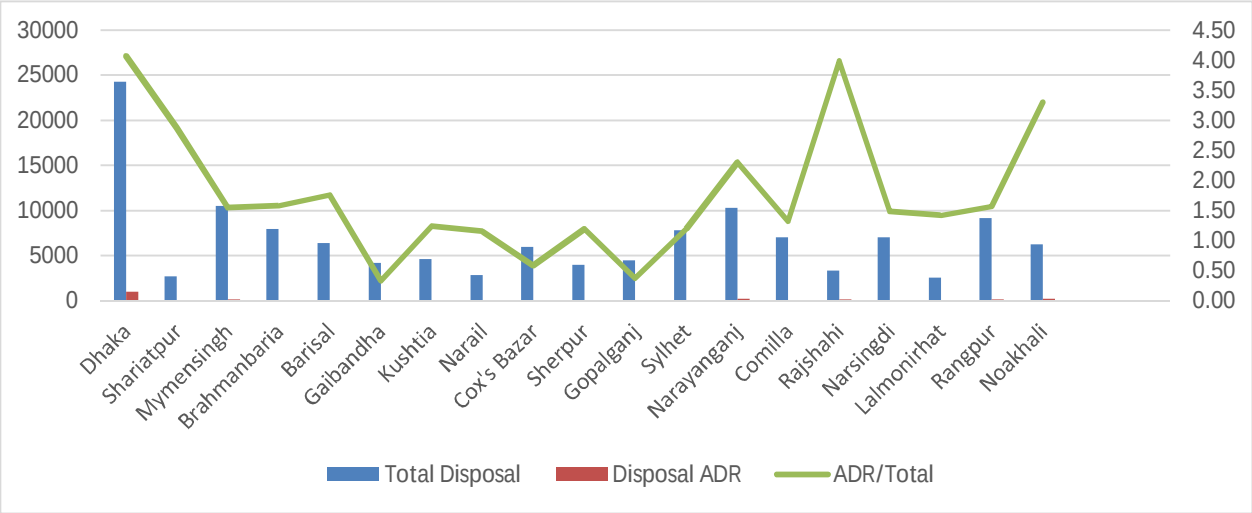
Source: *Data collected from a report published by Bangladesh Supreme Court from 1sr October 2019 to 31st December 2019*

Table 1.13 shown above, it can be said that in the particular courts of Dhaka judgeship, the ratio of disposal through court-connected mediation compared to the total number of pending cases is not in

a good position. Similarly, in Bangladesh, the performance of the mediation mechanism does not seem to be satisfactory for the disposal of the litigations.

As shown in Table 1.13 and Figure 1.2, in almost all the districts, the rate of disposal of civil disputes through mediation remains less than 1.0% of the total pending case in the year 2018. Especially in Dhaka, the percentage of resolving suits though mediation is only .22%.Unlike Dhaka, the greater districts, like Barisal, Sylhet, Rajshahi, and Rangpur, the situation of disposal of suits through mediation is even worse.

Figure 1.2: Disposal of civil disputes through mediation under CPC



In smaller districts, like Shariatpur, Narail, Lalmonirhat, the disposal rate of suits through mediation is the same irrespective of their volume of cases and number of judges compared to greater districts. Considering this unique feature of the dismal condition of resolving suits through mediation all over the country, civil courts in Dhaka judgeship that consists the largest number of courts and litigations(total pending suit is 1,17,807 and number of disposal is 7630) has been taken as the subject matter of research work.

As depicted in the previous statistics, through the trial, the disposal of the suits is not attaining the fruitful result of the timely disposal of suits. In contrast, as an alternative procedure, the rate of disposal through mediation is in a miserable situation. The discussion described above shows that though the mediation mechanism came forward to rescue the civil courts from case backlogs, it failed to accomplish the required result to achieve the

resolution of cases.[145] So, there remains an ample scope to identify the grey areas of hindrances in the existing laws and infrastructure, making the ADR mechanism ineffective. Therefore, Chapters 3 and 4, based on court registry data and individual case study, have identified legal and institutional loopholes that hinder the resolution of civil disputes through mediation. Similarly, Chapters 6 and 7 have attempted to receive response from different stakeholders regarding the dispensation of justice in civil litigations to chalk out the obstacles and possible ways to minimize the same.

1.4.4 Scope of the research: Reasons for ineffective District Legal Aid Officer as a mediator[146]

Data were collected regarding the effectiveness of ADR in Legal Aid Office Dhaka, and this data showed that this office mainly dealt with pre-case mediation.[147]In 2014 and 2015, no civil litigation has been transferred from the courts or Tribunal to the Legal Aid Office. The Office has by itself taken up the cases for ADR before the institution of the suit and 9 out of 12 family disputes have been disposed of through ADR. In 2015, 21 out of 21 cases (civil and family disputes) have been resolved through ADR. Then in the year of 2017, the District Legal Aid Officer has disposed of the suits through court-connected mediation. However, we cannot get a decent picture while studying statistics as most of these suits are of family suits in the Legal Aid Office. Moreover, the law relating to court-connected ADR under 89A by legal Aid Office came into force in 2017 and considerable time has not yet been lapsed after amendment and information at our hand is inadequate to come to any conclusion as regards the efficiency of this office. Nevertheless, the inclusion of District Legal Aid Office(DLAO) as a mediator has definitely widened the scope and rationality of this research. If the tool is properly utilized, it can significantly contribute to ensuring resolving the suits through mediation.[148]

[145]Md. Abbas Uddin; and K.M Rakibul Islam, *Practice of Court Annexed ADR in Bangladesh: Flourishing or declining*; (2018) P147 <https://www.banglajol.info/index.php/IIUCS/article/view/20405/14120> accessed 20 January, 2020.

[146] The Words, 'to the concerned legal aid officer appointed under the Legal Aid Act, 2000 (Act no 6 of 2000)'were inserted by section 2(a) of The Code of Civil Procedure (Amendment) Act, 2017. The Legal Aid Rules came into force on 9 February, 2015.

[147] The District Legal Aid Officer was given authority to mediate the civil suit through insertion of section 21(ka) of The Legal Aid Act, 2000. The Legal Aid Rules came into force on 9 February, 2015.

[148]Dr. Sheikh G Mahbub 'Alternative Dispute Resolution through Civil courts in Bangladesh' (Bangladesh International Arbitration Centre 2019) 327.

1.5 Research questions and objectives of the research

As disposal of civil disputes dealt under CPC are lengthy in nature compared to family disputes, the delay caused by legal professionals and their reluctance to proceed the suit could be a strong hypothesis for the poor performance of ADR in civil cases run through CPC. Further, unlike family courts where judges act as mediators, ADR under CPC can be conducted by lawyers, judges, and other third parties as decided by the parties to a dispute. Given this context, the research explored the following questions;

a) Does mediation play a significant role to fulfill its potential in reducing backlog in civil courts?
b) What legal loopholes might be causing deterrence to effective mediation?
c) How to motivate the key stakeholders to accelerate the effectiveness of mediation under CPC?
d) What institutional limitation might be causing hindrance to the efficiency of mediation mechanism in civil courts?
e) What legal and institutional reforms are required to accelerate the efficacy of mediation under CPC?

The aforesaid research questions are formulated to achieve new insights about the actual functions of mediation mechanism in respect of providing access to justice towards litigant people. Therefore, the corresponding research objectives are as follows;

a) To examine the role of mediation in resolving civil disputes under CPC;
   - To explore and trace the performance of mediation in reducing the case backlogs from court registry data and individual case reviews.
   - To provide new insights from the perspective of key stakeholders such as judges, lawyers and litigants for scrutinizing the performance for mediation for resolving cases. .
   - To explore the opinion of stakeholders outside the courts for gaining better understanding in this regard.

b) To identify existing legal loopholes that might have caused or allowing such delay and deterrence to mediation;

- Trace out the legal loopholes in the context of prevailing legislative framework relating to civil litigation with particular emphasis on mediation under CPC.
- Find out the application of those laws for resolving the suits through mediation by reviewing the individual case files.
- Explore the notions of different key holders about loopholes relating to the laws of mediation.

c) To explore the role and motivation of different stakeholders on the performance of mediation under CPC;

- To evaluate the role of professionals such as Judges, lawyers, clerks (both court support staffs and lawyer's clerks) and mediators in respect of dealing with the matter of ADR.
- To analyze the impact of stakeholders such as Assistant Commissioner (land) office and Sub-registry office on the success rate of ADR under CPC.
- To examine the awareness and knowledge of litigants about mediation as a tool of providing access to justice.

d) To identify institutional limitations and lack of major logistic facilities in courts those are responsible for such delay and deterrence;

- To explore the views of all the stakeholders in respect of institutional facilities favoring the performance of mediation.
- To get insights from the interviewees about the gap in the hard and soft infrastructures causing failure to the effective functioning of mediation.

e) In the context of prevailing legal and institutional drawbacks, explore the different means and ways to increase the performance of mediation under CPC.

- Careful empirical study and investigation under this research have ventured to expound different means and ways, to achieve the success of mediation in our civil justice administration system under CPC. The study has tried to unearth the grey areas in existing law to overcome the barriers or hindrances for successful implementation of mediation mechanism in civil justice within the purview of Code of Civil Procedure.

However, a detailed discussion on plausible legal and institutional mechanisms that might have been causing such delay is deferred to the next chapters.

1.6 Methodology

As discussed above, the present research aims to examine the role of mediation in resolving civil disputes, identify the loopholes behind its dysfunctional state and suggest reforms to the existing legal and institutional framework. In order to achieve the aims mentioned above, the present research employs different approaches in legal research such as analytical as well as socio-legal approach.

Analytical and socio-legal approach

According to Campbell and Harding, research of law:

> "…analyses the relationship between the rules, explains areas of difficulty, and perhaps predicts future difficulty."[149]

Thus, the analytical approach requires an analysis of available research materials through logical deduction and interpretation to arrive at a conclusion.[150]Along with the analytical approach, the socio-legal approach should also be considered to view this research topic in the background of the social entity of different stakeholders. According to Cotteral:

> "The sociology of law seeks to explain the nature of law in terms of empirical conditions within which legal doctrines and institutions exist in particular societies or social conditions."[151]

Thus, in this study, utilizing the sociological approach, theexisting legal mechanism has been viewed as a social phenomenon, and the aim would be to explore the research objective in the background of different social settings.[152]

1.6.1 Extensive literature review

By utilizing this analytical approach, there is an attempt to review considerable volume of a literature to understand the nature and context of the problem and generate relevant hypotheses of the study. Reviewed literature includes major Acts and practices (both of Bangladesh and other countries), published books, judgments from higher courts, research

[149] Dennis Pearce, Enid Campbell and Don Harding, *Australian Law School; A Discipline Assessment for the Commonwealth Territory Education Commission, A Summery*(1987) 307-08.
[150]Dr. Abdullah A Faruque, Essentials of Legal Research (PalalProkashoni, 2017) 41.
[151] Roger Cotteral, *The Sociology of law: An Introduction*(Butterorths, London, 1984) 303.
[152]Dr. Abdullah A Faruque, Essentials of Legal Research (PalalProkashoni, 2017) 41.

articles, and news publications relating to ADR and civil disputes. Both in the 1st and 2nd chapter of this thesis, there will be an effort to review those literatures to analyze those countries' existing theories, laws, and practices.

Apart from this, those literature have been reviewed to examine their practical application in our particular social features in the subsequent chapters. In the 2nd chapter of this thesis, the social institution dysfunction theory has been discussed which consider legal institutions an important social phenomenon. Consequently, the level of efficiency and causes of efficiency/inefficiency has been analyzed in the purview of that theory. Thus the above mentioned extensive literature review involves both analytical approaches as well as socio-legal approach.

1.6. 2 Empirical study: A blend of both quantitative and qualitative methods

In this research, there is extensive and in-depth data collection from the field level, and those data have been analyzed quantitatively and qualitatively.

(a) Qualitative method

Qualitative method has been described as:

> "...descriptive reports of individual perceptions, attitudes, beliefs, views and feelings, the meanings and interpretations given to events and things…"[153]

This present research relies upon analysis of individual case studies and interviews from different stakeholder respondents representing the diverse social and legal backgrounds. Chapters 4, 5, 6 and 7 of this study have highlighted upon assessment of case study and different stakeholders relating to the research subject matter such as judges, lawyers, litigants who are the components of justice delivery system inside the court. The stakeholders of different professions such as court support staff, Assistant Commissioner land and Court support staff opinion have also been considered to examine their opinion from outside of the court. Following qualitative research methodology, there has been an attempt to understand participants' perception and experiences from their socio-legal position and experience. Similarly, the individual case study has also reflected the relevant findings depending upon the facts of particular cases. However, the main drawback of qualitative research is dependent on the researcher's subjective assessment and *"opens up the possibility of more than one*

[153] Catherine Hakim, *Research Design* (Unwin Hyman, London, 1987) 26.

explanation being valid".[154] *This* aspect of qualitative research has also been tried to be minimized by putting respondents with the questionnaire of structures, semi structures and unstructured[155] so that there can be the least chance of researchers own biases in the interpretation of available data.

(b) Quantitative method

In order to overcome this possibility of being subjective and vague research output, the quantitative methodology of research has also been employed. The quantitative method of analysis has been described as the dominant strategy for conducting socio-legal research156 As regards quantitative research, Johnson and Onwuegbuzie stated that,

> "numerical statistical methods to measure and analyze specific aspects of the phenomenon and particularly the casual relationships between variables in order to produce a generalized result."157

In the present research, in order to obtain the objective outcome, data is collected through different modes systematically, and those collected data is analyzed strictly and formally. Regarding the formalities of collecting data in this methodology, sampling has been taken as the most vital criteria. According to Faruque,

> "Sample method implies the selection of a small group from a larger group of individuals as representative of the whole."[158]

From the viewpoint of socio-legal approach, the generation of data have diversified socio-legal entity, and in order to draw a reliable conclusion, it requires representative sample from each group of individuals.[159]. In the present research, the sampling method is used in all the modes of data collection such as collecting statistics from different courts[160] , individual case review[161] and interview from various stakeholders[162]. Among other sampling methods, like probability[163] and non-probability sampling method,[164]the probability sampling method is

[154]Martyn Denscombe, The Good Research Guide, (Open University Press, Berkshire, 1998)219.
[155]Kuldip Mathur, Interviewing: Art and Skill, in S.K Verma and M. AfzalWani (ed) (Indian Legal Institute, New Delhi, 2001) 367.
[156]Abdullah A Faruque, Essentials of Legal Research (Palal Prokashoni, 2017) 20.
[157] Burke Johnson and Anthony J *Onwuegbuzie, Mixed Methods of Research: A Research Paradigm Whose Time Has Come* (vol 33, no 7, Educational Researcher, 2004) 14-26.
[158]Abdullah A Faruque, Essentials of Legal Research (PalalProkashoni, 2017) 117.
[159]Shipra Agrawal, *Legal Research Methodology* (Sri Sai Law Publication, Faridabad, 2003) 106.
[160] This is detailed in chapter 3.
[161] This is detailed in chapter 4.
[162] This is detailed in chapter 5, 6 and 7.
[163] Probability sampling is defined as a sampling technique is which researcher chooses sample from larger population using a method based on the theory of probability. Here the researcher uses random selection.

employed in the present research to draw a precise conclusion about larger populations from verifying smaller segments of that population. However, as mentioned above, the case records and respondents are classified into different groups. Following this principle, stratified random sampling[165] is applied while collecting data. The method is explained in particular methods of data collection mentioned below:

(c) Individual case files review

In the present research, both the analytical and socio-legal approach of research, individual case study is taken as an essential part of empirical research. In the 4th chapter, a thorough analysis of legal provisions of law relating to the research topic was made in the background of individual case review. In this case review, a number of 30 cases with different facts in different courts were analyzed keeping in mind, *"the single situation, institution, particular group or community..."*[166]

In chapter 4 of this thesis, a number of 30 cases were analyzed from the individual files of different courts of both inside and outside Dhaka metropolitan. Among them, 15 cases were taken where the suits are shown to have been resolved through mediation. Another 15 cases were selected where the suit has not been resolved through mediation, and the trial is going on. This particular kind of data collection was done to ensure the proper representation of court litigations from both inside Dhaka metropolitan and outside metropolitan and suits where mediation is succeeded and where mediation is failed. Moreover, there was an attempt to demonstrate appeal cases to verify its applicability in mediation.

The purpose of such an individual case study was for spelling out nature and extent of application of mediation provision in the civil suits as well as the underlying reason for their success. Another purpose of such a study was to identify the reason behind the failure of mediation with particular focus on every aspect of different stages of the trial. The very purpose of the individual case study was to understand the obstacle of application of mediation in resolving civil suits in *"real-life context" and "circumstantial uniqueness"*[167].

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[164] In non-probability sampling, the sample is selected based on non-random criteria, and not every member of the population has a chance of being included.

[165] Stratification means the grouping of the units composing a population into homogenous before sampling.

[166] Abdullah A Faruque, Essentials of Legal Research (Palal Prokashoni, 2017) 103.

[167] Keith F Punch, Introduction to Social Research (Sage Publication, London 1998) 155-156.

(d) Interviews

As in the previous discussion, it was revealed that an in-depth interview was done towards the stakeholders. Following the probability sampling method, the respondents were classified into two broad categories: stakeholders inside the court, and stakeholders outside the court. These two broad categories are stratified into sub-groups, such as judges, lawyers and litigants as respondents inside the court and court support staffs, Assistant Commissioner(land) and sub-registrars as respondents outside the court. Therefore, such stratification was made to arrange the respondents as the representative from the respective group of population and a separate set of questionnaires is prepared for collecting their responses.

Further, in order to ensure probability sampling, the respondents are classified into courts inside the metropolitan area and courts outside the metropolitan area. As mentioned above,[168] Dhaka District Judge Court, the field of study (sampling frame) in the present research, is the largest court in terms of number and diversity of court and litigations. It consists of both courts of the inside and outside the metropolitan area. These two types of courts in Dhaka can be said to be representative of more significant districts and smaller districts. In addition to that, earlier discussion in the present chapter[169] reveals that in all the districts, including Dhaka disposal rate of suits both by trial and mediation are in a dismal condition and the picture of Dhaka District Judge Court is in no way different from other districts all over Bangladesh. Thus, in this case, the principle of probability sampling is strictly followed as Dhaka is representative of all the districts around the country both in terms of performance of mediation and in terms of big/small districts.

A number of 40 judges, 40 lawyers, 30 District Legal Aid Officers 50 litigants were interviewed as the earlier discussion depicts that efficiency of mediation is similar irrespective of districts around the country. So, it can be easily predicted that the responses of the stakeholders will be uniform to a large extent. Moreover, following the principle of purposive sampling,[170] the lawyers were selected deliberately among those who are well equipped with knowledge and experience about the legal procedure and able to give aproper understanding of the subject matter. The same scenario can be visualized from the

[168]Discussion in the point no 1.4.2.

[169]Table no 1.12 and 1.13 and Figure 1.1.

[170] Purposive sampling can be termed as non-probability sampling, the researcher is able to have access to the respondent who can present several features in the area of research.

stakeholders outside the court, and therefore, 30 court support staffs, 20 AC(land) and 20 sub-registrar are chosen as the respondents. Consequently, the total number of 230 respondents can be said to have been justified in terms of proper sampling towards the correct way of collecting data.

(e) Data collection from Court Registry

In the earlier segment of research methodology, both qualitative and quantitative methods were employed; however, the purely quantitative methodology was applied in respect of court registry data.[171]Data on the backlog of cases and nature of resolution (contested decree, compromise decree, ex-parte, dismissal, or withdrawal) were collected from case registries, and resolution registers respectively for the last eight years from 2012 to 2019. In the stage of data collection, there was an attempt to evaluate the variance of disposal of suits through trial and mediation over different types of civil courts such as the physical location of courts (inside or outside Dhaka), pecuniary jurisdiction, original/appellate court etc.

The above-mentioned research methodology can be depicted in Table 1.14 below:

Table no 1.14: A glimpse to the methodology of this research

Type of research materials	Purpose	Methodology followed	Sampling size
Books, Journals newspapers, legislations, online materials	To understand the laws of different countries and the theoretical framework of research	Extensive literature review	NA
Civil case records	To understand the efficacy of mediation and its problems	Both qualitative and quantitative	30 original civil suits and 6 appeal civil suits.
Respondents inside the court like judges, lawyers, DLAO mediators and litigants	To understand prospects, challenges of mediation and their way outs	Both quantitative and qualitative	40 judges, 40 lawyers, 30 DLAO mediators and 50 litigants
Respondents outside the courts like court support staffs AC(land) and sub-registers	To understand prospects, challenges of mediation and their way outs	Both quantitative and Qualitative	30 court support staffs, 20 AC(Assistant Commissioner)(land) and 20 sub registrars
Court registry data	To verify the efficacy of mediation based on jurisdiction, the location of the courts	Quantitative	Data as regards institution and disposal from 2012 to 2019 over 35 courts of Dhaka

[171]Details in chapter 3.

(f) Sample size followed by other researchers

Research published in the United States of America about the effect of divorce and parental conflict over children, the sample size used was 35 mediation family and 36 litigation family. Using this sample size, research was successfully conducted.[172]In Bangladesh, in the research of court-connected mediation, a total number of 220 respondents were selected as sample size, including expert interviews of 50 judges 40 lawyers, 30 litigants, and 30 court staff.[173]Court staffs are considered experts due to their wide experience in working a complex environment with lots of tacit knowledge and practices not explicitly visible. The number of sample size vary in different groups because new respondents were accepted until responses reached to a point of saturation and key information started to repeat. Therefore, more informed respondents such as judges and lawyers got higher number of sample under the study.

As the research is conducted under "social institution dysfunction theory" views from external stakeholders, whose activities are indirectly related to the complexity of mediation conducted in-court, have also have been considered in this research. For this purpose, it also gathers expert interview from twenty respondents in Sub-registry Office- including the Inspector General of Registration, two Inspectors of Registration, one District Registrar, six Sub-registrars, and ten staffs from different Sub-registry Offices. Another twenty external stakeholders were covered from Assistant Commissioner (land) office- including four Assistant Commissioners (land), six *kanoongo* [officer in charge of public records], four surveyors and four *tahshildars* [Collector of revenue; tax-collector] of those AC (land) offices.

All the methodology mentioned above is exercised in the subsequent chapters to obtain both qualitative and quantitative data to explain the reason/s for the poor performance of mediation in civil courts. The statistical data from all kinds of civil courts has been analyzed based on various conditions, as mentioned above. On the other hand, using the same methodology, judges, lawyers and parties of the civil suits are interviewed about their knowledge, and understanding regarding prospect, challenges and way outs for developing mediation mechanism. Subsequent chapters analyzed the role of legal professionals,

[172] Robert E Emery, David Sbarra and Tara Grover, Divorce Mediation : Research and Reflection [2005] Family Court Review, Vol 43, No 1, 26.

[173] ABM Mahmudul Huq, *Alternative Dispute Resolution, Challenges and Prospect* (Md. Tofazzal Hossain Sarkar) 263.

including the district legal aid officers played in this regard. Their responses are examined considering their particular socio-legal standpoint. Using the socio-legal approach, this research investigates whether the stakeholders think mediation a fruitful tool for resolving disputes and identifies the loopholes in the legal and institutional frameworks for limited application of mediation in resolving civil disputes under CPC.

1.7 Limitations of the research

The present study highlights only upon the court-connected mediation under section 89A of the Code of Civil Procedure. Because the primary purpose of this research is to explore the reasons for the non-functioning state of mediation in resolving civil suits and propose some recommendation to make it functioning to reduce the backlog of civil litigations. Consequently, mediation in respect of family suits and criminal cases is not considered in this research. This is because the approach and technique of resolving suits relating to family matters and criminal matters different outlook and deals with varying types of litigants. Therefore, those issues are kept outside the ambit of this present research. For a similar reason, the matter of arbitration as enshrined in section 89B of CPC is not taken as the scope of this current research.

1.8 Outline of the thesis

This thesis spreads over eight chapters. In the given situation of case backlog, the first chapter deals with the rationale and objective of the study. This chapter discussed best practices of mediation mechanism in different countries and demonstrated mediation as a low-cost mechanism for resolving suits in the civil courts of Bangladesh. Data analysis about the resolution of suits through mediation and trial has also been briefly discussed to justify the necessity of its proper application. It also details the method used, techniques of data collection, rationality and scope of the research. The remaining thesis was guided by the outline set in this first chapter.

After setting the research outline and methodology in the first chapter, Chapter Two critically examined the theoretical aspect of institutional dysfunction with the specific focus of legal, institutional dysfunction. In this chapter, particular emphasis is given to the constrained access to justice, and mediation has been recommended as one of the waves to enhance access to justice. This mechanism has been introduced in this chapter as a low cost, quick and easy method of resolving litigations and analyzed inefficiency of this system from the perspective of social institution dysfunction theory.

Chapter Three deals with analyzing data about case filing and disposal from court registries to depict the actual performance of mediation in resolving civil cases dealt through CPC. It has highlighted the burgeoning case backlog in civil courts. It emphasizes the limited application of ADR in the civil courts worldwide with different pecuniary and territorial jurisdiction.

Analyzing the individual case files, Chapter Four attempts to spell out the resolution of suits through mediation with a comparative analysis of the resolution of civil suits through the trial to measure the rate of mediation attempts as appeared on the surface. This Chapter has further unearthed the efficacy of mediation in original suits and appellate suit at different courts of pecuniary and geographical jurisdiction all over the country.

Chapter Five incorporates structured and unstructured interviews with judges, lawyers, other mediation practitioners, to investigate the gap between legal ideals and actual practice of mediation in pre-trial and post-trial stages. This chapter also analyzes their perception on mediation, whether they are performing their role in implementing the provision about mediation, what troubles they face in this regard and their recommendations to minimize those troubles.

Chapter Six deals with clients' perception and investigates whether clients make informed decisions to avoid or discontinue mediation, resulting from their lack of knowledge or misconception. Through questioning, this chapter digs out their attitude and thoughts about mediation in their individual cases and their experiences.

Chapter Seven considers stakeholders outside the formal trial process but are closely related with total court procedure such as court clerks. The viewpoints of officers and staffs of Assistant Commissioner (land) office and Sub-registry office were collected and analyzed, as their functions are closely related with the origins of many civil disputes out of faulty land records. Their views on the necessity and functionality of mediation in the civil courts are also accumulated and considered under this research.

Finally, Chapter Eight summarizes the overall findings and pose some policy suggestions on some legal and institutional changes that, according to the research data, remain imperative to improve the performance of mediation in resolving civil disputes under CPC.

1.9 Probable outcome of the research

Justice seekers hunt for speedy and quality access to justice and settle their disputes as early as possible. Sufferings of the commoners remain enormous due to the delayed and complex proceedings in courts all over the country. However, as the discussed mediation practice is yet to gain any considerable success to reduce the backlog in civil courts or produce low-cost, accessible justice to the justice seekers. While doing the literature review, several researchers have worked upon the field of court-connected mediation in civil courts of Bangladesh. Keeping in mind the uniqueness of the civil justice delivery system in this country, those research works have only been considered for comparing those with the present research.

The literature review reveals that research work [174]has recommended for several steps like awareness building among litigants through media, NGO, paying reasonable fees to the advocates, improvement infrastructural facilities in courts, forming ADR courts in every district, the formation of central mediation organization, using ADR in new legal aid law. Further research work has recommended the same kind of recommendations and gave a proposal for full-time mediators in every district.[175] In separate research,[176] it has been recommended for determining the suitability of suits for mediation by taking recourse to Order X, XL of CPC, refer those suits for mediation, deciding the procedural course for mediation, fixing up of minimum fees for mediation, preparation of the comprehensive report of the cause of failure for mediation etc. The proposals described above seem to be crucial for developing the mediation mechanism in the civil courts. However, those recommendations appear to have a gap in respect of detailed and specific mode for the application.

On the other hand, this research aimed to find out the way of effective application of mediation in civil disputes within the purview of CPC by legal and institutional reforms and formulate a new dimension in this regard. Therefore, this research has put an utmost effort to set up an appropriate mediation mechanism for the solemn purpose of eradicating the sufferings of the commoners by reducing the backlog of cases and improving access to justice through the administration of civil justice system in Bangladesh. To this end, the specific attempt has been made digging out the problems behind the inefficiency of mediation, and there was an effort to put a particular

[174] Dr Sheikh G Mahbub, *Alternative Dispute Resolution through civil courts in Bangladesh*(Bangladesh International Arbitration Centre, 2019) 335.
[175] ABM Mahmudul Huq, *Alternative Dispute Resolution in Bangladesh: Challenges and Prospects* (Md. Tafazzal Hossain Sarkar, 2015) 293.
[176] Md. Akhtaruzzaman, *Case management and Court Administration in Bangladesh*, (Advocate Razia Khatun, 2014) 380-381.

recommendation for the development of a mediation mechanism. At the end of this research, there was a proposal for the establishment of a mediation court along with its structures and working procedure. There was a proposal for fixing up the minimum fees after complying with certain procedures and framing specific rules for conducting mediation procedure. The other important recommendations were for strengthening District Legal Aid Officers' authority while doing mediation, and such authorities were defined in the subsequent chapter very clearly. There were further recommendations for imposing consequence for non-cooperation with mediation procedure, and the procedure for imposing such consequences was explicitly mentioned.

Consequently, it can be said that the novelty of this research work would be to present the recommendations mentioned above in a more specific and pragmatic way. Apart from this, the proposal for rendering authority of judge-mediators and DLAO under the proposed mediation court would add a new dimension of knowledge for developing the court-connected mediation mechanism in Bangladesh. Those novels and specific recommended solutions would benefit from improving civil cases' justice delivery system through the court-connected mediation mechanism in Bangladesh.

CHAPTER 2

INSTITUTIONAL DYSFUNCTION AND CASE BACKLOG: CIVIL COURTS OF BANGLADESH IN PERSPECTIVE

2.1 Introduction

Proper functioning of the social institutions is essential to run any society, be it family, educational organizations or law enforcement agencies or justice delivery system. The present chapter has tried to visualize the idea of dysfunction of a social institution and try to co-relate the theory in the context of the current situation of not effective ADR in the civil courts of Bangladesh. In the previous chapter, we have already seen that civil court is not performing to the satisfactory level in resolving civil litigations either through trial or through ADR. To identify the reason and way out of this situation, the proper understanding of social institution dysfunction theory is essential.

According to Berger and Luckmann (1966):

> "Institutionalization occurs whenever there is a reciprocal typification of habitual actions by types of actors. Put differently; any such typification is an institution."[177]

The term "social institutions" usually refer to different kinds of social forms that take different entities like family, human languages, universities, hospitals, business corporations, and legal systems, etc.[178]

Social institutions have been defined by Jonathon Turner in the following words,

> "a complex of positions, roles, norms and values lodged in particular types of social structures and organizing relatively stable patterns of human activity concerning fundamental problems in producing life-sustaining resources, in reproducing individuals, and in sustaining viable societal structures within a given environment."[179]

Social Institutions are constructs of stable, valued, recurring patterns of behaviour[180]. Social Institutions form the structures and mechanisms of social order and govern the conduct of different groups of individuals within a given community[181].In contemporary society, "we observe various social institutions including our family, community, educational institutions, cultural groups, government and legal system." Every social institution is identified with a

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[1] Peter L Berger and Thomas Luckmann *Social Construction of Reality: The Treaties in the Sociology of Knowledge*' (Penguin Books 1966) 42.

[178] Edward N. Zalta, Uri Nodleman (eds) Stanfoı ıpedia of Philosophy (First published in 2007 and substantive revision at 2011) <plato.stanford.edu/social/entries/social-instittuion/> accessed 20 January, 2020

[179]Jonathan Turner, *The Institutional Order*(Longman in New York 1997) 6.

[180] Samuel P Huntington, *Political Order in Changing Societies* (Yale University Press Ltd. London 1968) 12.

[181] James G. March and Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life* (American Political Science Association 1984) 734.

particular purpose, e.g. social, political, religious or any other, for which it transcends individuals' intentions and activities by mediating the rules that govern their behaviour. [182]As explained by Berger and Luckmann (1966), in a society, every person observes the behaviours of others and attach motives to those actions. As behaviours are repeated and get predictable and transparent over a considerable period of time, specific social rules are formed. A part of these social rules may be codified as law, while the other part remains as customary rules of the society. Once established, these social institutions get recognition by a large group of people overcoming the challenge of time. [183]

As discussed throughout this chapter, social institutions form an integral part of the society and proper functioning of these institutions can endure the state and community's well-being at large. Similarly, the legal institutions such as the justice delivery system of a particular country forming an integral part of society that provides access to justice to the litigant public.

2.2 Nature of social institutions and their functions

2.2.1 Nature of social institutions

Sociologist Talcott Parsons was the pioneer in developing and interpreting social institutions. Parson has analyzed the sociology in terms of functional contributions of the different institutions and identified the social institutions from its functional significance. According to him, the primary task of sociology is to explore how the social institutions (like family, school, church) functions to contribute for the existence of the society. [184] Consequently, analysis and exploring different dimensions and functions of social institutions in terms of its way, reasons and targets of functions can help to understand the nature and character of an area of the society.

The social institutions are different from social norms, such as rule and regulations as those are less complex than institutions. Similarly, those institutions are not similar to more complex and complete social entities, i.e., society. Rather, social institutions are constituent parts of society.[185]

[182]*P*eter L *Berger* & Thomas Luckmann, *Social Construction of Reality: The Treaties in the Sociology of Knowledge*' (Penguin 1966) 42.
[183] *Ibid*
[184] Talcott Parsons, *The Social System* (Routledge 11 New Fetter Lane London EC4P 4EE 1951) 18.
[185]Seumas Miller, *Social Action: A Teleological Account* (Cambridge University Press New York. 2001) 18-53.

According to Seumas Miller:

> "A society, for example, is more complete than an institution since a society—at least as traditionally understood—is more or less self-sufficient in terms of human resources, whereas an institution is not. Thus, arguably, for an entity to be a society, it must sexually reproduce its membership, have its language and educational system, provide for itself economically and—at least in principle—be politically independent."[186]

Social institutions are sometimes organizations, sometimes meta-institutions. For example, the capitalist economy comprising multi-national organizations are organized into a system. On the other hand, the meta institution means multiple organization which regulates several institutions in a given society. For example, the governments of a particular state co-ordinates the economic system, police, military, and educational organizations.[187]Similarly, the non-organizational factors may constitute a social institution, for example, the English language which is considered to be more than any other formal institutions because of its worldwide practice for communication of people of different races and nationality. [188]

The idea of social institutions involves four salient properties which may be termed as function, structure, culture and sanctions. [189]Within the meaning of structure, the individuals in the society have different roles to play, which are sometimes connected hierarchically to each other. For example, the executing organ, i.e. the government of a society regulates the behavior of other organizations subordinate to it in order to keep those organizations functional. This inter-relationship is termed as the structure of the institution. [190]Apart from the formal tasks and rules, an institutional culture comprises some informal attitude, values norms and ethos that determine the individuals' behaviour and tasks and forbids certain activities as well.[191] Apart from the function, structure and culture, each of the institutions comprises some sort of sanctions. For example, the society constitutes moral disproval for non-conformity of certain cultural norms, and it includes formal sanctions by the legal institutions, such as courts, for the commission of a particular crime. [192] Lastly, Miller has described the functional property of social institution as

[186]Ibid 35-36.
[187] Richard Scott, *Institutions and Organizations* (Sage Publications 2001) 136-140.
[188] Ibid
[189] Justin O Brien, 'Introduction: The Dynamics of Capital Market Governance' in Justin O Brien (ed), *Private Equity, Corporate Governance, and the Dynamics of Capital Market Regulations* (Imperial College Press 2007)P 1-18.
[190]Seumas Miller, *The Moral Foundations of Social Institutions* (Cambridge University Press2010) 25.
[191] Ibid p. 346
[192] John Elster, *Cement of Society A Study of Social Order* (Cambridge University Press 1989) 97-151.

> "social institutions are defined in terms of their collective ends. ..such collective ends are also collective goods, then this gives a right to joint moral rights to those goods."

Miller has described the goods as functional properties or collective ends. [193]For example, in a market economy, the directors of a company, workers, and the consumers have duties to continue the performance of this social institution. The workers have responsibilities to do their everyday jobs, and the directors are expected to perform the fiduciary duties of selling the best quality products at a reasonable price. On the other hand, the consumers or stake-holders hold the duties of not investing money to the corporations practicing fraud and bribery. [194]

2.2.2 Functions of social institutions

Before discussing Parson's AGIL paradigm, it is necessary to have a glimpse as regards the functions of social institutions. The institution has multiple functions of regulating the behaviour of individuals. These institutions contribute by way of reproduction, socialization, spreading knowledge, distributing goods and services and thus acts as a catalyst for creating social solidarity. [195] The social institutions function through family, educational institutions, labour market, legal and political institutions, cultural, media and religious organizations. [196]As a social institution, the family has been given core importance as a human being grows up and acquires his first socialization.[197] Secondly, the institution in the realm of education and training transmits and cultivate knowledge, skill and ability. Similarly, economic and market institutions are significant for the distribution of good and service, and the functionality of the same depends upon the level of technological development and the regulations of the government imposed upon it. [198]

In sociological theory, there are three prevailing interpretations of social institutions. Such as functionalist approaches, Marxist-inspired conflict-oriented explanations, and neo-

[193]Seumas Miller, *The Moral Foundations of Social Institutions* (Cambridge University Press 2010) 349.
[194] Ibid P. 350
[195] Prof. Dr. Roland Verwiebe, 'Social Institutions' (*Social Institutions of Encyclopedia of Quality of Life Research 2011)* <www.academia.edu>Social_Institution_in_ Encyclipedia> accessed 20 January 2020.
[196] Ibid
[197] Don Edgar 'Globalization and Western Bias In Family Sociology' in Jacqueline Scott, Judith Treas and Martin Richards, (Eds) *The Blackwell Companion to the Sociology of Families* (Oxford, Blackwell 2004) 1-18.
[198] Wolfgang Streeck, 'The Sociology of Labor Markets and Trade Unions' In Neil J Smelser, Richard Swedberg, (Eds) *The Handbook of Economic Sociology* (Princeton University Press 2005) 254-283.

institutionalist approaches.[199] One of the fundamental criteria for maintaining the social system is the proper functioning of the social system. The core functions of the social institution are assured output of expected behaviour from the individuals who are members of a given society, such as a state. Other functions of the social institutions are the distribution of assets among the persons living the society and stabilizing the values and canons in the given society. [200] According to Durkheim, through the functions above, societies maintain internal stability and survive over time which is essential to maintain social solidarity of the society. However, conflict theory holds a dissenting view against the functionalist theory. It states that disadvantaged or minority groups such as women or tribal do not get equal treatment from social institutions.[201]

While describing the neo-intuitionalist theory, Victor Nee[202]stated that in sociology, John Meyer, Richard Scott, Paul DiMaggio and Walter Powell have developed Neo Intuitionalist theory and have analyzed how the institutional environment and cultural beliefs shape their behaviour. The social mechanisms motivate, govern and facilitate the activities of the organizations and influences the actions of individuals. Those actions get the shape of institutionalized routine, and the same acquire trust, transparency and confidence of the people at large. In this way, particular institution functions. [203]

Whatever may be the approaches towards social institutions and its functions, there is a consensus that without the presence of these institutions, the social system cannot work properly. However, social institutions are subject to changes due to the emergence of novel demands and the emergence of a group of people with different thoughts. This change results process of "institutionalization and deinstitutionalization". [204] For example, financial institutions undergo rapid changes. For instance, rapidly growing real estate market handling transactions of both urban and township land use rights has given rise to a new concept of

[199] W. Richard Scott, *Institutions and Organizations* (Sage Publications 2001) 136-140.
[200]Émile Durkheim *The Rules of Sociological Method.*(Paris Library Felix Alcon 1895). 14.
[201]Theodor.W. Adorno, Max Horkheimer and John Cumming *Dialectic of Enlightenment* (London: Verso editions, 1979).
[202]Victor Nee, *New Institutionalism, Economic and Sociological* (Center for Study of Economy and Society July 2003) 2.
[203] Martin Richards, 'Assisted Reproduction, Genetic Technologies and Family Life' in Jacqueline Scott, Judith Treas and Martin Richards, (eds) *The Blackwell Companion to the Sociology of Families* (Oxford, Blackwell 2004)478.
[204] Monsieur J.H. Van Doorne, *Situational Analysis: Its potential and anthropological research on social change in Africa* (Creative Commons 1981) 467-506.

buying and selling the properties through the market like transactions.[205]These types of changes are also seen in the families, religious institutions, cultural organizations, media etc.

2.2.3 Talcott Parson's GAIL theory on social institutions

According to Talcott Parsons:

> "In social theory, employing analogies and metaphors from biological sciences has been a common strategy in the development of theoretical frameworks on social systems. This strategy was basic to the "organic analogy" which was common to social Darwinism and Spencer's evolutionary sociology."[206]

Parsons was concerned with religious values and biological sciences while dealing with the topic of sociology. Parsons considered our society with a human body and identified social institutions as constituent parts of the society.[207]He has created a sociological scheme named AGIL paradigm, which contains a systematic depiction of certain social functions.[208]Parsons developed a theoretical framework called *"structural-functionalism"*. *B*y this theory, he delineated four functional states of a social system, which are named as(i) goal attainment, (ii) adaptation, (iii) integration and (iv) latent pattern maintenance.[209]

Parsons has identified four functions mentioned above states as an essential requirement for a society to function, and in order to perform those functions, the social institutions develop. [210]Herbert Spencer also developed that these parts of society as *"organs"* that work toward the proper functioning of the *"body"* as a whole. [211]

(a) Goal Attainment

Parsons has given prime importance on goal attainment, which is generated through decision-making, and goal attainment is achieved in different manners in different societies.[212]

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[205]Victor Nee, *Politicized capitalism: Organizational Dynamics of Social Changes in China* (Cornell University 2002) 13.

[206]Talcott Parsons, *The Social System* in Byron S. Turner(ed) (Routledge 11 New Fetter Lane London EC4P 4EE 1951) 18.

[207]Talcott Parsons, *The Structure of Social Action*, (New York: Free Press 1949) 87-122.

[208]Robert J Holton, 'Talcott Parsons: Conservative Apologist or Irreplaceable Icon' George Ritzer and Barry Smart (eds), *Handbook of Social Theory* (London: SAGE Publications Ltd. 2001) 152.

[209]Brandell Jerold R.(ed.) , ' Theory and Practice in Clinical Social Work', 2nd Edition, SAGE Publications Asia Pacific Pvt. Ltd. .

[210]Talcott Parsons, *The Social System* (Routledge 11 New Fetter Lane London EC4P 4EE 1951) 39, 154, 200

[211] John Urry "Metaphors". *Sociology beyond societies: Mobilities for the twenty-first century*. (Routledge. 2000) 23.

[212]William Little, 'Chapter 17: Government and Politics' William Little (ed) *Introduction to Sociology* (B.C Ministry of Advanced Education 2012) 687.

According to Persons:

> "I conceive of political organization as functionally organized about the attainment of collective goals, i.e., the attainment or maintenance of states of interaction between the system and its environing situation that are relatively desirable from the point of view of the system."[213]

The purpose and process of goal attainment of a human body are compared with Government in a country because the Government and its different partset goals, and make decisions.[214]For instance, the cerebrum that performs many sophisticated functions of a brain, including the interpretation of touch, vision and hearing can be compared with the parliament. The right and left part of the cerebrum is like the upper and lower house of a parliament. The types of issues decided by different houses are different, while the decisions of both houses are coordinated. Cerebellum that is located at the bottom of cerebrum performs other less sophisticated functions like coordinating muscle movements, maintaining posture, and keeping the balance of a human body. It is comparable with other administrative functions of a government conducted through different ministries.[215]

Finally, the brainstem performs many automatic functions like maintaining the body temperature, wake and sleep cycle, digestion, breathing, and sneezing. We do not need separate instruction for every different breathing, or sneezing, as they are mostly automatic due to the proper co-ordination between the brain and other body parts. [216]

According to Ritzer:

> "When a system determines and prioritizes its goals and then obtains and mobilizes its resources in directed actions to achieve those goals, it demonstrates the action of goal attainment."[217]

The institutional end and functions of the government include organizing other institutions (both individually and collectively) by way of regulating and co-coordinating economic, educational, police and military organization mainly by way of legislation.[218]A police force that maintains day to day law and order condition, or city corporation that performs regular cleaning function of our cities can be compared with our brainstem. The Parliament of Bangladesh has enacted the laws relating to mediation, and the government has established

[213]Talcott Parsons, *The Social System* in Byron S. Turner(ed) (Routledge 11 New Fetter Lane London 1951) EC4P 4EE 435.
[214] Ibid
[215]Ibid, 126,127.
[216] Ibid
[217] Mark Abrahamson, 'Functional, Conflict and Neo-Functional Theories' George Ritzer and Barry Smart(eds), *Handbook of Social Theory*(SAGE Publication Ltd. 2001) 139.
[218] W. Richard Scott, *Institutions and Organizations* (Sage Publications 2001) 23.

courts and other infrastructural facilities, including manpower to achieve the goal of highest quality performance of resolving cases through ADR. In this chapter, different requisites of society are discussed and compared with a human body to link the purpose of this research, i.e. the decision making on the part of the parliament and the government to enhance the performance of ADR in civil courts for enhancing access to justice.

(b) Adaptation

'Adaptation' is somewhat a new term which can be described as a process modifying something to a new condition. The purpose of adaptation is to distribute resources and raw materials throughout a system so that other parts can perform their respective actions properly.[219] For instance, the respiratory system of a body distributes oxygen to every cell of a human body and keeps them alive and active. Within the sphere of biology, several aspects of individual organisms such as nutrition, nervous system, growth etc. function as the catalyst of adaptability with mortality, disease resistance, mental and physical progression, happiness, tolerance, sexuality etc. [220] In biology, the process of adaptation determines biological potentials and limitations upon which a person works for goal attainment.[221]

Dobzhansky has correlated the idea both with biology and ecology. According to him, it is a process to adopt a new situation for survival and increase the quality of living.[222] It is the function of an organism both in society and body where it becomes better able to live with habitats. [223]Similarly, Parsons has co-related the adaptation procedure in society, and Byron S. Turner has expressed the Parson's idea of economic function. According to him, it is particularly about scarce allocation resources through which it facilitates the process of adaptation between environment and social system.[224]

Max Weber has described economic institutionalism that distributes economic resources to different organs of an economy and generates income through tax and other charges. These

[219] Talcott Parsons, *The Social System* in Byron S. Turner(ed) (Routledge 11 New Fetter Lane London EC4P 4EE 1951) 116.
[220] Richard B. Mazes, 'Biological Adaptation: Aptitudes and Acclimatization' in Elizabeth S Watts, Francis E. Johnston, and G.W. Lasker*Biosocial Interrelations in Population Adaptation* (The Hague: Mouton Publishers 1975) 918.
[221] Ibid
[222] Theodosius Dobshansky, 'On Some Fundamental Concepts of Darwinian Biology' .In Theodosius Dobzhansky, Max K Hecht and William C. Steere, *Evolutionary Biology*. Vol. 2. (Appleton-Century-Crofts. 1968) 1–34.
[223] Ibid
[224] Talcott Parsons, *The Social System* in Byron S. Turner(ed) (Routledge 11 New Fetter Lane London EC4P 4EE 1951) 6.

resources are later distributed among different parts of the society through land, labour, capital resulting development of cultural mentality over an extended period of time. [225]

Similarly, the legal system, i.e., the formal courts, in the given legislation of the land, implements those laws leading to the way of adapting different modes of ensuring access to justice. For example, the relevant laws of mediation for resolving civil disputes are applied by the courts so that the people at large can get adapted with the benefit of these legal provisions of law. The mechanism of ADR is discussed in the later part of this chapter to clarify as to how it works as one of the waves to facilities access to justice.

(c) Integration

This purpose of a human body is related to our central nervous system (physical nerves) that conveys our brain's messages to every part of our body and maintains an orderly and coordinated action of its different parts. In the context of a social system, Parsons has described integration as the process of harmonizing the entire society through which values and norms of society become solid and formal.[226]He has reiterated that an ideology is a common belief held in common by the members of a collectivity, i,e, society. At a point of time, a member of the society performs some behaviour deviant from the main culture. It is then oriented with collective acceptance after undergoing a process of test covering a long period of time. Ultimately, such behaviour attains the status of society's norms.[227]Those norms have the necessary components of the reward system and sanction to ensure conformity with norms. [228]Parsons has identified such a process as the integration from collective orientation to a set of norms.

Chief Justice Allsop has reiterated in a lecture:

> "These values find their expression not only in the formal law, but also in societal expectations, behavior and actions (which may, in time, also come to be reflected or incorporated within the law, but which, in any event, do not require a formal legal expression for society to understand their correctness or importance."[229]

[225] Heino Heinrich Nau, *Institutional, evolutionary and cultural aspects in Max Weber's social economics* (*Cahiers d'économiePolitique / Papers in Political Economy* , 49 (49) 2005) 127, 142.
[226] Talcott Parsons, *The Social System* in Byron S. Turner(ed) (Routledge 11 New Fetter Lane London EC4P 4EE 1951) 26-30 .
[227] Ibid 235.
[228] Ibid 277.
[229] Chief Justice Allsop AO, 'Values in Law: How they Influence and Shape Rules and the Application of Law' *(Centre for Comparative and Public Law ,Faculty of Law, University of Hong Kong* 2016) <*www.fedcourt.gov.au*> accessed 12 February 2018.

It has further been stated by Parsons and Platt (1973) that integration functions through the evolution of law which determines the behaviour of the person living within the periphery of the society.[230]

For a society and its Government, this integration function is facilitated through different laws, policies, regulations, and other customary social practices, common values, and social norms. We may have a different set of laws, rules, and regulations, e.g. environmental law, police regulation, Code of Civil Procedure, or Criminal Procedure Code to govern other organs of a Government or institutions of a society.[231] When required, government may change these rules, regulations and laws. However, as discussed earlier, rules of social institutions develop over a long period. Therefore, any change in codified laws alone may not be sufficient to bring changes in these institutions.

In the same way, it has been observed in the previous chapter that the traditional trial process is not functioning well to achieve the goal of disposal at a satisfactory level. This situation has raised the necessity to find an alternative way, i.e. ADR, for minimizing the volume of cases. The practice was prevalent from ancient time. Due to the collective acceptance over it, the mediation mechanism has attained the legal status and infrastructural supports in the justice delivery system, particularly in civil litigations.

(d) Latent Pattern Maintenance

In his Social Theory and Social Structure, Merton has distinguished manifest and latent functions stating that the earlier one is the systematic formal pattern actions explicitly intended by the actors, individual or collective. This manifest action can be identified as the objective consequence, which results in adaptation and adjustment of rules and laws. It intentionally contributes to adjustment and adaption to the society. On the other hand, the second refers to unintended and unrecognized consequences of the above mentioned manifest actions.[232]

Merton has further co-related the institutionalized norms and latent functions, stating that once the institutional rules and norms abolished, it still persists n human emotions which can be described as latent retention. Thus, the emotional factors such as a feeling of guilt, a sense of sin and other like values constitute the subtle expression of latent functions. More

[230]Harvie Farguson, 'Phenomenology and Social Theory' George Ritzer and Barry Smart (eds) *Handbook of Social Theory*, (SAGE Publication Ltd 2001) 246.
[231] Jacek Tittenbrun, *Talcot Parsons' economic sociology: International Letters of Social and Humanistic Sciences* (Research Gate 2013) 21.
[232]Robert K Merton, *Social Theory and Social Structure* (New York The Free Press 1968) 117.

precisely, the behaviour in contradiction to the formalized norms becomes the matter of *"emotionalized disapproval"*. [233]

Maintenance of this latent pattern indicates our social, religious, educational, or even family values that hold our social uniformity and prevents unwanted social values. It even sanctions non-compliance of norms by any social institution.[234]

According to Parsons:

> "All institutionalization involves common moral as well as other values. Collectivity obligations are, therefore, an aspect of every institutionalized role. But in certain contexts of orientation-choice, these obligations may be latent, while in others they are "activated."[235]

Thus, he has described the latent function of the society as on forms of values, morals of different institutions such as family, education institution etc. between older generations and its successors.[236] In return of conformity to the social values, one gets *"relational rewards"* that are love, approval and esteem. Actually, it serves as machinery for keeping the social control intact.[237]

For instance, the purpose of our civil justice system is to ensure access to justice among the members of our society, when a dispute arises out of any civil matter. However, not every civil dispute is solved through our formal civil justice system, under CPC and other civil laws. Instead, a large part of our civil disputes is resolved within our family, or community, using social norms and rules identified by Merton as "law without force"[238]. Further, when civil mediation is introduced within CPC, the effectiveness of civil mediation also depends on how far the latent social pattern is reflected in the practice of mediation. Moreover, apart from the codified law relating to mediation, the *shalish* system is prevalent in Indian sub-continent, which is functional in the present-day society for resolving the disputes. The next part of this chapter discusses the relevance of the introduction of ADR to ensure access to justice and then elaborate the discussion about the causes for its dysfunction under current legal structure and institution.

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[233]Ibid 190, 259.
[234]Ibid 99.
[235] Talcott Parsons, *The Social System* in Byron S. Turner(ed) (Routledge 11 New Fetter Lane London EC4P 4EE 1951) 65.
[236] Ibid, 65, 66; 26-50.
[237] Streeck, Wolfgang (2005): The Sociology of Labor Markets and Trade Unions. In: Smelser, Neil J.; Swedberg, Richard (Ed.): The Handbook of Economic Sociology. Princeton, Princeton University Press.(pp. 254-283).
[238] Merton Cf. Robert K.,(1968) Social Theory and Social Structure, Chapter I. New York The Free Press P.101.

2.3 The functions of AGIL system in the context of mediation mechanism: An analysis of the objective of study

The present study has pinpointed the theoretical aspect of the research to attain clear understanding as to how the social institution works and what are the reasons behind its mal-functioning. As discussed above of social institution, the four functional mechanisms at a time work to mobilize society at a time. Those functional tools consist of internal and external problems. Such as, society goes into the realm of production of commodities for the purpose of adaptation of the certain economic environment. It involves the external problem of allocation of resources and commodity production. In this connection, the strategic political goal is to attain economic stability and development. In order to attain this goal, it requires co-ordination and co-operation of different political offices and mass consensual support to acquire that goal. The process of production mentioned above, the methodology requires to achieve the goal. For that purpose, it involves the integration of new production mechanism in economic, social and political factors which leads to a gradual development of new social and cultural values. Thus, the process of integration involves the religious institutions and media etc. to get proper integration. The values, morals constitute latent or pattern maintenance. The schools, family and other social institutions form their part as a catalyst to develop the aforesaid latest patters maintenance. [239]The above discussion has given the clear understanding that goal attainment, adaptation, integration and latent maintenance form constituent part of social institutions, when these various component and factors of AGIL theory work efficiently facing all the above external and internal problems subject to their proper co-ordination and co-operation.

The aim of this chapter is to apply the theory to the present context of mediation mechanism prevalent in Bangladesh. This theory will also try to identify and deal with the reasons of dysfunctional state of mediation. The AGIL theory described above is incorporated in this study to provide a clear idea on the present structure of court connected mediation. In order to highlight the objective of the chapter more specifically, the next point will more highlight the present theory with pros and cons of the art of regulating mediation.

[239], Talcott Parsons 'Sociological Enquiry', in Andrew Effrat (ed) *On the Concept of Value-Commitments. Vol.38. Issue 2.*(April 1968)..135-160. <http//doi.org/10.1111/j.1475-682x1968.tb00676.x> accessed 20 January, 2020.

2.3.1 Finding co-relation between AGIL theory and art of regulating mediation[240]

The issue of "*what aspect is to be regulated and how*" of mediation mechanism helps to find out the theoretical approach of AGIL theory and its co-relation with it.

In this connection, Alexander[241] has recommended that:

> "The diversity –consistency dilemma refers to the multiple tensions between the desire to embrace diversity in practice through flexibility and innovation, on the one hand, and the call to establish consistent and reliable measures of quality in mediation services provision through regulation on the other".

In the previous chapter, it has already been discussed that both in developed and developing countries around the globe, some aspects of mediation are interfered with formal legislative regulations, and certain features are regulated by other forms of convention within the domain of existing economy, culture, legal tradition, government policies etc. in a given society.[242]Those situations have been categorized by Alexander as market regulation, self-regulation, a formal framework and formal legislative approach which tends to develop the institutionalization of mediation in a particular country. [243]

Ordinarily, in market contract regulation, if the litigants have accurate information about mediators, the mediator with poor reputation and performance will not be accepted by the litigants. Gradually, they will be pushed out of the market.[244] According to Frenkel and Sterk:

> "No regulatory authority act as a gatekeeper to the mediation field … no state regulator applies professional, ethical standards across the mediation field; and no state agency can discipline malintentioned or ineffective mediators…"[245]

In the statement mentioned above, it is difficult to control them under any legislative framework. There is hardly any mechanism to monitor mediator's conduct and make them disciplined in their professional activities. The litigants consult and proceed with the mediator

[240]Nadja Alexander 'Mediation and The Art of Regulation' (2008) Josh Underhill and Tammy White *QUT Law Review 8(1)* , (Research Collection School of Law,) 1-2.

[241] National Alternative Dispute Resolution Advisory Council(NARDAC), A Framework for Standards (Attorney General's Department, 2001) 4, 70-1, In particular recommendation 1.

[242]Nadja Alexander 'Mediation and The Art of Regulation' (2008)Josh Underhill and Tammy White *QUT Law Review 8(1)* , Research Collection School of Law, 3.

[243]Ibid 3-4.

[244]David Charney, ' Non-legal sanctions in Commercial Relationships' Harvard Law Review Association (ed) *Harvard Law Review Vol 4, No. 2 1990* 375, 392-94.

[245]Douglas N. Frenkel and James H Stark The Practice of Mediation: A Video Integrated Text (Aspen Publisher 2012) 33.

on the basis of *caveat emptor* theory.[246] However, in court-connected mediation programs, there exist some sort of regulatory functions.[247] The court always contains a pool of mediators who require specific qualifications like minimal training, education, ongoing regulatory work as mediator[248]etc. However, most of the lawyers find the mediation services financially less viable[249] and therefore, some sort of regulations deserve to provide them with minimum financial gain.

Consequently, there is a necessity to develop legal and institutional setup to regularize and promote their activities to make the mediation mechanisms properly functional. For example, in different countries, laws tend to provide specific rules and regulations concerning the practice of mediators so that they can get adapted with the court-annexed civil and family mediation.[250] In addition to that, the formal legislation also provides effective guidelines of mediation procedure with proper harmonization of the local policy so that participants become integrated with the process and get the desired benefit.[251] So, formal legislative approaches are required to set *"practice consistency goals, establish certainty on legal issues and consumer protection"* in order to achieve quality assurance goal.[252] For example, the Australian Law has a piece of legislation "which contains standard setting(mediators qualification standard) and beneficial standards(provisions relating to confidentiality, evidence and suspension of court proceedings"[253]Thus, the proper method of regulating mediation procedure is a necessity for complying with Parson's AGIL theory.

On the other hand, the organizational setup is essential to increase the ability and credibility of mediator's professions and inform the public about the utility of the mediation service.[254]For example in the USA, prominent organizations like Bar Associations Dispute

[246]Robert Dingwall, *Does Caveat Emptor Alone Help Potential Users of Mediations? (*9 NEGOT.J. 1993). 331, 334 .

[247] Art Hinshaw, 'Regulating Mediators' in *Harvard Negotiation Law review* (2016)168 <SSRN: https://ssrn.com/abstract=3044870> accessed 20 January, 2020.

[248]Rule 1-205-Qualification of Court Designated Mediators; (a)(4), (b)(2), (c)(3), (d)(4).

[249]Art Hinshaw, 'Regulating Mediators' (2016) Harvard Negotiation Law review Vol 21 201.

[250] The Austrian Law on Mediation in Civil Cases, 2003; Family Law Act, 1975(Cth), the Family Law Regulations, 1984(Cth), The Uniform Mediation Act, 2001(UMA).

[251]Robyn Carroll 'Trends in Mediation Legislation: All for One and One for All or One at All?' (2002) University of Western Australia Law Review Vol 30 167, 207.

[252]Nadja Alexander 'Mediation and The Art of Regulation' (2008)Josh Underhill and Tammy White *QUT Law Review 8(1)* , (Research Collection School of Law)10.

[253]Australian National Mediators Standards , Rule 4.

[254]Sarah R. Cole, Craig A. McEwen and Nancy H. Rogers. *Mediation: Law, Policy and Practice* (Thomson Reutars 2018) 2–4.

Resolution Section and the Association of Conflict Resolution work for developing regulations for mediation process as well as increase proficiency of mediators in this field and disseminate information towards the public.[255]

According to Alexander,[256]

> "Formal Framework approaches can accommodate diverse interest groups while still pursuing a common policy. They are most effective where a single body, such as the European Court of Justice has the power to interpret and enforce regulatory issues as they arise."

Thus, the organizational setup, as a form of social institution also plays a vital part in integrating the mediation mechanism to court-connected mediation. The overall legal and institutional structure can construct the proper institutionalization of the mediation process and the theoretical framework of AGIL theory pave a way to properly understand the aforesaid issues. In short, this chapter, therefore, forms a theoretical background to analyze such inefficiency from the perspective of social institution dysfunction theory.

2.4 Examining the underlying causes of institutional dysfunction

According to Parson's theory of social institution functionalism as discussed above, some problems are involved when the institutions function through different mechanisms of goal, attainment, integration, adaptation and latent maintenance. Institutions are conceptualized as a vehicle for undertaking collective endeavours. [257] According to March and Olsen, Institutions facilitate collaborative activities by providing individual incentives, establishing norms of appropriate behaviour, and streamlining actors' expectations about other actors.[258]
The institutional dysfunction has become widespread in the social, economic and cultural area. There is decline in trust and confidence among the actors of the society in every field of social, cultural, intergovernmental and non-governmental organizations.[259]It is a difficult task to identify and conceptualize the underlying causes of institutional dysfunctionality. Before

[255] Art Hinshaw, 'Regulating Mediators' (2016) Harvard Negotiation Law review Vol 21 190.
[256]Nadja Alexander, 'Mediation and The Art of Regulation'(2008) QUT Law Review, Research Collection School of Law, 8.
[257] Douglass C North *Institutions, Institutional change and Economic Performance* (Cambridge University Press 1993) 1.
[258]James G March and Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (1989) The Journal of Public Policy, Vol 10, Issue 3 (The Free Press New York) 161.
[259]Ashim Prakash and Matthew Potoski, *Dysfunctional institutions? Towards a new agenda in governance studies* (Wiley Publishing Asia, Pvt. Ltd Dec. 2015) 1.

going into the in-depth study of legal institution dysfunction, it is necessary to highlight the causes of institutional dysfunction as a whole.

2.4.1 Design failure and adaptation failure

Every institution in the society has its own rules and regulations through which it ensures compliance by the mechanisms of reward and punishment for the purpose of shaping the behaviours of individuals. [260] Those rules and regulations may fall short for proper functioning, which may be recognized as design failure causing dysfunction of a particular institution. [261] An institutional dysfunction may arise when the institution is not designed adequately at its inception. Ideally, social institutions are formed to serve collective ends.' Though individuals frequently use the service of social institutions, for a properly functioning social institution fulfillment of individual interests also serves the collective means.[262]For instance, when an individual gets recourse to the police force to prevent a dacoit, the individual himself benefits from a social institution. Further, this individual move towards accessing a social institution also served the collective interest by reducing crime and ensuring safe living by its citizens.[263]

In order to get the maximum benefit of the proper functioning of the institutions, the designers have to keep in mind the following things,

Firstly, during design negotiation designers have to compromise with competing needs of different social groups, compromise with the social power structure, and make the required changes. The normative social standards at the beginning of the design process may hold up to the end. However, it is not unlikely that one or more groups of the society may not value the newly developed social institution if only normative rules are upheld without any consideration of these competing views.[264]When that pattern is not flexible enough to cope with new circumstances, it results in adaptation failure.[265]Careful consideration of different views during designing is essential because institutions that do not follow appropriate "design

[260] James G March and Johan P Olsen, 'The New Institutionalism: Organizational Factors in Political Life' (1984) The American Political Science Review Vol 78 No 3 743.
[261] William Easterly, *The White Man's Burden* (Penguin, New York 2006) 376-378.
[262]Anayet Hossain and Md Ali Korban 'Relation Between Individual and Society' (2014) Open Journal of Social Sciences, Vol 2, No 38; Department of Philosophy, University of Chittagong, 7.
[263] Ibid
[264]Ostrom Elinor, *Design Principles and Threat: To Sustainable Organizations that Manage Commons* (Indiana University Press, 1999) 1-18 .
[265]Ibid

principles" are likely to under-perform or even fail.[266] Further, apart from bargaining compromises, creators of an institution may lack adequate knowledge on the preference and context of stakeholders who may access the services of that institution.[267]

For instance, while making laws for successful mediation in Bangladesh, the cultural impact to explain the dispute resolution approaches is very important. There is a greater degree of flexibility, mobility, and ambiguity in a low power distance culture, while in high power distance culture, the reverse situation applies.[268]The high power distance culture and low power distance culture[269] require different sets of laws relating to mediation for effectively resolving disputes, specifically to the role of a third party involved in the dispute resolution process.[270]Bangladesh is a High-Power Distance country where disputants culturally expect and accept some intervening normative evaluations from a superior third party.[271]On the other hand, the low power distance country like the USA is more suitable for the facilitative, neutral, and non-coercive roles of mediators.[272]Therefore, while designing a social institution and laws relating to the process of mediation, proper consideration to local culture, heritage and customs are necessary to make such laws acceptable by the society.

To lead an individual's goal towards collective interest and make social institutions functional, some monitoring, incentive, and punishment mechanisms should be built in its design. While most of these incentive and reward mechanisms are ideally designed before the inception of a social institution, monitoring and control mechanisms may also evolve over time to meet the changing expectations of society.[273] One group of Functionalist who emphasizes on *"rational design" approach"*, however, argues that social institutions are developed through consensual social practices. According to Ostrom, Prakash and Potoski:

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[266] Ibid

[267] William Easterly, *The White Man's Burden* (Penguin, New York 2006) 376-378.

[268] Ian Macduff, 'Decision making and commitments; Impact of power distance in mediation' in Joel Lee, TehHwee (eds) *A Asian Perspective of mediation*. (Singapore; Academy Publishing 2009) 111-114, 115.

[269] Power distances is divided into 2 categories that resemble a societies power index. It is a cultural phenomenon. The way that we regard the distribution of power and how we even define power are subject to each culture biases. A High Power Distance Culture is one in which power inequality is pronounced and common and people accept that without question. In Low Power Distance Culture, individual aim to distribute power equally.

[270] Geert Hofstede, 'Cultures Consequences: comparing values, behaviors, institutions and organizations across nations' (Thousand Oaks SAGE 2001) 127.

[271]Jamila A Chowdhury, *Mediation to enhance gender justice in Bangladesh*(London College of Legal Studies, South 2016) 62-65.

[272] Ibid

[273] James G March and Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (1989) The Journal of Public Policy, Vol 10, Issue 3 (The Free Press New York) 159-172.

> "While the rational design might constitute the normative goal, compromises during design negotiations may leave rules falling short of what is needed, with actors forced to live with flawed rules, considering that imperfect rules are better than nothing."[274]

Therefore, as argued by Functionalists, social institutions are rationally designed during their evolution stage.[275]As we see, nowadays, many new laws, regulations, and institutions are formed through negotiation rule-making Regulatory Negotiation (Reg-Neg), memorandum, and similar other participatory mechanisms.[276]

As the formation of a new institution brings some changes in the operating conditions faced by its stakeholders, the institutional design should not consider only the initial conditions, rather always be vigilant about the core purpose of that institution and consider how the formation of a new institution may affect such purpose.[277]For instance, companies with anartificial entity may be formed to reduce the inefficiency ofsole proprietorship and partnership where individual owners have more discretion to tap over organizational resources. Though companies' formation with an artificial entity may reduce some of these problems, companies itself may come with another new set of inefficiencies with them. Therefore, while measuring theefficiency or dysfunctionality of an institution and looking for a change, we also have to consider the new forms of inefficiencies that may arise out of that new institution.[278] For instance, when we advocate for more use of mediation to reduce the backlog in trial cases, we also have to consider that inefficiencies that mediation may create over theformal trial. [279]

2.4.2. Institutional mismatch and rational choice to dysfunction

It may not be the cause always that social institutions are not functioning because of imperfect design or that the views of different social actors are not incorporated or considered while designing a new institution, or a part of it. The institutions need to tailor their norms

[274]Ashim Prakash and Matthew Potoski, *Dysfunctional institutions? Towards a new agenda in governance studies* (Wiley Publishing Asia, Pvt. Ltd Dec. 2015) 1.
[275]Mathew D. McCubbins and Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms (1984) American Journal of Political Science Vol 28, Issue 1 28, 165–179.
[276]Andrew Moravcsik, Preferences and Power in the European Community (1993) JCMS: Journal of Common Market Studies 31, 473–473.
[277] Mathew D. McCubbins and Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms (1984) American Journal of Political Science Vol 28, Issue 1 165–179.
[278] Ibid
[279] James G March and Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (1989) The Journal of Public Policy, Vol 10, Issue 3 (The Free Press New York) 736.

and laws according to the context of the emergence of new actors. But sometimes, those actors adopt new capabilities, and they circumvent the institutional rules causing the dysfunction for the other actors associated with the function of those institutions.[280]

In the words of Parsons:

> "tendencies to deviant behavior on the part of the component actors pose functional "problems" for the social system in the sense that they must be counteracted by "mechanisms of control" unless dysfunctional consequences are to ensue."[281]

While underpinning the reasons for dysfunction, Parsons has emphasized that an actor's ultimate purpose in an organized social action is the optimization of gratification. Hence, in patterning that object's orientation, the problem is the permissibility of satisfying the individuals' immediate gratification interest or being renounced for instrumental, moral or more specifically collective interest. This is called "alternative pair orientation", formerly called self-orientation; the letter is called collective orientation.[282] Sometimes, the self-orientation is uncontrolled that may put him in a position to interfere with the interest and sentiments of others as the layman is unable to protect his interest in the market place.[283]However, individuals' motive to access social institutions may lead to a fulfillment of narrow personal interest that incurs extra burden to the society or community. For instance, when a malicious litigant files suit in a civil court and construct protracted delay through unnecessary time petitions or so, to enjoy the disputed property until final decree, that may benefit the individual but goes against the collective interest.[284]

This situation can also be conceptualized as capture by superior powers which compel the institution to serve the interest of particular section at the expense of broader collective goods.[285]In the broader sense, the state policy may select specific industries to have more significant benefit while importing goods from foreign countries. In the narrow sense, the

[280] Ibid 739

[281]Talcott Parsons, *The Social System* in Byron S. Turner(ed) (Routledge 11 New Fetter Lane London EC4P 4EE 1951) 22.

[282] Ibid, 39, 40

[283] Ibid 232

[284]Jamila A Chowdhury. *ADR Theories and ADR practices; A glimpse on access to justice and ADR in Bangladesh* (London College of Legal Studies South 2012) 57-66.

[285]Ernesto D Bó Regulatory Capture: A Review (2006) Oxford Review of Economic Policy Vol 22, Issue 2 22, 203–25.

particular stakeholders' political action regulates certain functions which cause negative impact the other mass people of society.[286]

According to the words of Garry Miller:

> "Rational actors, in the aggregate, can choose dysfunctional institutions even when they perfectly understand what they are doing."[287]

As discussed earlier, in the absence of proper incentive and punishment mechanism, it is not unlikely that individuals may use a social institution for their narrow personal interest.This might happen if the individual with a good political connection or muscle power can continue pursuing their personal interest while incurring extra cost to society.[288]

This situation may be considered as a reason for being the social institution as dysfunctional.

2.4.3 Non fulfillment of role expectation

There is also a role expectation that persists in society as norms, rules, and values are set by every individual's organized social actions. The pattern of value orientation is institutionalized as role expectation. [289] This patterned expectation is regarded as appropriate for everyone, and prevailing cultural orientation assigns great emphasis to this pattern and holds it appropriate for everyone.[290] When there is a significant discrepancy between the expectation of mobility and actual fulfillment, it results in a state of anomie; this state of things has been named by Merton as moral weakening of the process of demoralization.[291]"In political version, there is an assumption that on average voter's vote intelligently concerning their interests, legislators organize sensible coalitions, and nation-states voluntarily enter alliances, on average improve their positions. The state can also lead to the dysfunction of social institutions." [292] The non-compliance with types of expectation may lead to the institutions as dysfunctional.

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[286] Jean J Laffont and Jean Tirole 'The Politics of Government Decision-making: A Theory of Regulatory Capture' (1991) The Quarterly Journal of Economics Vol. 106, Issue 4 1089–1127.

[287] Garry Miller 'Governance' (2000)An International Journal of Policy and Administration; Vol 13 No 4, Blackwell Publishers USA, 540.

[288] Ibid 541

[289] Talcott Parsons, *The Social System* in Byron S. Turner(ed) (Routledge 11 New Fetter Lane London EC4P 4EE 1951) 236.

[290] Robert K. Merton Social Theory and Social Structure, Chapter I (New York The Free Press 1968) 221.

[291] Ibid 59

[292] James G March and Johan P Olsen, '*The New Institutionalism: Organizational Factors in Political Life*' (1984) The American Political Science Review Vol 78 No 3 736.

From the above discussion, it becomes clear that institutional dysfunction is prevalent in our society for various reasons depending on different criterions of designs and adaptation failure, institutional mismatch, etc. The consequence of such dysfunction is faced by other stakeholders residing within the purview of those institutions. The consequence of dysfunction can be visualized from the barriers to get the service by mass people.

2.4.4 Availability and access to justice: Finding the causes of "legal institution dysfunction"

All civilised countries nowadays have a formal court system to resolve disputes among the member of its society. This formal court system is machinery for enforcing the laws provided by the legislature, and for proper enforcement of laws, only the availability of justice in the law books will not suffice. Actual access to justice for all is an inevitable criterion for the proper function of the court system as an institution.[293]'

As explained by Hutchinson, availability relates *"to the question of whether a service exists"* and access deals with 'the question of "whether a service is actually secured."[294]

The term "access to justice" has been described by Cappaletti and Garth:

> "they serve to focus on two basic purposes of the legal system –the system by which the people may vindicate and/or resolve their disputes under general auspices of the state. First, the system must be equally accessible to all; and second, it must lead to results that are individually and socially just."[295]

In this connection, the decision cited in UK labour law and constitutional law judgement, of *Runisonvs Lord Chancellor*[296] can be stated in which it was held that fees for employment tribunal are unlawful because they impede access to justice and defy the rule of law. Lord Reed emphasized access to justice as a core element of the rule of law stating that

> "Parliament exists primarily in order to make laws for society in this country. Courts exist in order to ensure that the laws made by parliament and the common law created by the courts themselves are applied and enforced. That role includes ensuring that the executive branch of the government carries out its functions in accordance with the law. In order for the courts to perform that role, people must, in principle, have unimpeded access to them. People and business need to know, on the one hand, that they will be able to enforce their rights are they

[293]Allan C. Hutchinson, *Access to civil Justice* (Carcwell, Toronto 1990).P. 181.
[294] Ibid
[295]Mauro Cappelletti, and Bryant G. Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective (1978) Buffalo Law Review, vol. 27, no. 2, 181–92.
[296]R(Unison) *v* Lord Chancellor [2017]UKSC 51.

> have to do so and on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them."[297]

Thus access to justice by all categories of people in the society is a compulsory element of ensuring justice. Ensuring justice is the objective of all international treaties and national legislations. [298] As mentioned in section 6 and 7 of the Universal Declaration of Human Rights, 1948, *"Everyone has the right to recognition everywhere as a person before the law"*.

Likewise, article 8 has imposed a duty upon the government of signatory states to provide fair justice to all. International Covenant on Civil and Political Rights, 1966 and international Covenant on Social, Political and Cultural Rights has also emphasized securing the proper legal remedies for every person before the law.[299]

Therefore, the availability of justice may not be equal to its accessibility if people in a society or any group face barriers to access available justice. However, an available legal system with courts and laws in a country only ensures the availability of justice, not its access. [300] According to Chowdhury:

> "Though many protective legal provisions are theoretically available, in different laws of the country, because of the high cost and delay in litigation, poor people may not be able to access the benefit of such laws."[301]

It has further been reiterated by Akhtaruzzaman that delay in the dispensation of justice has been a chronic problem. The mounting backlog of cases results in inordinate delay, and therefore, the very purpose of availability of laws become frustrated.[302]

2.5 Tools for measuring institutional dysfunction: A theoretical underpinning with special reference to the dysfunction of the justice delivery system

A number of complex issues both at the conceptual and empirical levels are involved in measuring institutional dysfunction. As we encounter numerous social institutions to promote different social requisites among various groups of individuals, there are no set criteria for

[297] Ibid
[298] Jamila. A. Chowdhury, *Mediation to Enhance Gender Justice In Bangladesh* (London College of Legal Studies South 2016) 1.
[299] Jamila. A Chowdhury, *ADR Theories and ADR PracticesA Glimpse on Access to Justice and ADR in Bangladesh* (London College of Legal Studies South 2012) , P27.
[300] Ibid
[301] Ibid, P. 28
[302] Md. Akhtaruzzaman, *Case Management and Court Administration in Bangladesh* (Advocate RaziaKhatun, 2014) 1.

measuring dysfunction among all.[303] Nevertheless, to measure institutional dysfunction, there are at least two broad categories that we may apply to measure institutional dysfunction in any social institution. Those are cost-benefit analysis and settling benchmark to gauge institutional performance

2.5. 1 Cost-benefit analysis

Firstly, the cost-benefit analysis in terms of social welfare can be used to measure institutional effectiveness. This approach is used to measure the effectiveness of governmental institutions to serve broader social purposes. Every social institution has an objective to enhance social welfare and involves some cost to society regarding tax, charges, and other compliance costs.[304]However, measuring social welfare is complex and involves some issue that cannot be measured readily, without further research. For example, money is not everything to decide whether to pay for help.[305]Some people can afford to hire a lawyer will not do so; they would rather save money for medical or other services.[306]As they have not expended to the legal procedure, they will not get the required benefit from the system. Thus, in that case, it will not proper to measure the institutional dysfunction by cost-benefit analysis. In the background of such circumstances, Prakash and Potosky has posed the question of whether *"costs and benefits incurred by different groups to be weighted equally?"*[307]

Nevertheless, the concept above of cost-benefit analysis is an efficient mechanism of measuring the results based on services provided and the cost incurred.

According to Sunstein, Jolls and Thaler, within the purview of subsisting laws and regulations of the society, the outcome of services can be measured by the percentage of lane miles of road maintained in excellent, good, or fair condition or the clearance rate of severe

[303] Ashim Prakash and Matthew Potoski, *Dysfunctional institutions? Towards a new agenda in governance studies* (2015) Regulations and Governance (Wiley Publishing Asia, Pvt. Ltd Dec) 2.

[304] Cass R Sunstein, ChrintineJolls and Richard H Thaler, *A Behavioral Approach to Law and Economics*(University of Chicago Law School 1998) 1471-1484.

[305] Rebecca L Sandefur, 'Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers Services' in Michael J. Trebilcock, Anthony Duggan and Lorne Sossin, *Middle Income Access to Justice.* (University of Toronto Press, 2012) 222-245.

[306] Amy Myrick, Robert L Nelson and Laura B. Nielsen, 'Race And Representation: Racial Disparities In Legal Representation For Employment Civil Rights Plaintiffs' (2012) New York University Journal Of Legislation And Public Policy 15 : 705---758.

[307] Ashim Prakash, and Matthew Potoski, 'Dysfunctional institutions? Towards a new agenda in governance studies' (Dec. 2015) Regulations and Governance, Wiley Publishing Asia, Pvt. Ltd, 2.

crimes, or the percentage of residents rating their neighborhood as safe or very safe, etc.[308]These outcomes are generally compared with the costs, taxes and other expenditures that the citizens bear for getting these facilities. In the words of Masur and Posner:

> "Most of these regulations are cost-benefit justified, in the sense that they produce greater benefits to well-being than costs."[309]

In the justice system, the primary task of law is to affect human behaviour. The primary purpose of the law is to achieve a specific end, such as deterring socially undesirable behaviour; in other words, the goal of the legal system is to maximize the 'social welfare'.[310]Sunstein and others have described the situation where the concept of cost-benefit analysis will come into play. According to their words:

> "bounded self-interest is relevant primarily in situations in which one party has deviated substantially from the usual and ordinary conduct under the circumstances; in such circumstances, the other party will often be willing to incur financial costs to punish the unfair behavior."[311]

So, the measurement of the proper functioning of judicial institutions depends on the benefit it conveys in return of the litigants' costs for its proper functioning.

According to Schetzer and others, court structure and litigation procedure bear directly upon the persons' ability to resolve the legal problem. The people who come before the court seeking justice have to face the cost and delay of the proceeding. The court system bears the responsibility to develop an effective case management system consisting of quality and early disposal of disputes through maintaining the due process of law.[312] In the purview of such a process, the proper implication of ADR method can bring effective result for the proper functioning of courts from the viewpoint of cost-benefit analysis.

2.5.2. Settling benchmarks to gauge institutional performance

To avoid the complexity of measuring cost-benefit of a social institution as a whole, we may identify a specific yardstick(s) for a particular institutions' performance or dysfunction. According to Melkers & Willoughby, it is a great challenge to identify the indicators and the

[308] Rebecca L Sandefur, 'Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers Services' in Michael J. Trebilcock, Anthony Duggan and Lorne Sossin, *Middle Income Access to Justice.* (University of Toronto Press, 2012) 183.

[309] Jonathan S. Masur and Eric A Posner, 'Cost Benefit Analysis and The Judicial Role' (2017), CoaseSandor Working Paper Series in Law and Economics No 794. University of Chicago Law School 1.

[310] Cass R Sunstein, ChrintineJolls and Richard H Thaler, *A Behavioral Approach to Law and Economics*(University of Chicago Law School 1998) 1475.

[311] Ibid P. 1471

[312] Louis Schetzer, Joana Mullins and Roberto Buonamano, *Access to Justice and Legal Needs* (Law and Justice Foundation of New South Wales 2002), P 10.

institutional performance can be measured by those indicators which are based upon some specific criteria.[313]

An appropriate way of setting a benchmark is to measure the performance criteria under two different contexts, i.e. one when an institution is present and the other when it is absent. This approach would be particularly helpful to measure the performance of a newly formed organization when its incremental impact can be differentiated easily.[314] Heckman has identified three fundamental questions in the context of the institutions' economic functions, which seems relevant for measuring extent of functions of judicial components of society. Those questions are:

> "(1) What are the parameters of economic interest, (2) Under what conditions can they be identified (3) How can alternative non-parametric procedure set forth in the literature aid in securing parameters of interest?"[315]

For instance, if we intend to measure the effectiveness of our government in promoting healthy society, should we measure it through people's access to medicine and other health care services, or in terms of lower prevalence of diseases. If we measure social welfare holding the parameter of access to medicine, it would be relatively simple and involve only the performance of the ministry of health in providing such access. However, if we measure welfare in terms of lower prevalence of diseases, it involves the parameters of performance of the Ministry of Health, Ministry of Environment, Ministry of Industry, Ministry of Transport and many other agencies whose activities may affect the prevalence of various airborne, waterborne, and other diseases among the public.[316]

We are not supposed to take benchmarks out of our whim, rather the selection of performance criteria and benchmark should be grounded on the concrete theoretical understanding. These are a few core issues that we need to deal with while measuring institutional dysfunctionality. Ms Viviane Reding, the then vice president of the European Commission, emphasized the need to create a new mechanism for measuring, comparing and benchmarking the strength, efficiency and reliability of the judicial system.[317]

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[313] Julia Melkers and Katherine Willoughby, 'The State of the States: Performance-based Budgeting Requirements in 47 out of 50' (1998). Public Administration Review, Vol 58 No 1, 58, 66–73.

[314] James Heckman, ' Varieties of Selection Bias' (1990) The American Economic Review Vol 80, Issue 2 80, 313-318.

[315] Ibid P 313.

[316] Norman Daniels, 'Justice, Health, and Healthcare' (2001) The American Journal of Bioethics 1(2): 2-16 4.

[317] Adriani Dori, 'The EU Justice Scoreboard-Judicial Evolution as a New Governance Tool' (2015), MPI Luxemberg working paper series 2(2015), 12.

For example, we still need to decide whether we should count only the physical access to justice or access to fair justice. Even when we choose to use the physical access to justice criteria, we need to answer many related questions on how may we define physical access? The lack of availability of interpreters or other problems associated with the uses of court-related issues causes a bar to access to fair justice. Similarly, the physical environment of courts, which may produce an atmosphere of exclusion, alienation or disempowerment, impinges upon the individual's access to just processes.[318]The atmosphere mentioned above of the court frequently poses a bar to physical access to justice.

In order to measure access to justice through mediation, several factors required to be considered. For example, the performance of ADR in the courts of the metropolitan area and outside the metropolitan area, the percentage of successful ADR in different ranks of courts such as Assistant Judge, Joint District Judge Court should be compared to arrive at a correct assessment of the present success of ADR. Moreover, the evaluation of disposal of cases through formal adjudication and mediation procedure should also be taken into consideration. Over what time period this access is monitored? Are functions of ADR effective equally to the suits of a lower or higher valuation? The proper use of benchmarks mentioned above can give the proper assessment of thefunctioning of the court-connected mediation.

2.5.3. Objective vs subjective criteria in measuring institutional dysfunction

As discussed above, in some cases, we may be able to identify "objective" measures of dysfunction and agree on how to benchmark it. However, taking an objective measure may not always fulfill our criteria to measure organizational functionality. For instance, when our objective is to ensure fair justice for all, a mere statistic on a high rate of disposal through formal courts may not fulfill our purpose. The objective and subjective measurement are described clearly in the following words,

> "Assessment is often categorized as either objective or subjective. Objective assessment is a form of questioning which has a single correct answer. Subjective assessment is a form of questioning which may have more than one correct answer (or more than one way of expressing the correct answer)".[319]

[318]Schetzer Louis, Mullins Joana, Buonamano Roberto (2002)'Access to Justice and Legal Needs', Law and Justice Foundation of New South Wales, P 10.

[319] Joint Information Systems Committee (JISC). "What Do We Mean by e-Assessment?" JISC InfoNet .Retrieved January 29, 2009 from http://tools.jiscinfonet.ac.uk/downloads/vle/eassessment-prinTable .pdf Archived 2017-01-16 at the Wayback Machine.

The objective assessments are usually dependent upon the data; however, subjective assessments are involved in such measurement while analyzing the data for arriving at any result. Subjective questions include “extended-response questions and essays” on the basis of the interview to different stakeholders involved in the concerned institutions.[320]

We need to be careful while setting to measure institutional performance, as a benchmark may promote perverse interest among stakeholders and enhance rather than reduce institutional dysfunction.[321] For instance, the passing rate (those who got more than 33%) in SSC examination could be a good measure of effective functioning of our secondary education system when examinees answered essay type questions. However, keeping a 33% benchmark even after the introduction of an MCQ question bank for SSC examinees was counterproductive. It is widely argued that the introduction of question bank in public exam apparently increased the performance of our secondary education system, as almost 100% of the participants get passed (got more than 33%). However, it might have increased the dysfunction of our secondary education system, by promoting a perverse interest among students to get higher marks by memorizing answers from the question bank, rather understanding their lessons. The expectation of different groups from a single institution may be different. Therefore, we may need to balance between these competing expectations, decide which one should get preference.

The objective measures are often used to assess the success of government on the basis of economic growth. Gross domestic product, sales, profit, shares are considered as appropriate benchmarks for assessing the functions of the government institutions. However, there is criticism on the ground that through this process, the actual measurement is partially addressed. Sometimes objective measures do not cohere with subjective or perception-based measurement. For example, while examining the effectiveness of our judicial system in delivering justice to society, we may measure only the effectiveness of our judicial system in the disposal of cases in-court trial or mediation. Using this specific yardstick to measure institutional welfare means that the value of that yardstick primarily reflects the effectively functioning social institution.

[320] Ibid.

[321] Mctighe, Jay; O'Connor, Ken (November 2005). "Seven practices for effective learning". Educational Leadership. 63 (3): 10–17.

This is because many clients may not be able to continue with their case due to high cost and delay and got *exparte* decree or dismissal in consequence. Therefore, a high rate of disposal through a contested trial could be a better criterion of measurement in this regard.

Further, the participation of both parties in a dispute resolution process may not be enough if they cannot participate and raise their voice (either directly by themselves or directly by their lawyers) equally. For instance, though both parties get an equal opportunity to raise their voice in a third party assisted mediation,[322] a neutral mediator may not ensure an equitable outcome to many women in Bangladesh, who habitually remain submissive, or keep silent in mediation, and expect intervention from an authoritative mediator to ensure equity.[323] A perception-based index of participants' satisfaction on the fairness of justice may be used to measure how effectively a justice delivery mechanism is functioning to ensure equitable outcome to its participants.[324]However, according to the words of Grootellar and others:

> "...despite the fact that the in-depth interviews with our respondents were of great value, their subjective character and their dependence on the case at hand affected the validity and reliability of this research."[325]

Therefore, while measuring the effective functioning of mediation mechanism on the basis of subjective criteria in the subsequent chapter, we should carefully collect the subjective perception from different stakeholders including the participant of the trial and ADR mechanism very carefully so that the risk of subjectivity can be avoided.

2.6 Conclusion

As discussed in the introductory chapter, access to justice through the formal judicial system is chronically constrained by the backlog in cases, and the provision of ADR is not used effectively to accelerate case disposal to reduce the backlog. This chapter, therefore, forms a theoretical background to analyze such inefficiency from the perspective of social institution dysfunction theory to examine any possibility of rational choice from stakeholders to

[322]Jamila. A Chowdhury, (2016) Mediation to Enhance Gender Justice In Bangladesh, London College of Legal Studies(South) p 18.
[323]. Ibid 38-39.
[324] Grootellar, Hilke A.M, WaterbolkTjalling A., WinkelsJakoline (2014)'The relationship between Role Conception, Judicial Bahaviour and Perceived Procedural Justice' http//www.Utrechtlawreview.org// Vol 10 Issue 4 P1-15.
[325]Ibid P. 152.

continue such inefficiency. Analyzing empirical data from the court registry, the next chapter has discussed the dysfunction in the disposal of civil disputes under CPC, with appropriate measurement criteria and benchmarks discussed in this chapter. In the subsequent chapters 4, 5 and 6, a thorough study of individual cases and interviews to different stake-holders, will be elaborated to explore the extent of the research premises mentioned above in this chapter.

CHAPTER 3

EFFECTIVENESS OF MEDIATION IN CIVIL COURTS UNDER CPC: AN EMPIRICAL EVALUATION USING COURT REGISTRY DATA

3.1 Introduction

Mediation is a dispute resolution mechanism that is celebrated worldwide for quick, and in many cases, low-cost settlement of disputes. Following the success of family courts,[326] provisions to try mediation in resolving the civil dispute at the pre-trial stage was introduced through Section 89A of CPC in 2003. The provision of 89A of CPC deals with the mechanism of mediation which is regarded as a method of resolving civil suits.[327] Later, sections 89C,[328] 89D and 89E were inserted in 2006 and 2012 respectively to add a provision of mediation at the pre-trial and post-trial stages. Further, in 2012 such provisions to try mediation at the pre-trial and appellate stage have been made mandatory.[329] However, parties attending mediation under CPC can at any time withdraw from mediation and apply to resume their cases for trial.[330] Any evidence is taken, or information gathered during the continuation of mediation, remain confidential, and cannot be used for the subsequent trial.[331] Alternatively, parties can apply to resolve their disputes through arbitration under Section 89B of CPC.[332] Though every case under CPC has to try ADR (either arbitration or mediation) the rate of resolution through ADR is still very low and, almost all of the ADR is done through mediation.[333] This chapter aims to analyze court registry data to examine the efficacy of mediation in civil courts. However, any discussion of the reason for low efficacy of mediation in civil courts is beyond the scope of this chapter but discussed in subsequent

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[326] In chapter 1, topic no 1.4.3, the success of mediation in family courts were discussed.

[327] According to 89A(1), '…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 shall by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit…'.

[328] According to 89C(1) 'An Appellate Court shall mediate in an appeal or refer the appeal for mediation in order to settle the dispute or disputes in that appeal….'.

[329] In section 89A, the words, 'the Court shall' were substituted for the words, 'the court may' by section 2(a)(ii) of the Code of Civil Procedure(Amendment) Act, 2012 (Act no xxxvi of 2012).

[330] According to section 89A(7), 'When the mediation fails to produce any compromise, the court shall subject to the provision of section(9) proceed with the hearing of the suit from the stage at which the suit stood before..'.

[331] According to section 89A(8), 'The procedure of mediation under this section shall be confidential and any communication made, evidence adduced, admission, statement or comment made and conversation held between the parties ….shall be deemed privileged…'.

[332] According to section 89B, 'If the parties to a suit, at any stage of the proceeding, apply to the court for withdrawal of the suit on ground that they will refer the dispute or disputes in the suit to arbitration, the court shall allow the application and permit the suit to be withdrawn…'.

[333] In 1st chapter of topic 1.4.2, the dismal condition of resolution of suits through mediation was pinpointed.

chapters. According to the provisions of CPC, mediation can be conducted in both original suits and appellate stage of the suits. This chapter examined the efficacy of mediation in both of these stages separately. Therefore, the next section reiterates the civil court structure in Bangladesh that deals with the civil justice system of Bangladesh. After that, data has been collected from those courts of different tiers and jurisdictions on the resolution of various types of civil litigations through mediation and trial.

3.2 The civil court structure of Bangladesh

It is quite apparent from the discussion as mentioned above that in traditional dispute resolution system, the court is the vital component that constitutes the institutional framework for settling the dispute between the parties to arrive at a decision for determining the rights of the parties. The judicial structure of Bangladesh is divided into two different tiers: the Higher Judiciary and the Subordinate Judiciary. The current court structure of Higher Judiciary is enshrined in Article 94 of the People's Republic of Bangladesh's Constitution. The structure of subordinate court is enumerated in the *Civil Courts Act, 1887*. The Supreme Court of Bangladesh, consisting of Appellate Division and High Court division, has its appellate authority in deciding the merits of the civil litigations.[334]As is discussed in Chapter 1, though research data was collected from the Dhaka Judgeship, this research aimed to generate new knowledge to enhance the effectiveness of mediation all over the country and at the different tires of justice. Therefore, knowing the civil court system was important before collecting the court registry data for this research. The structure of Subordinate Judiciary as envisaged in section 3 of the *Civil Courts Act, 1887* is as follows:

3.2.1 District Judge Courts

According to section 18 of the *Civil Courts Act 1887, "Save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Joint District Judge extends, subject to the provisions of section 15 of the Code of Civil Procedure, 1908 to all original suits for the time being cognizable by Civil Courts"*. As specified in the Code of Civil Procedure, 1908 "Every suit shall be instituted in the Court of the lowest grade competent to try it".[335]

Therefore, District Judge or Joint District Judge courts have original, appellate, revision,

[334] According to article 94 of The Constitution of People's Republic of Bangladesh 'a Supreme Court for Bangladesh' is established.
[335]The Code of Civil Procedure 1908, s 15.

transfer, review and reference jurisdiction.[336] Nevertheless, the District Judge Court or Joint District Judge court cannot try any civil suit if any other lower court is competent to try that matter. According to section 20 of the *Civil Courts Act 1887*, any appeal against an order or decree of a District Judge court shall lie to the High Court Division of the Supreme Court.

3.2.2 Additional District Judge Courts

It has same powers as to the District Judge but can exercise its power only if the District Judge refers any matter to the court;[337] According to section 20 of the *Civil Courts Act 1887*, any appeal against an order r decree of an Additional District Judge court shall lie to the High Court Division of the Supreme Court.

3.2.3 Joint District Judge Court

It has jurisdiction to hear an appeal, and it has original jurisdiction as well. As specified in section 18 of the *Civil Courts Act 1887*, the Court of Joint District Judge can exercise its unlimited pecuniary jurisdiction in case of civil suits, except those civil suits that can be dealt with a competent lower court. Further, according to section 22 of the Civil Courts Act 1887, the District Judge court may transfer to the Joint District Judge court, under its' administrative control, any appeal against decrees or orders from a Senior Assistant Judge court or Assistant Judge court. In the judicial hierarchy, the court of Joint District Judge can act as a specialized court like *Artha Rin Adalat, Paribesh Adalat*, etc. which have been established under the special law. For instance, as specified in section 4(3) of the *Money Loan Courts Act 2003*, if no separate Money Loan Court is established any district, the Joint District Judge court shall act as a Money Loan Court for that district.

3.2.4 Senior Assistant Judge Courts

It is a court of the first instance subject to the limit of its pecuniary jurisdiction. As specified in section 19 of the *Civil Courts Act 1887*, save as otherwise provided by any enactment for the time being in force, the jurisdiction of a Senior Assistant Judge shall extend to all suits of which the value does not exceed [twenty-five] lac taka.

3.2.5 Assistant Judge Courts

It is a court of the first instance subject to the limit of its pecuniary jurisdiction. As specified in section 19 of the *Civil Courts Act 1887*, save as otherwise provided by any enactment for the time being in force, the jurisdiction of an Assistant Judge shall extend to all suits of which

[336]The Civil Court's Act 1887, s18 to 21.
[337]Ibid, s.8.

the value does not exceed [fifteen] lacs taka.

As mentioned above, the jurisdiction of subordinate courts depends on the pecuniary values of the cases filed in a court. In addition, there are some special courts and tribunals established by different special laws, such as:

- the Family Court established by the *Family Courts Ordinance, 1985* and it is presided by a Judge who is also an Assistant Judge or Senior Assistant Judge,[338]
- The *Artha-Rin Adalat* (Loan recovery Court) established by the *Artha-Rin-Adalat Ain*, 2003 and presided by a Judge who is a Joint District Judge,[339]
- The Labour Court established under the *Labour Act 2006* and presided by a District Judge.[340]
- The Environment Court established by the Environment Court Act, 2010 and presided by a Judge who is a Joint District Judge,[341]
- Insolvency Courts**:** Insolvency Courts declare defaulting borrowers as insolvent. etc. established under *Bankruptcy Act, 1997* and the District Judge shall be the judge to deal with and dispose of the case under this Act.[342]

The forum for appeal from the orders and judgment of special courts and tribunals are sometimes to the regular appellate courts or in some cases to the special appellate courts and tribunal created by the concerned special laws.

3.3 Backlog of cases in civil courts and practices of mediation all over Bangladesh

As mentioned above, the hierarchy of courts is the institutional frameworks through which the civil dispute resolution occurs around Bangladesh. However, as summarily explained in Chapter 1, the civil courts' system is inundated with a large number of unresolved cases, and the number is increasing every year and causing pressure on the effective delivery of justice through formal courts. According to a recent report, in the subordinate courts including all the District and Sessions Judges Court and all the courts subordinate to it, all the tribunals, Chief Metropolitan Magistrate (CMM) and Chief Judicial Magistrate(CJM) courts are burdened with a number of 31,72,043 litigation among which the number of civil litigations

[338]Family Court Ordinance, 1985, s 4(3).
[339]Artha Rin Adalat Ain 2003,s 4(12).
[340]Family Court Ordinance 1985, s 4(3).
[341] Environment Court Act, 2010, s 4(2).
[342]Bankruptcy Act, 1997, s 4.

is13,65,678.[343]

As regards the number of judges working in the subordinate courts in the year 2019, is 1880.[344]Thus, on average, each of the judges has 2000 litigations upon them for disposal, which is impracticable for a judge to accomplish. As the overall scenario of the backlog of civil cases in Bangladesh, Dhaka is demonstrated in Chapter 1, and this chapter set the scenario of case backlog in the civil courts of Dhaka district.[345] The rationale for selecting Dhaka district as the geographical scope of this research was also clarified in Chapter 1. For instance, the scenario of District Judge Court, Dhaka is in a more dismal condition, as shown below:

Table 3.1: Number of pending cases in the courts of Dhaka judgeship (2012- 2018)

Name of the Court	2012	2013	2014	2015	2016	2017	2018
Joint District Judge 1st Court	5629	17,759	12681	7889	8288	8150	6505
Joint District Judge 2nd Court	5397	6037	6910	7394	7606	6472	4468
Joint District Judge 3rd Court	3427	3653	4713	4823	5145	4751	3845
Land Survey tribunal, Dhaka	10,254	9609	9044	8537	7870	6869	5684
***ArthaRinAdalat*1, Dhaka**	2852	3424	3927	5004	5689	5628	4187
***ArthaRinAdalat*2, Dhaka**	2045	2539	5986	6399	7772	9724	7650
Senior Assistant Judge 1st Court, Dhaka	2730	2991	3045	3133	2988	3686	2389268
Senior Assistant Judge, 2nd Court, Dhaka	3203	3520	3268	3063	2977	3075	2689
Senior Assistant Judge, 3rd Court, Dhaka	2197	2147	2039	1887	2133	2363	1858
2nd Additional Senior Assistant Judge court and Family court	2094	2366	2187	2227	2364	2288	2142

Source: *Data collected from Dhaka Judge Court*

From the above Table 3.1, it becomes apparent that during the years, each of the courts in Dhaka is burdened with 2000-3000 litigations and thus, it can be said that the number of judges is grossly disproportionate to the number of litigations pending.

According to Akhtaruzzaman, "*The existing number of judges is not sufficient to cope with*

[343] Bangladesh Supreme Court, Statistical Report from 1st October 2019 to 31 December, 2019.

[344] Data obtained from Ministry of Law, Justice and Parliamentary Affairs on 1st January, 2018.

[345] Topic no 1.4.2 and 1.4.3 of chapter 1 described the scenario of backlog of each of the civil courts in Dhaka.

the progressively increasing work".[346]As shown in Table 3.1, with few exceptions in all civil courts, the backlog of cases is increasing over the years.

Mediation can be described as a process of dispute resolution through mutual and amicable settlement. Court-connected mediation, as stated in section 89A, which is termed as mediation, as demonstrated in Chapter 1, is incorporated in many legislations relating to the litigations of civil nature. We have several laws dealing with mediation which sets the principles through which civil suits can be resolved through conciliation, mediation, negotiation and arbitration. However, the availability of law does not necessarily mean its smooth application in reality. The backlog of cases in civil courts and a low resolution through mediation exists not only in Dhaka district but also in all over Bangladesh. Therefore, the rate of dispute resolution through mediation and the success of civil courts require to be measured for the purpose of finding out the barriers of the smooth functioning of court-connected mediation.

3.4 Relevant laws and regulations in resolving civil litigation: A critical analysis of existing backlog in civil courts in general

In Bangladesh, civil courts are entrusted with a resolution of civil disputes. The existing provisions of substantive and procedural laws concerning the disposal of civil disputes are several and diverse in nature. Before going through the laws and regulations relating to civil disputes, we may have a glimpse of the actual meaning and connotation of civil litigations. According to Oxford Advanced learner's Dictionary civil refers to any matter connected with the people who live in a country.

> "A civil dispute is a disagreement between individuals, or an individual and a trader, business or company".[347]

In "Litigation: Trial, Harvard Law School",[348] the nature of civil litigation has been described as

> "The term civil litigation refers to a legal dispute between two or more parties that seek money damages or specific performance rather than criminal sanctions. A lawyer who specializes in civil litigation is known as a litigator or trial lawyer. Lawyers who practice civil litigation represent parties in trials, arbitrations and mediations before administrative agencies, foreign tribunals, and federal, state, and local courts. Several common types of civil

[346]Md Akhtaruzzaman.,*Case Management and Court Administration in Bangladesh*, (Advocate RaziaKhatun 201) 164.

[347] Quinsland Civil and Administrative Tribunal(QCAT) 'Other Civil Disputes' (29 August, 2019)<www.qcat.qld.gov.au › accessed 20 January, 2020.

[348] Litigation: Trial, Harvard Law School <https://his. Harvard,edu>dept>opia> last visited 17/2/2020.

> litigation include environmental law, housing law, products liability, intellectual property, labour and employment, and antitrust".

In Bangladesh, the civil adjudication process owes its origin to the codified law named the *Code of Civil procedure, 1908*. The suit of civil nature has been enumerated in the provision of explanation to section 9 of the *Code of Civil procedure, 1908*. The explanation is as follows:

> "A suit in which the right to property or to an office is contested is a suit of civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies".

A suit is of civil nature involves the target of enforcement of one's civil rights or obligations. The distinction between a civil proceeding and criminal proceeding is that the object of the former is the enforcement of right and the object of the later is punishing the wrong. The suits of civil nature are numerous in number and diverse in nature. The suit in respect of the property is a suit of civil nature.[349] The word 'property' embraces all objects, including tangible or intangible, movable or immovable that can be owned by a person. Patents, copyrights, trademarks or right of franchise, the right of fishery, right of ferry, right to pension can be termed the intangible properties.[350]

In 1877, the enacted law named as *the Specific Relief Act, 1877* came into force in order to deal with enforcement of rights when the same is infringed or threatened to be infringed. According to the preamble of the *Specific Relief Act, 1877:*

> "Whereas it is expedient to define and amend the law relating to certain kinds of specific relief obtainable in civil suits…"[351]

This Act embraces several kinds of civil rights to property and office and elaborates the types of reliefs that can be granted in case of its infringement through the way of institution and trial of civil suits.[352] The *Contract Act, 1872, Transfer of Property Act, 1882*etc. also came into place to enforce the individuals' civil rights. Later on, the Code of Civil Procedure came into force in the year of 1908 for the purpose of delineating the procedural aspects of the civil litigations. According to its preamble, '*Whereas it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature.*'[353]

[349]Secy. of state v Fahmdannissa, Indian Law Report (ILR) 17 Cal 590(PC).
[350]Mahmudul Islam and Probir Neogi, *The Law of Civil Procedure* (Mullik Brothers 2006) 26.
[351]The Specific Relief Act, 177, Preamble.
[352]Probir Neogi, *The Law of Specific Relief* (Mollik Brothers 2011)
[353]The Code of Civil Procedure, 1908, Preamble.

With the course of time, with major and minor amendments in the years of 1962, 1963, 1978, 1983, 2003, 2007, 2012, etc. (this Code has taken its present shape concerning the procedural laws for conducting the litigation involving civil disputes.[354]In 1998, the Law Commission, in a research identified several reasons for the delay of civil cases. Amongst them, the absence of specialized courts and the weakness of procedural laws were considered the main hindrance for speedy disposal.[355]

With the increasing number and variety of civil litigations, there arose a need for creating special laws and courts to deal and dispose of those civil litigations smoothly and effectively. Thus, different laws relating to family disputes, money loan disputes, labour disputes etc., were enacted to cope with the demand for justice in such diverse types of litigations. The reason and rationality behind incorporating and creating special laws can be realized by the observation mentioned below:

> "Three of the primary benefits associated with the creation of specialized courts are (I) fostering improved decision-making by having experts decide complex cases; (ii) reducing pending case backlogs in generalist courts by shifting select categories of factually and/or legally complex cases to specialized courts more capable of dealing with them, thus generating fewer appeals; and (iii) decreasing the number of judge hours required to process complex cases by having legal and subject-matter experts adjudicate them."[356]

Thus, it is apparent from the discussion mentioned above that the adjudication and disposal of the suits of civil nature are governed by Code of Civil Procedure along with other general and special laws. Some of the special laws are as follows:

- *Artha Rin Adala Ain*, 2003
- State Acquisition and Tenancy Act, 1950
- Family Courts Ordinance, 1985
- Administrative Tribunals Act, 1980
- Labour Act, 2006

Under these legislations, different specialized courts and tribunals are created with special jurisdictions subordinate to the supervisory power of the Supreme Court of Bangladesh.[357]As mentioned above, each of the laws has its own adjudication procedure through which the trial of the civil litigation proceeds. However, the scope of this thesis is limited to the discussion

[354]Mahmudul Islam and Probir Neogi, *The Law of Civil Procedure* (Mullik Brothers 2006) 26.

[355]Md., Akhtaruzzaman, *Case Management and Court Administration in Bangladesh* (Advocate RaziaKhatun, 2014) 55.

[356] Markus B. Zimmer,' Overview of Specialized Courts' (2009) International Journal for Court Administration. 2(1):46,2<atwww.iaca.ws/files/LWB-Specialized Courts> accessed 2/17/2020.

[357] Md. Al Halim, 'Mediation in Bangladesh: Issues and Challenges'. (CCB Foundation, Dhaka 2011) 154.

of the disposal of civil suits under CPC. Therefore, the performance of special courts in the disposal of civil disputes is not discussed further.

3.4.1 Laws relating to resolution through mediation: Application of Artha Rin Adalat Ain, 2003

The *Artha Rin Adalat Ain*2003 is a special law that laid down for the first time, the foundation for speedy disposal of money suits connected with banking and non-banking financial institutions. In view, the end was the quick recovery of loan amount advanced by the financial institutions within the shortest possible time.[358]

Table 3.2: State of institution and disposal of suits in *ArthaRinAdalat*1st court

Year	Opening balance	Instituted and received	Total	Total Disposal	Disposal through Mediation	Disposal through trial				
						Contested	Expart e	Disposal through otherwise	Disposal of execution case	Total disposal
2014	2268	584	2852	383	--	46	124	52	161	383
2015	2469	955	3424	625	1	147	318	54	105	624
2016	2799	1128	3927	316	--	126	84	6	100	316
2017	3927	1077	5004	969	2	110	299	114	444	967
2018	4035	1654	5689	1169	--	110	737	70	252	1169
2019	4187	969	5156	1111	5	173	666	264	303	1106
Total	**19,685**	**6367**	**26052**	**4573**	**8**	**712**	**2228**	**560**	**1365**	**4565**

Source: *Data collected from Dhaka Judge Court*

It is evident from the Table mentioned above is that a number of pending cases are increasing year by year, for example in the year of 2014, the total number of pending cases was 2268 which increased to the number of 2852. On the other hand, the rate of disposal in the years of 2014, 2015, 2016, 2017, 2018 and 2019 was 383, 624, 316, 967, and 1169 and 1111 respectively. Moreover, the rate of dissolution of litigations through mediation is not mentionable. Thus, it can be said that within the present legal framework, the court has not been yet able to accomplish the end of recovering loan amount satisfactorily within the shortest possible time. The same condition is also visible in the *Artha Rin Adalat* no 2.

[358] 'Money Loan Courts Fail to deliver Results' Financial Express(Dhaka, 31 October, 2019) 1.

Table 3.3: State of institution and disposal of suits in *Artha Rin Adalat,* 2nd court

Year	Opening balance	Instituted and Received	Total	Total Disposal	Disposal through Mediation	Disposal through trial				
						Contested	Exparte	Disposal through otherwise	Disposal of execution case	Total disposal
2014	1431	614	2045	505	3	28	311	62	101	502
2015	1540	999	2539	586	7	24	334	100	121	579
2016	1959	4027	5986	585	4	66	345	60	110	581
2017	5401	998	6399	690	8	74	407	101	100	682
2018	5709	2963	7772	1119	12	68	651	188	200	1107
2019	7650	3102	10751	2064	--	150	1376	533	50	2064
Total	**16040**	**8701**	**24741**	**3485**	**34**	**260**	**2048**	**511**	**632**	**3451**

Source: *Data collected from Dhaka Judge Court*

3.4.2 Laws relating to resolution through formal Mediation: Application of the State Acquisition and Tenancy Act, 1950(SATAct)

According to section 145A of State Acquisition and Tenancy Act, 1950, the Government may by notification of official gazette, establish as many as land survey tribunals as may be required to dispose of suits arising out of the final publication of record of rights. Therefore, this tribunal is empowered to dispose of the suits only arising from thefinal publication of the record of rights and nothing else.[359]

Table 3.4: State of institution and disposal of suits in Land Survey Tribunal, Dhaka

Year	Opening balance	Instituted and received	Total	Total Disposal	Disposal through Mediation	Disposal through trial				
						Contested	**Exparte**	**Disposal through otherwise**	**Disposal of execution case**	**Total disposal**
2014	9938	316	10254	780	--	100	353	327	--	780
2015	9498	135	9609	629	--	78	270	281	--	629
2016	8980	64	9044	581	--	57	135	389	--	581
2017	8463	74	8537	799	--	143	133	523	--	799

[359] The State Acquisition and Tenancy Act, 1950, s. 145A(4).

2018	7738	132	7870	1098	--	107	167	824	--	1098
2019	5684	25	5709	163	3	19	44	97		160
Total	50,277	746	51,023	4050	3	504	1102	2441	--	4047

Source: *Data collected from Dhaka Judge Court*

As shown in Table 3.4, the number of pending cases is very high, 10254 in the year 2014. Though the number has decreased in the succeeding years, the number stands as 7870, creating a massive backlog of cases in the court. After a full trial, the disposal of suits is 100, 78, 57, 143, and 107 which do not seem to be sufficient for reducing the backlog of cases in that particular court. Likewise, the mediation mechanism has not been possible to implement in Land Survey Tribunal.

3.4.3 Laws relating to resolution through formal mediation under the Family Court Ordinance, 1985

Under the *Family Courts Ordinance, 1985*, the Assistant Judge is to act as the family court to try the matters specified in the Ordinance. The matters relating to the dissolution of marriage, dower, maintenance, restitution of conjugal rights and guardianship are tried and disposed of by this court.[360]

Table 3.5: State of institution and disposal of suits 2nd Additional Assistant Judge and Family Court, Dhaka

year	Opening balance	Instituted and received	Total	Total Disposal	Disposal through Mediation	Disposal through trial				
						Contested	**Exparte**	**Disposal through otherwise**	**Disposal of execution case**	**Total disposal**
2014	2472	971	3443	1064	227	51	47	724	15	837
2015	2379	1023	3402	1296	397	59	137	688	15	899
2016	2106	1109	3215	1332	284	98	158	627	165	1048
2017	1883	1206	3089	1123	418	110	157	426	12	705
2018	1969	1232	3201	1335	289	191	228	615	12	1046
2019	2142	1376	3518	1269	266	110	172	721	13	903
Total	**46735**	**6917**	**19868**	**7419**	**1881**	**619**	**899**	**3801**	**232**	**5438**

Source: *Data collected from Dhaka Judge Court*

As per the Table 3.5,in respect of the trial of the family suits, the disposal of family suits through trial and mediation in the years of 2014, 2015, 2016, 2017,2018 and2019 depicts a

[360] The Family Courts Ordinance 1985, s. 5.

better result than those of the other courts. For example, in the year of 2014, the number of suits instituted and received was 1091, and the number of disposal through the trial was 829 and through mediation was 127. So, the number of total disposal stands at 956. Thus, the proportion of institution and disposal conveys a picture of the smooth functioning of delivering justice to the litigant public.

Table 3.6: State of institution and disposal of suits 3rd Additional Assistant Judge and Family Court, Dhaka

Year	Opening balance	Instituted and received	Total	Total Disposal	Disposal through Mediation	Disposal through trial				
						Contested	Exparte	Disposal through otherwise	Disposal of execution case	Total disposal
2014	1884	1091	2975	956	127	74	130	601	24	829
2015	2047	1267	3314	1649	127	80	184	1138	120	1522
2016	1791	1309	3100	1441	137	122	309	823	50	1304
2017	1793	1349	3142	1164	139	125	267	578	55	1025
2018	1944	1262	3206	1130	137	111	180	550	152	993
2019	2959	1505	4464	1941	325	165	503	948	138	1616
Total	**12,448**	**7783**	**20,201**	**8221**	**992**	**677**	**1573**	**4638**	**539**	**7229**

Source: *Data collected from Dhaka Judge Courts*

Similarly, in the year of 2019, the number of disposal of family suits through trial and mediation is 1941 and the suits instituted and received is 1505 which depicts the situation of, to a large extent, effective functioning of family court in Dhaka.

3.4.4.Laws relating to resolution through formal mediation: Application of Labour Court 2 in Dhaka

The *Labour Act, 2006* has elaborated the mechanisms for resolving the industrial dispute. The judicial route of settling the industrial dispute is dealt with Labor Court. This procedure starts from application to the labour courts ending to the appellate division.[361]. According to section 213 of Labor *Act, 2006* any employer or workman may apply to the labour court for the enforcement of any right guaranteed to him by any law. The nature of the dispute of industrial matters can be of civil or criminal nature.

[361] Md. Abdul Halim '*Mediation In Bangladesh; Issues and Challenges* (CCB Foundation Dhaka 2016) 148.

Table 3.7: State of institution and disposal of suits in Labour Court 2, Dhaka

Year	Opening balance	Instituted and received	Total	Total Disposal	Contested	Exparte	Disposal through otherwise	Total disposal
2014	2451	1743	4194	439	297	131	11	439
2015	3755	2123	5878	1741	839	576	56	1471
2016	4407	2097	6504	2097	655	1438	4	2097
2017	4407	1997	6404	1171	461	710	--	1171
2018	5233	2233	7466	1492	576	916	--	1492
Total		**10,193**	**30,446**	**6,670**	**2,828**	**3,771**	**71**	**6670**

Source: *Data collected from Labour Court 2, Dhaka*

The picture depicted in the Table mentioned above shows the huge number of pending litigations and a small portion of disposal in relation to the total number of pending litigations. As per the Table, the court, from the year of 2014-2108, in 5 years has 30,446 litigation pending, and the number of disposals is only 6670. The number of disposals seems to be grossly inadequate in comparison to the total number of pending cases. Moreover, the provision of mediation is not available in this Code. Thus, the application of the *Labour Act, 2006* has to accomplish more significant result in order to provide proper justice to the litigant.

From the observation made above, it can be said that the different laws relating to the formal resolution of civil disputes do not adequately serve the purpose of effective adjudication of disputes in different types of courts in Bangladesh.

3.5 Contribution of National Legal Aid Organization to accelerate court-connected mediation

No institution has yet been established or developed under the auspices of the government to promote and facilitate the mediation system exclusively in the national or district level. However, the National Legal Aid Services Organization (NLASO) and its District Offices have been extending facilities to hold mediation for the persons who seek legal aid or assistance.[362] But, in consideration of the vast populace of the country and the increase of their disputes in both civil and criminal matters, the facility provided by the NLASO and its

[362] According to section 21ka of the *Legal Aid Services (Amendment) Act, 2000*, the District Legal Aid Officer will be able to give legal advice to the applicant of legal aid and if any competent court or tribunal situated in territorial jurisdiction of the office send any matter for resolving the same by alternative dispute, the concerned legal aid officer shall have the authority to do the same.

District Legal Aid Office does not seem to be sufficient (see, Table 3.8. and Table 3.9). As a matter of fact, the justice seekers have to refer to the formal court system, or they are induced to come to the court system for resolving their disputes. Therefore, the amendment has been done in order to make the mediation process part and parcel of the formal legal system, preserving at the same time, trial courts statutory authority to pass a verdict upon the resolution through mediation.[363] The Table below shows that in the years of 2015-2018, only family suits have been resolved through mediation and the referral for mediation of the civil suits has not come into play in District Legal Aid Office.

After the rules came into force on 9th February 2015, Dhaka District Legal Aid Officer has taken up a few family suits for mediation, but there is till now no instance of successful mediation in civil suits.

Table 3.8: Mediation of civil disputes by District Legal Aid Officers

Year	Number of cases sent by Courts or Tribunal	Number of cases taken up for mediation	Number of cases resolved by mediation	Number of beneficiary of mediation	Amount of money recovered through mediation
2015	N/A	12	9	4	94,000/-
2016	N/A	21	21	12	2,07,000/-
2017	1	1	--	--	--
2018	2	10	7	5	95,000/-
Total	**1**	**34**	**30**	**16**	**3,96,000**

***Source**: Data collected from Dhaka Judge Court*

In the Table, as mentioned above, it is apparent that no case has been transferred from the court to the District Legal Aid Officer for exercising a mediation mechanism. It is mention-worthy that by an amendment in section 89A, the court is authorized to refer the dispute to concerned District Legal Aid Officer in order to settle the dispute or disputes in the suit.[364] After such amendment, the efficacy of such provision can be shown in the Table below:

[363] Khair Dr. Sumaiya; (2004) Alternative Dispute Resolution; How it works in Bangladesh; Dhaka University Studies, Part F Vol XV(1) P 68.

[364] The amendment has been made by section 2(a) of Code of Civil Procedure Amendment Act, 2017.

Table 3.9: Referral for post case mediation and disposal of suits by District Legal Aid Officers in 2019 [365]

Name of the District	Number of suits received for post case mediation	Successfully disposed of	Sending back the suit to the trial court after unsuccessful attempt
Dhaka	1	0	1
Narsingdi	0	0	0
Manikganj	5	2	3
Narayanganj	10	2	8
Gazipur	0	0	0
Maimansing	0	0	0
Rajshahi	0	0	0
Sirajganj	0	0	0
Barisal	3	0	3
Chittagong	0	0	0
Sylhet	0	0	0
Kurigram	0	0	0

Thus, given the discussions mentioned above, the scenario of the disposal of civil disputes in the present institutional framework does not render any satisfactory picture in terms of its inadequacy in number. Irrespective of geographical location, the success rate of post case mediation has no difference all over Bangladesh, and all the legal aid offices at this initial stage after amendment though started to take the initiative. Still, they are yet to achieve the required result. Consequently, civil courts undoubtedly require institutional reforms to accelerate success with respect to its number of disposal.

3.6 Efficacy of mediation in original civil suits: Is there any variance in performance of mediation at different courts of jurisdictional disparity or geographical disparity?

3.6.1 Examining the variance in disposal rates over courts with equal jurisdictions: Joint District Judges Court

As mentioned earlier in Chapter 1, a considerable backlog of cases in different civil courts of Bangladesh hinders access to justice through trial. For instance, the statistics of case filing and case disposal in the Joint District Judge 1st court of Dhaka district are demonstrated in Table 3.10 below. Table 3.10 demonstrates reported data on civil cases resolved through contested trial and mediation for an eight-year period from 2012 to 2019. The purpose of this analysis is to illustrate the trend of case disposal in civil courts. The table also allows us to

[365] This data was collected from National Legal Aid Services Organization on the date of 16/11/2020.

compare the average disposal through mediation and contested trial, and examine the relationship, if any, between these two trends.

As mentioned in Section 18 of the *Civil Courts Act 1887:*

> "Save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Joint District Judge extends, subject to the provisions of section 15 of the Code of Civil Procedure, 1908 to all original suits for the time being cognizable by Civil Courts".

However, Joint District Courts have no ordinary jurisdiction to review civil decrees made by other subordinate courts, including Assistant Judge courts and Senior Assistant Judge courts. According to Section 21(2) of the *Civil Courts Act, 1887*, *'…an appeal from a decree or order of a Senior Assistant Judge or an Assistant Judge shall lie to the District Judge.'*

An appeal may be referred to the court of an Additional District Judge court only when the function of reviewing any appeal which lies to the District Judge has been assigned to an Additional District Judge.[366]section 21(3) of Civil Courts Act, 1887Decrees and Orders of any Assistant Judge and Senior Assistant Judge can be reviewed by a Joint District Judge only when the High Court Division direct so by notifications in the official Gazette[367]

In the backdrop of poor average performance in disposal through mediation by all Joint District Judge courts, Dhaka the following discussion in this section analyzed inter-court differences in disposal rates to understand any micro characteristics of individual courts that may be beneficial for a higher rate of disposal through mediation but was not visible through average statistics.

Table 3.10: Seven-year average on disposal of pending cases through trial and mediation in the Joint District Judge 1st court, Dhaka

Year	Rate of disposal through trial (%)	Rate of disposal through Mediation (%)
2012	11.56	0.71
2013	36.85	0.43
2014	47.94	0.55
2015	18.00	1.06
2016	17.34	0.85
2017	24.54	0.87
2018	12.53	0.39
2019	14.37	0.78
Average (2012-2019)	26.34	0.72

Source: Analysis of unpublished primary data collected from respective court registries

[366] Civil Courts Act, 1887, s21(3) .
[367] Civil Courts Act, 1887, s 21(4) .

Analysis of empirical data collected from the Joint District Judge 1st court of Dhaka district indicates that in the year of 2012, the total number of pending suits/cases was 5629. The number of total disposals was 651 out of which 61 were disposed of through contested trial, 199 through ex-parte, and disposal through other modes was 458. The ratio of disposal through trial to the number of pending cases was 11.56%. Though the ratio of disposal through trial to the number of pending cases improved gradually in 2013 and 2014, the ratio declined further in 2015 and 2016. However, as shown in Table 3.10, the average rate of disposal for the eight-year period was 26.34. Hence, the rate of disposal through trial was more than doubled from 11.56% in 2012 to 26.34% on average. On the other hand, the ratio of disposal through mediation in relation to a total number of pending cases in 2012 was 0.71%, but the rate of disposal was at the same level of .78% in the year 2019.

Thus, the ratio of disposal through mediation in the Joint District Judge 1st court, Dhaka got ups and downs during the past eight years from 2012 to 2019. On average, the ratio remains almost the same in case of disposal through mediation. Unlike trial cases, the ratio of disposal through mediation remains very low in all eight years. The ratio of disposal through mediation even declined in 2013 and 2014 when the corresponding ratio for a contested trial marked some improvement. Further, in 2015, out of 7889 civil litigations, only 1464 suits were disposed of through trial. For some unavoidable reasons, the rate of disposal through trial dropped from 20% in 2014 to only 18%. In 2016, the rate of disposal through trial further dropped to 17.43%.

In contrast, starting from a 0.55 rate of disposal through mediation in 2014, the rate of disposal increased to 1.06% in 2015 and then declined again to 0.85 in 2016. The rate of disposal through mediation was further declined to 0.39% in 2018. Therefore, resolution through mediation showed ups and downs throughout the years but did not correlate with corresponding changes in the rate of disposal through a contested trial.

Table 3.11: Eight-year average on disposal of pending cases through trial and mediation in the Joint District Judge 2nd court, Dhaka

Year	Rate of disposal through trial (%)	Rate of disposal through Mediation (%)
2012	08.10	0.830
2013	09.10	0.770
2014	09.66	0.550
2015	20.00	0.270
2016	18.00	0.550
2017	29.35	0.940

2018	16.72	0.610
2019	22.56	0.840
Average (2012-2019)	12.97	0.590

Source: Analysis of unpublished primary data collected from respective court registries

A similar analysis of case disposal through mediation and contested trial in the Joint District Judge 2nd court, Dhaka Table 3.11 indicates that the average pattern of disposal through mediation and contested trial in the 2nd court doesn't vary significantly from the rates of disposals observed in the Joint District Judge 1st court in Dhaka. However, a more in-depth analysis indicates the rate of disposal was even worse in the 2nd court. As demonstrated in Appendix 3.1, similar scenarios on lower disposal through mediation exists in Joint District Judge 4th, and 5th courts, Dhaka. In some cases, the ratio of disposal was even worse. For instance, in the Joint District Judge 5th Court, the number of disposal in 6 years from 2014 to 2019 was only 7, 2, 4, 7, 6 and 5 through mediation which can be considered as a very negligible amount concerning the suit pending in corresponding years.

Further, as demonstrated in Table 3.15, amongst all Joint District Judge courts of Dhaka, the dismal scenario on case disposal through mediation was observed in the Joint District Judge Additional court, Dhaka. Though the record of disposal through mediation also remains negligible in the 4th and 5th court, these rates were gradually improving in recent years. On the other hand, the rate of disposal through mediation in the Joint District Judge additional court showed a declining trend since 2014 and marked a zero per cent rate of disposal through mediation in 2018 and 2019. Likewise, the scenario of Joint District Judge 3rd court is as follows.

Table 3.12: Rate of disposal through trial v. mediation in the Joint District Judge 3rd court, Dhaka

Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	35.00	0.029
2013	42.00	0.380
2014	40.00	0.820
2015	33.00	0.390
2016	49.50	0.460
2017	37.44	0.390
2018	33.94	0.520
2.019	34.44	0.620
Average (2012-2019)	38.96	0.41 0

In the joint District Judge 4th Court, Dhaka, the scenario of disposal of suits through trial and mediation is almost the same as that of the other Joint District Judge Courts. However, the ratio is given below:

Table 3.13:Rate of disposal through trial v. mediation in the joint District Judge 4th Court, Dhaka

Year	Rate of disposal through trial (%)	Rate of disposal through Mediation (%)
2012	05.70	0.004
2013	11.94	0.002
2014	13.75	0.015
2015	13.05	0.440
2016	13.84	0.580
2017	06.42	0.680
2018	06.19	0.001
2019	07.99	0.200
Average (2012-2019)	09.24	0.240

Joint District Judge 5th Court's picture about the rate of disposal through trial and mediation also remains the same.

Table 3.14: Rate of disposal through trial v. mediation in the Joint District Judge 5th Court, Dhaka

Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	10.34	0.190
2013	17.12	0.038
2014	17.93	0.050
2015	34.72	0.090
2016	16.62	0.110
2017	11.70	0.000
2018	15.75	0.000
2019	12.33	0.340
Average (2012-2019)	17.74	00.09

In the Joint District Judge 5th Court, the number of disposal in the previous eight years was only 7, 2, 4, 7, 6, 0, 0 and .34 which can be considered a very negligible amount related to the suit pending in the particular court.

Table 3.15: Eight-year average on disposal of pending cases through trial and mediation in the Joint District Judge Additional court, Dhaka

Year	Rate of disposal through trial (%)	Rate of disposal through Mediation (%)
2012	21.16	0.000
2013	09.66	0.068
2014	16.78	0.080
2015	6.780	0.060
2016	5.440	0.000
2017	4.820	0.000
2018	6.260	0.000
2019	5.500	0.100
Average (2014-2019)	11.96	0.040

Source: Analysis of unpublished primary data collected from respective court registries

The above analysis on the ratio of disposal through trial and mediation depicts the picture that disposal of suits through mediation in the Joint District Judge Courts remains less than 1 per cent on an average. As demonstrate in Table 3.15, despite a snail pace in the disposal of trial cases under CPC, rate of disposal through trial still remain better than the disposal rate attained through mediation. Thus, the performance of mediation in the civil court in Joint District Judge Courts is really in a miserable condition. The reasons may be that these courts conduct a wide variety of civil and criminal proceedings having both original and appellate jurisdictions and those courts remain overburdened with these litigations. Analysis of responses attained through a questionnaire survey to judges, as discussed in the next chapter confirmed that issue.

Here it is pertinent to mention that, as shown in Table 3.12, the rate of disposal through trial in the Joint District 3rd Court, Dhaka remain consistently above 30% in all eight years considered in this research and reached almost 37% in 2019. This statistic indicates that the 3rd Joint District court markedly outperform other Joint District courts discussed so far in this chapter.

Despite a consistently better performance of the Joint District Judge 3rd court, Dhaka in disposing of cases through trial, compared with other Joint District courts of Dhaka, the performance of the court in disposing of cases through mediation remain poor and no better than other courts. As demonstrated in Table 3.12 the average rate of disposal through mediation in the Joint District Judge 3rd court Dhaka over the period 2012 to 2019 was 0.42, that was lower than the average rate of disposal attained in Joint District Judge 1st court (Table 3.10) and Joint District Judge 2nd court (Table 3.11) over the same period. A low rate

of disposal trough mediation in the Joint District Judge 3rd court, Dhaka despite its superior performance in disposing of cases through trial indicates that the set of factors that promotes higher disposal through trial may not be adequate for the promotion of disposal through mediation.

Based on the analysis of disposal rates discussed above, the Joint District Judge 1st court, Dhaka, the Joint District Judge 3rd court, Dhaka, and the Joint District Judge additional court, Dhaka were chosen to conduct in-depth case study following case files. One individual case file was selected from the Joint District Judge 1st court to analyze a case disposed of quickly through mediation; another individual case file was chosen from the Joint District Judge 3rd court Dhaka to analysea case disposed of quickly through a contested trial. Finally, two other individual case files were selected from the Joint District Judge Additional court, Dhaka to analyze one case that took a long time to disposal through trial. Another case took a long time to disposal, despite using mediation.

So far, disposal rate in civil disputes is analyzed from Joint District Judge courts situated within Dhaka district. However, the complexity of cases may increase in courts with higher jurisdictions, including appellate courts. On the other hand, higher caseload may remain in court with low jurisdiction, including Assistant/Senior Assistant Judge courts, and supply of court logistics may vary among court situated inside and outside of Dhaka district area. Therefore, the following sections observe whether this lower rate of disposal may vary significantly over civil courts with higher/lower jurisdictions, in civil courts outside the Dhaka district area, and in Appellate Courts.

3.6.2 Examining the variance in disposal rates over courts with lower jurisdictions: Senior Assistant Judge Courts, Dhaka

According to Section 19 of the *Civil Courts Act 1887:*

> "save as otherwise provided by any enactment for the time being in force, the jurisdiction of a Senior Assistant Judge and an Assistant Judge shall extend to all suits of which the value does not exceed twenty-five lac Taka and fifteen lac Taka respectively."

However, according to Section 25 of the *Civil Courts Act 1887*, the High Court may assign any Assistant Judge Court or Senior Assistant Judge Court with an additional jurisdiction to act as a judge of Small Cause Court/s, i.e. to take cognizance of all suits of civil nature for which the value does not exceed twenty-five thousand Taka.

The performance of mediation in civil suits/cases by the Senior Assistant Judge/ Assistant Judge Courts is very much relevant to this discussion as these courts' jurisdiction is only

relating to original civil suits. Thus, the actual effectiveness of mediation can be analyzed by the proper study of the situation of those courts.

Table 3.16: Rate of disposal through trial v. mediation in the 1st Senior Assistant Judge Court, Dhaka

	The rate of disposal through trial and mediation in relation to the total number of pending cases.	
Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	26.92	1.02
2013	21.29	0.70
2014	15.24	1.02
2015	26.08	0.83
2016	18.37	1.37
2017	35.40	0.00
2018	13.07	0.22
2019	20.14	0.55
Average (2012-2019)	22.33	0.99

Source: Empirical data collected from the court registry at the 1st Senior Assistant Judge Court, Dhaka 1.

Table 3.17: Rate of disposal through trial v. mediation in the Senior Assistant Judge, 2nd Court, Dhaka

Year	**Rate of disposal through trial (%)**	**Rate of disposal through Mediation (%)**
2012	12.11	0.78
2013	14.06	1.05
2014	17.13	1.25
2015	25.66	0.97
2016	17.09	1.65
2017	12.91	0.26
2018	13.77	0.48
2019	13.56	0.33
Average (2012-2018)	16.10	1.14

Source: Empirical data collected from the court registry at the 2nd Senior Assistant Judge Court, Dhaka

Table 3.18: Rate of disposal through trial v. mediation in the Senior Assistant Judge, 3rd Court, Dhaka

Year	**Rate of disposal through trial (%)**	**Rate of disposal through mediation (%)**
2012	17.75	0.22
2013	26.50	0.46

2014	26.92	1.32
2015	33.59	1.21
2016	15.79	0.52
2017	20.30	0.29
2018	21.33	0.41
2019	22.66	0.45
Average (2012-2019)	20.12	0.75

Source: Empirical data collected from the court registry at the 3rd Senior Assistant Judge Court, Dhaka

Table 3.19: Rate of disposal through trial v. mediation in the Senior Assistant Judge, 4th Court, Dhaka

Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	23.13	0.65
2013	22.78	0.81
2014	26.95	0.65
2015	27.55	0.38
2016	20.74	0.70
2017	14.11	0.61
2018	14.11	0.32
2.19	17.55	0.45
Average (2012-2019)	24.23	0.64

Source: Empirical data collected from the court registry at the 4th Senior Assistant Judge Court, Dhaka

As shown in Table 3.19 above, the disposal rate through trial and mediation in relation to the total number of pending cases remains insignificant.

Table 3.20:Rate of disposal through trial v. mediation in the Senior Assistant Judge, 6th Court, Dhaka

Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	12.18	0.24
2013	34.14	0.00
2014	18.70	0.00
2015	15.87	0.98
2016	16.56	0.42
2017	08.20	0.34
2018	10.15	0.16
2019	11.22	0.23
Average (2012-2019)	16.54	0.33

Source: Empirical data collected from the court registry at the 6th Senior Assistant Judge Court, Dhaka.

As shown in Table 3.21 below, similar scenario exists in courts outside the Dhaka metropolitan area.

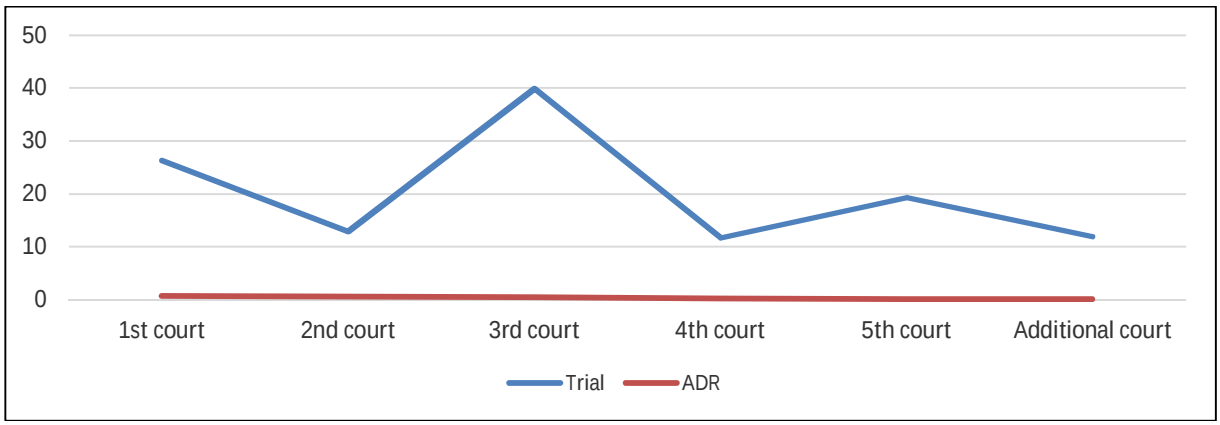
Table 3.21:Rate of disposal through trial v. mediation in the Senior Assistant Judge, *Dohar* Court

Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	11.65	0.12
2013	17.27	0.19
2014	16.12	0.08
2015	17.92	0.36
2016	24.56	0.49
2017	13.85	0.11
2018	21.08	1.30
2019	18.09	0.44
Average (2012-2019)	17.49	0.25

Source: Empirical data collected from the court registry at the Senior Assistant Judge Court, Dohar

From the observation of the above mentioned 10 Senior Assistant Judge Courts of Dhaka, it is apparent that in those courts, disposal through trial in each of the courts, in average is not more than 26 percent and a lot less than 13 percent in the previous eight years. On the other hand, disposal through mediation in those courts is less than 1 percent on average. Thus, it can be said that though the Senior Assistant Judge Courts fully deal with the cases of civil nature of original jurisdiction, the success of mediation in those courts is really in a painful condition.

Figure 3.1: Zero correlation between rates of disposal through trial and mediation attained in different Senior Assistant Judge Courts, Dhaka metropolitan area



Source: Analysis of unpublished primary data collected from respective court registries

As one objective of this section was to examine whether the disposal rate for courts with higher jurisdiction may vary significantly from the rate of disposal in courts with the lower

jurisdiction. The study mentioned above depicts that between the average rate of disposal in all Senior Assistant Judges courts, Dhaka and the average rate of disposal in Joint District Judge courts, there is no remarkable difference over courts with higher/lower jurisdictions. Figure 3.1 above also shows no significant difference regarding disposal through mediation in the senior Assistant Judge Courts of the Metropolitan area.

As demonstrated in Figure 3.1 variation in the average rate of disposal attained through trial in 1st, 2nd, 3rd, 4th, 5th, and additional Senior Assistant Judge Courts, Dhaka does not have any impact on the rate of disposal attained in different courts through mediation.

Table 3.22: Eight years average on case filing and case disposal in all Senior Assistant Judge courts, Dhaka

Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	17.95	0.53
2013	20.43	0.65
2014	21.07	0.70
2015	24.03	0.74
2016	17.26	0.79
2017	19.43	0.84
2018	18.79	0.90
2019	22.34	0.89
Average (2012-2019)	20.14	0.68

Source: Analysis of unpublished primary data collected from respective court registries

Table 3.22 demonstrates the average rate of disposal through nine Senior Assistant Judge courts, Dhaka namely the Senior Assistant Judge 1st court, Dhaka, Senior Assistant Judge 2nd court, Dhaka, Senior Assistant Judge 3rd court, Dhaka, Senior Assistant Judge 4th court, Dhaka, Senior Assistant Judge 6th court, Dhaka, Senior Assistant Judge court, Dohar, Senior Assistant Judge court Savar, Senior Assistant Judge court, Keraniganj, and Senior Assistant Judge court, Dohar.[368] (As indicated in Appendix 3.1, 3.2 the Senior Assistant Judge court, Nawabganj was considered as an outlier and taken out from the analysis, due to a zero-disposal rate in all seven years from 2012 to 2019.)

A comparison of average disposal rate of cases through trial and mediation in Senior Assistant Judge courts (Table 3.22) with average disposal rates in Joint District Judge courts, as shown in (Table 3.10 to Table 3.15) indicates that neither the disposal rate of a case through trial nor the disposal rate of cases through mediation varies significantly over courts

[368]Table 1.16 to 1.21 in the 1st chapter separately showed individual performance of senior assistant judge courts in respect of resolution of suits through trial and mediation.

with higher/lower jurisdictions. Further, a comparison of yearly variation in the average rate of disposal through trial and the average rate of disposal through mediation under Senior Assistant Judge courts reaffirms that these two types of disposal do not show any correlation over the years. In other words, factors liable for the lower rate of disposal through trial are not adequate to explain the lower rate of disposal through mediation. Hence, we need to seek the reason for lower disposal through mediation as separate research.

3.6.3 Examining the variance in disposal rates among courts based on geographical disparities: Senior Assistant Judge courts inside and outside Dhaka district

Furthermore, as mentioned earlier, another primary objective of this chapter was to understand whether the rate of disposal through mediation might vary over the physical location of the court, i.e. inside or outside the Dhaka district. Therefore, as shown in Table 3.23,the average rate of disposal through Senior Assistant Judge courts was divided into two parts and analyzed further to understand the difference, if any.

Table 3.23:Seven-year average on disposal of pending cases through trial and mediation in all Senior Assistant Judge courts inside and outside Dhaka district

	Rate of disposal in relation to thetotal number of pending cases			
Year	Rate of disposal through trial (%)		Rate of disposal through mediation (%)	
	Inside Dhaka	Outside Dhaka	Inside Dhaka	Outside Dhaka
2012	18.41	17.37	0.58	0.46
2013	23.75	16.28	0.60	0.71
2014	20.99	21.16	0.85	0.51
2015	25.75	21.87	0.87	0.57
2016	17.71	16.70	0.93	0.60
2017	20.91	19.21	0.75	0.70
2018	22.33	23.44	0.89	0.63
2019	19.88	21.45	0.87	0.69
Average (2012-2019)	21.32	18.68	0.77	0.57

Source: Analysis of unpublished primary data collected from respective court registries

As indicated in Table 3.23, there was around 3% difference in the average rate of disposal through contested trial in Senior Assistant Judge courts inside and outside the geographical territory of Dhaka district. However, no such marked variation was visible in case of disposal through mediation.

3.7 Efficacy of mediation at the appellate stage: Is there any variance in performance of mediation at the equal, higher or lower level of jurisdictions?

3.7.1 Mediation at the appellate stage: The District Judge court and Additional District Judge courts Dhaka

As mentioned in Section 18 of the *Civil Courts Act 1887*, "save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Joint District Judge extends, subject to the provisions of section 15 of the *Code of Civil Procedure, 1908* to all original suits for the time being cognizable by Civil Courts."

Though the jurisdiction of the District Judge and Joint District Judge covers all original suits cognizable by civil courts, every civil suit shall be instituted in the court of the lowest grade competent to try it.[369] Therefore, civil cases can be tried in Assistant Judge court, or Senior Assistant Judge courts are not considered in Joint District Judge courts or District Judge courts. Further, in case of appeals, all decrees made by Assistant Judge courts and Senior Assistant Judge courts, and decrees made by Assistant District Judge courts for original suits up to five-crore can be preferred in District Judge courts. However, the High Court Division, with the previous sanction of the Government, may direct, by notification in the official Gazette, that appeals lying to the District Judge from all or any of the decrees or orders of any Senior Assistant Judge or an Assistant Judge court, shall be referred to the court of any Joint District Judge, as may be mentioned in the notification.[370] As we have already discussed the disposal scenario of Joint District courts earlier, the following section discussed the disposal rate of District Judge Court, Dhaka.

In the year of 2012, in the District Judge Court, the total number of suits pending was 8024 out of which a number of 1146 suits were disposed of, and 3593 suits were transferred to other courts. 242 suits were disposed of on contest, and 627 suits were disposed of through otherwise. But it is mentionable that no suits were disposed of through mediation Though there is a provision for mediation in the appellate stage, the mediation mechanism has not been possible to exercise at all in the District Judge court Dhaka even though in accordance to section 89C, the suit may be resolved even at the mediation stage. Therefore, the disposal of civil suits through mediation is 0% in the District Judge Court Dhaka.

In the year 2013, out of 28,435 cases, 25123 suits were transferred to another court, and a

[369]The Code of Civil Procedure, 1908.S 15.
[370] Civil Courts Act, 1887 , Ss. 20, 21 and 22.

number of 1199 were disposed of and out of which 244 suits were resolved on the contest. 599 suits were disposed of through otherwise. In 2014, the number of suits pending before the court and total disposal were almost the same as that of the preceding year. However, in the year of 2015, the number of a suit pending before the court was 4731 and the total number of disposal was 1842 which is much better than the rate of disposal to that of previous years. Out of 1842 suits, disposal through contest was 904. In the earlier years, the disposal through contest was 242, 244 and 389 respectively. In 2016, disposal through contest was 493 out of 3992 suits pending before it. The scenario of 5 years depicts that due to some reasons in the district Judge court, the disposal through contest was increased at least two times in the subsequent years, but there was no disposal of suits through mediation. Similarly, in the years of 2018 and 2019, a number of 1606 and 1263 cases were disposed of through trial, but no case was disposed of through mediation. The scenario can be shown summarily in the Table 3.24 below:

Table 3.24: Rate of disposal through trial v. mediation in the District Judge Court, Dhaka

	Rate of disposal in relation to the total number of pending cases	
Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	14.28	0.00
2013	4.21	0.00
2014	3.11	0.00
2015	38.91	0.00
2016	35.92	0.00
2017	19.43	0.00
2018	34.11	0.00
2019	25.44	0.00
Average (2012-2019)	21.42	0.00

Source: Data collected from District Judge Court Dhaka

Analysis of data collected from District Judge Court implies that though the disposal rate of civil suits was not satisfactory in 2013 and 2014, the rate was higher in the subsequent years of 2016, 2017,2018 and 2019. However, irrespective of changes in disposal rate through a trial of civil suits due to different reasons whatsoever, there was no variation in case of mediation.

3.7.2 Mediation at the appellate stage: The Additional District Judge courts, Dhaka

In the Additional District Judge 1st Court of Dhaka, in 2012, the total number of disposal was 196 out of 357 civil suits pending before it and disposal through contest was 112 which is 31.37% compared to the total number of suits. But disposal through mediation is nil in that year. In the years of 2013, 2014, 2015, 2016, 2017, 2018 and 2019 the total number of pending civil litigations before that court was 336, 342, 180, 160, 201, 387 and 379 and the disposal was 174, 162, 170, 165,123, 176and 168 respectively. Thus, the trend of disposal was about 50% in those years. But in all those years, the disposal through mediation was nil. It reveals that the court activity for disposal of cases was good enough in the present circumstance, but the performance of mediation for disposal of cases was nil. In total eight years, (2012-2019), the total number of disposal is 1166, but no litigation was disposed of through mediation.

In the Additional District Judge 2nd Court of Dhaka, the total number of pending cases was 508 in the year of 2012. Out of which 208 cases were disposed of, and the number of contested disposal was 141. But, the disposal through mediation was only 2. In the succeeding years of 2013, 2014, 2015, 2016, 2017, 2018 and 2019, the disposal through mediation was 1, 2, 1 and nil, respectively. However, disposals through the contest, ex-parte and otherwise were 213, 137, 207, 246, 128, 176 and 155 respectively. In the last eight years, the total disposal through the trial was 1487; on the other hand, the disposal through mediation was only seven.

In the Additional District Judge 3rd Court, the number of civil suits pending is much lower than the other courts. In 8 years (2012-2019), the total number of pending cases was 869, and the total disposal was 251. But the success of mediation in civil suits was nil. The scenario of civil suits in Additional District Judge, 4th Court is that the number of pending cases in the above mentioned eight years is only 285 and the total disposal is 66. No mediation in this court occurred in these years in this court.

Regarding the Additional District Judge 5th Court in Dhaka, the number of suits pending is higher than the other courts. To be more specific, in the years of 2012, 2013, 2014, 2015, 2016, 2017, 2018 and 2019, the total number of suits pending before the court was 444, 425, 523, 627, 522, 354, 333 and 354 respectively. Those years' disposal was 145, 114, 219, 265, 206, 159, 65 and 169 leading to the conclusion that the percentage of disposal was 32.66, 26.82, 41.87, 42.2, 39.46, 44.9, 19.40 and 30.26 respectively. Though the rate of total

disposal increased over the years, disposal through mediation was only 3, 3, 1, 6, 2, 1 and nil (or remain near to zero) in all the years mentioned above. In Additional District Judge 6th Court, in 8 years (2012-2019), the total number of pending suits was 3787, and the total disposal was 953. So, the percentage of total disposal was 20.27%. But, only one suit was resolved through mediation in those eight years. The other Additional District Judge Courts, that is, 7th, 8th and 9th, the disposal rate is almost the same.

From the above discussion, it can be concluded that the rate of disposal through the mediation of civil suits in mediation at the appellate stage is almost zero, and the situation is really dismal. The disposal rate of civil suits in the 1st Additional District Judge Court, through mediation and trial, can be summarily shown in the Table below:

Table 3.25: Rate of disposal through trial v. mediation in the Additional District Judge 1st Court, Dhaka

	Rate of disposal in relation to the total number of pending cases	
Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	54.92	0.00
2013	51,78	0.00
2014	47.36	0.00
2015	50.00	0.00
2016	44.47	0.00
2017	39.79	0.00
2018	46.43	0.00
2019	42.67	0.00
Average (2012-2019)	47.82	0.00

To verify whether any variation is occurred in mediation due to changes in Additional District Judge Court's territorial jurisdiction, the rate of disposal in 8th Additional District Judge Court has been taken into consideration.

Table 3.26: Rate of disposal through trial v. mediation in the Additional District Judge 8th Court, Dhaka

	Rate of disposal in relation to the total number of pending cases	
Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	29.72	0.13
2013	28.74	0.00
2014	33.28	0.00
2015	37.42	0.57

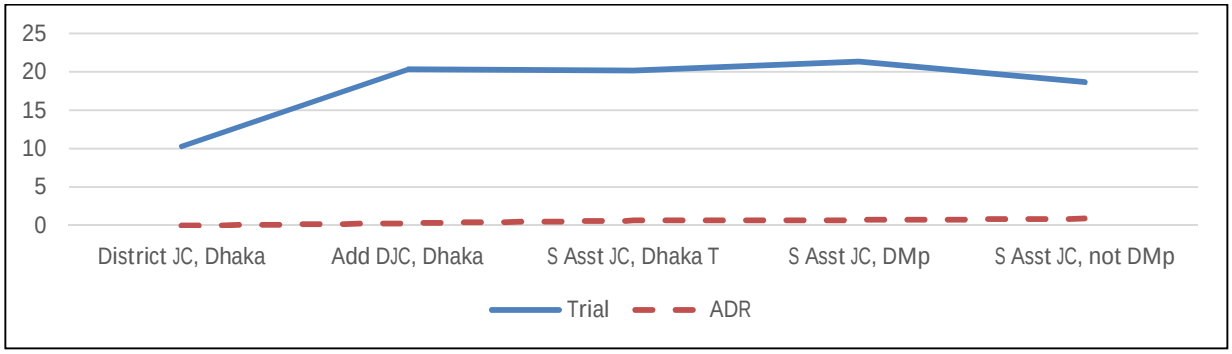
2016	59.38	0.00
2017	60.44	2.23
2018	26.66	0.00
2019	30.44	0.00
Average (2012-2019)	39.37	0.40

Thus, the Table 3.26 above shows that due to geographical local and other factors of the courts, the trial's disposal rate was varied, but there was no variation in disposal rate through mediation.

Analysis of responses taken from the court of different jurisdictions, as presented in the next chapter seeks to answer that question. Further, two more case studies from the Senior Assistant Judge court, *Nowabganj*, and District Judge court, Dhaka were conducted to triangulate the results obtained by analyzing court registry data and survey responses collected under this research.

Table no. 3.10 to 3.25 demonstrated the variance in average disposal rate of cases through trial and mediation. As shown in Figure 3.3 below, the District Judge court that deals with high-value complex cases, and appeals show a lower disposal rate through trial. As expected lower disposal rate is also evident in Senior Assistant Judge Courts outside metropolitan area compared with Senior Assistant Judge Courts within metropolitan area. However, despite different levels of jurisdiction, there was no visible difference between the disposal rates observed in Senior Assistant Judge Courts and Additional District Judge courts. More pertinently, the average rate of disposal through mediation does not vary significantly over different types of civil courts irrespective of jurisdiction and geographical location inside or outside the Dhaka Metropolitan area. Hence, the dotted trend line showing the rate of disposal over the court with different jurisdictions, and different geographical locations remains almost flat.

Figure 3.2:Average rate of disposal through mediation in civil courts under different jurisdictions



Source: Analysis of unpublished primary data collected from respective court registries

3.8 Comparative effectiveness of mediation in resolving civil suits under CPC and Family Courts

Though this thesis aims to examine the effectiveness of mediation in resolving civil suits under CPC, the following discussion of this section examines comparative statistics of civil suits resolved in family courts. This comparison is essential to reiterate the potentials of mediation in resolving civil disputes. Such comparison is made with the disposal rate in family courts because earlier research identified a superior position of family courts in resolving civil disputes.

Table 3.27:Rateof disposal through trial v. mediation in the 2nd Additional Assistant Judge and Family courts, Dhaka

	Rate of disposal in relation to the total number of pending cases	
Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	24.31	06.59
2013	26.42	11.66
2014	32.59	08.83
2015	22.82	13.53
2016	32.68	09.03
2017	39.90	05.29
2018	36.46	03.24
2019	35.66	04.44
Average (2012-2019)	30.74	08.31

Source: Analysis of unpublished primary data collected from respective court registries

As indicated in Table 3.26, the average rate of disposal through trial in the 2nd Additional Assistant Judge and Family Court, Dhaka was better than the average rate of disposal observed for trial in many other civil courts discussed earlier in this chapter. For instance, 20.36% average rate of disposal through the trial was observed on average in all the Joint District Judge court, Dhaka (Table 3.10 to 3.15). The average rate of 30.74% disposal through trial attained in the 2nd Assistant Judge and Family Court, Dhaka was better than the average rate attained in all Senior Assistant Judge courts (either inside or outside the Dhaka district) (Table 3.16 to 3.23). However, the 8.31% average rate of disposal through mediation as attained in the 2nd Assistant Judge and Family Court, Dhaka was much better than the less than 1% rate of disposal through mediation attained in all other civil courts operating under CPC.

Table 3.28:Rate of disposal through trial v. mediation in the 3rd Additional Assistant Judge and Family courts, Dhaka

	Rate of disposal in relation to thetotal number of pending cases	
Year	Rate of disposal through trial (%)	Rate of disposal through mediation (%)
2012	27.87	4.27
2013	45.93	3.83
2014	46.48	4.42
2015	37.05	4.42
2016	35.25	4.27
2017	26.75	5.40
2018	20.25	2.07
2019	22.33	3.77
Average (2012-2019)	27.66	4.09

Source: Analysis of unpublished primary data collected from respective court registries

As shown in Table 3.27, the superior rate of disposal through mediation may not attain uniformly in all other Family Court. Nevertheless, the 4.24% average rate of disposal through mediation in the 3rd Additional Assistant Judge and Family courts of Dhaka was much better than the less the 1% average rate of disposal through mediation attained in all other civil courts operating under CPC. Therefore, family courts could still be a good initial milestone to accelerate the average disposals through mediation in civil courts operating under CPC in Bangladesh.

3.9 Conclusion

It is evident from the above analysis that the rate of disposal through mediation low in civil court over all different jurisdictions and in different geographical locations, i.e. both inside and outside of Dhaka district area. Though the overall disposal rate through trial also remains as low as around 20% in many courts, for almost all the court average rate of disposal through mediation remains less than 1%., or even below 0.5%. The rate of disposal through mediation in the appellate stage remains even more dismal condition. Therefore, based on individual case file study and interview responses of civil court judges from different jurisdictions, the next chapter has discussed the reason for lower disposal of the civil case through mediation. The analysis of family court data indicates that there is more potential to improve disposal through mediation in civil disputes under CPC.

CHAPTER 4

LOOPHOLES IN LEGAL PROVISIONS AND PRACTICES OF COURT-CONNECTED MEDIATION IN BANGLADESH: A CONTENT ANALYSIS OF CASE FILES UNDER CPC

4.1 Introduction

The fair and efficient judicial system exists to ensure and protect the rights of the individuals so that the litigants can achieve justice through the judicial process. Broadly, the process can be divided into two divisions, civil and criminal justice system. A suit is of civil nature where its object is the enforcement of a civil right or obligation.[371] The distinction between criminal proceeding and the civil proceeding is that while the objective of the former is to punish a wrongdoer, the objective of the latter is the enforcement of a civil right. According to section 9 of the *Code of Civil Procedure, 1908, "The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting the suit of which their cognizance is either expressly or impliedly barred."*Therefore, is has been laid down in the very provision of law that it is the right of an individual to plea for enforcement of his right through adjudication or civil trial which can also be termed as the civil justice system. Though Bangladesh has a long tradition of the established legal and judicial system, access to such justice system and legal entitlement in court is limited due to a huge backlog of cases, delays in the disposal of cases, and consequent high cost of resolution through litigation.[372]*"Increasing time delay"* and *"unmanageable huge backlog of cases"* have been identified as the reason for the inaccessibility to justice and diminished quality of justice delivery system.[373] Consequently, the civil justice delivery system has not succeeded to meet the needs of the litigant people. From the analysis of court registry data in Chapter 3, it can be said that only around 20% of civil litigations are being settled by formal adjudication. In fact, according to Chowdhury:[374]

> "If the current rate of disposal continues, Bangladesh cannot expect to overcome this backlog and ensure people's access to justice through formal courts. Therefore, policymakers need to broaden the scope of access to justice in the country."

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[371]Dildar *v* Farouque [1975] 27 DLR (Dhaka Law Report) (AD) (Appellate Division)138.

[372] M. S. Alam, 'A possible Way Out of Backlog in Our Judiciary' The Daly Star (Dhaka, 16 April 2000)3.

[373] Md. A Halim, ADR In Bangladesh: Issues and Challenges(CCB Foundation, Dhaka 2011)) 17.

[374]Jamila A Chowdhury, *ADR Theories and ADR Practices A Glimpse on Access to Justice and ADR in Bangladesh*, (London College of Legal Studies South 2013) 1.

The concept of resolving disputes in an informal, amicable and consensual manner, as termed as ADR today, has always inherently been in exercise and practice, during all ages of human history.[375]Due to the formal adjudication system's inefficiency, the theory of ADR has been incorporated in different legislations dealing with the adjudication of the civil suits. In different laws dealing with adjudication, both the formal trial mechanism and informal procedure of resolving disputes through ADR.[376]

In the present chapter, there is an attempt to analyze the existing legal framework for the formal adjudication of civil disputes and to identify procedural loopholes of the prevailing civil justice delivery system in Bangladesh under CPC. In the previous chapter, dismal conditions of court-connected mediation were demonstrated through court registry data. In that chapter, it was shown that irrespective of jurisdiction and geographical changes, the poor application of mediation is not varied. Now, the present chapter has attempted to explore the reason for the poor practice of mediation in civil litigation by extensive study of the individual case filed.

4.2 Procedure to resolve civil disputes through mediation in civil courts under CPC: Legal provisions and procedural loopholes

The civil litigation process in Bangladesh is adversarial in nature, and the "civil proceeding" covers all proceedings in which a party asserts civil rights conferred by a civil court.[377]

The civil proceeding in Bangladesh is mainly governed by the *Code of Civil Procedure, 1908*. The *Civil Rules and Orders* and *Civil Courts Act 1887* prescribe the procedural matters in order to elaborate the sections and rules contained in the Code of Civil Procedure, 1908. Those laws together provide detailed provisions of the case management system in Bangladesh. This part of the literature has shed some light on the provisions of CPC concerning the formal resolution of a civil dispute with the background of the actual situation of procedural matters relating to particular civil litigations pending in different courts of Dhaka Judge Court. The stages of civil suit prescribed in the Code of Civil Procedure can be summarized as follows:

[375] Dr. ABM M Huq ,*Alternative Dispute Resolution In Bangladesh: Challenges and Prospect* (Law Book Company 2015) 51-87.

[376] The laws in which the ADR mechanism is incorporated is discussed in detail in Chapter 1 topic 1.3.

[377] Md. A. Halim, *ADR In Bangladesh: Issues and Challenges*(CCB Foundation 2016)), P 186.

- **Pre-Mediation Stage**

  Presentation of plaint

  Issue of process

  Submission of a written statement

- **Mediation Stage**

  Mediation

- **Post-Mediation Stage**

  Framing of issues

  Steps under section 30 of CPC

  Settling date for peremptory hearing

  Peremptory hearing

  Argument

  Judgment and decree

4.3 Pre-Mediation Stage:

4.3.1 Presentation of plaint legal provisions

The suit is instituted by the presentation of the plaint. The provisions of CPC[378] provide necessary provisions for the institution of a suit by presenting plaint.

(a) Legal provisions

According to section 26 of CPC- The suit is instituted by the presentation of the plaint. The laws contained in CPC can be laid down in the abridge way; Plaint must be filed with necessary copies for defendants, draft summons with fees for service, a list of documents relied upon in support of the plaint case.[379] Documents not produced with plaint shall not be received in evidence without leave of court.[380]At any stage of the proceeding, the court may strike out the unnecessary or scandalous part in the plaint, which may cause a delay in a fair trial.[381]

The plaint shall contain the particulars, such as the name of the court, name address of the plaintiffs and the defendants, facts constituting the cause of action, facts showing that the

[378] The Code of Civil Procedure 1908, Section 26 and Order IV Rule 1.
[379] Ibid, Order 7 Rule 9 and 14.
[380] Ibid, Order 7, Rule 18.
[381] Ibid, Order 6 rule 15.

court has a cause of action, the relief the plaintiff claims, whether the plaintiff has claimed set-off or relinquishment of his claimed the valuation of the suit and the required court fees.[382] When the relief claimed is undervalued, and the plaintiff fails to correct the valuation within the time fixed by the court, the plaint shall be rejected.[383]

When the suit is appropriately valued, but the plaint is written in paper insufficiently stamped, and the plaintiff on being required fails to supply the requisite stamp papers within a time to be fixed by the court, the plaint shall be rejected.[384]

Plaint shall be rejected if copies of the plaint and other requisites under rule 9(1A) Order 7 are not filed within the given time.[385]It is the duty of Shristadars to examine the plaint after receiving the same.[386]He (the sheristadar)examining the plaint must certify the sufficiency or otherwise of the stamp borne and note the amount of deficiency. A second certificate is to be appended if and when the deficiency is collected.[387] There are specific time limits at this stage; for example; Correction of valuation and supply of required court fees must be made within 21 days failing which the plaint shall be rejected.[388]The plaint shall be rejected if copies of the plaint and other requisites under rule 9(1A) Order 7 are not filed within the given time.[389]

Those requisites are:

- As many copies on plain paper of the plaint as there are defendants
- Draft forms of summons and fees thereof.[390]

According to Civil Suit Instruction Manual, as soon as the plaint is filed, it should be examined with particular reference to ascertain whether -

- The requirements under Order 7 Rule 1 has been followed;
- The subject matter of the suit has been appropriately valued; and

[382] The Code of Civil Procedure, 1908, Order 7 Rule 1.
[383] Ibid, Order 7 Rule 11(b).
[384] Ibid, Order 7 Rule 11(c).
[385] Ibid, Order 7 Rule 11(e).
[386] Civil Rules and Orders, (Volume 1) rule 55(1).
[387] Ibid, Rule 55(2).
[388] The Code of Civil Procedure, 1908, Order 7 Rule 11(b).
[389] Ibid, Order 7 Rule 11(e).
[390] Ibid, Rule 9 (1A) of Order 7 of CPC.

- The plaint has been properly stamped.[391]

If the plaint is defective in any of these respects, the orders must be taken by the *sheristadars,* and the plaintiff should be required to remedy the defects within a period not ordinarily exceeding 7 days. Undue latitude should not be allowed to the plaintiff in allowing extension of time and the presiding judge should not hesitate in suitable cases to reject plaints under Order 7 Rule 11(c) and (e) of the Code of Civil procedure in case of non-compliance with their order.[392]

Section 148 and 149 of the Code of Civil Procedure provides for enlargement of time regarding payment of court fees. On the other hand, order 7 Rule 11 allows 21 days to the plaintiff for correction of valuation and supplying the requisite court fees, but paragraph 1(2) of the Civil Suits Instruction Manual allows seven days and no time limit as prescribed in section 148, 149 and 151 of CPC.[393]

Thus, the relevant laws are very detailed about the requirement that has to be fulfilled at the time of presentation of the plaint. The process of examining the plaint and other documents minimizes the possibility of further delay in a subsequent stage of the suits. Also, it clarifies the plaintiff's position and the reason behind filing the case.

(b) Empirical findings on procedural loopholes

Presentation of the plaint is the first step to initiate a civil suit under CPC. A perusal of the records of different courts of Dhaka Judge Court reveals that at the stage of presentation of the plaint, the plaint is accepted right away in almost every cases and the process is issued at once. My findings in some records are as follows;

- The proper valuation is not cited at the time of presentation of the plaint. For example, in the suit, no 194/17 of 1st Senior Assistant Judge Court, Dhaka, in a declaration suit for the title, the property's value was shown as 4 lacs that is grossly inadequate for a property of 1 acre situated in Dhanmondi area. In a suit bearing number 172/13 of Nawabganj Senior Assistant Judge Court, the valuation of 145 decimals of land was cited as Tk.45,000/-. The valuation is improperly cited for fitting the case within the

[391] Civil Suit Instruction Manual, Paragraph 1.
[392] Ibid, Paragraph 2.
[393]M Akhtaruzzaman, *Case Management and Court Administration Bangladesh*, (Advocate RaziaKhatun .2014) 74.

pecuniary jurisdiction of the Senior Assistant Judge Court.

- In another case, in a suit for partition with the declaration in the Senior Assistant Judge Court, Keraniganj, the valuation of the property is shown only as 1 lakh taka which seems to be disproportionate to the actual price of the suit property and the court fee is paid only Tk. 8,400/- The situation appears to have been done only for lowering the payment of the amount of court fee.

- In a suit for partition no 3505/08 in the court of 1st Senior Assistant Judge Court, the suit was instituted on the date of 18/6/2008. At the further hearing stage, on 31/12/2012, an application for amendment of the plaint was filed as the schedule of the property was not correctly cited with specific boundary and defendant on the subsequent date filed a written objection. The amendment proposed to include a larger area than the area specified in the plaint, and the petition was allowed. Consequently, the suit was fixed for steps by the plaintiffs in relation to the amended plaint. Non-examination at the initial stage created an unnecessary delay in the later stage and prejudiced the interest of both the parties.

Thus it is evident through an examination of above mentioned individual files of civil suits in Dhaka Judges Court, improper submission of plaints that cause significant reasons for the delay are briefly outlined below:[394]

- The inaccurate description of the disputed property and further petition for the correction of the plaint;
- Lower valuation of disputed property to avail pecuniary jurisdiction of lower courts, and keep more space for further appeal and delay;
- Payment of lower court fees.

4.3.2 Issue of the process

The issue of the process is one of the most vital factors in a civil proceeding, and there are specific laws as regards the service of summons in relevant legislations. The fundamental principle is that, where a suit has been duly instituted, summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed.[395]

[394]Civil Suit no 194/17 of 1st Senior Assistant Judge Court. Dhaka; Civil Suit no 172/13 of Senior Assistant Judge, Keraniganj Court, Dhaka; Civil suit no 3505/08 of 1st Senior Assistant Judge Court, Dhaka.
[395]Code of Civil Procedure 1908 s. 27 of CPC.

(a) Legal provisions

It is mention-worthy that Order V, Order XXIX and XXX of the Code of Civil Procedure and Chapter III and IV of Civil Rules and Orders (volume 1) and paragraph 5 and 6 of Civil Courts Instruction Manual deal with the procedure for service of summons.

The main underlying rules and regulation for proper service of summons contained in CPC can be laid down in an abridged way as the following:

- Summons shall be issued within five working days by an officer of the Court. If the officer fails to issue, he shall be liable for misconduct.[396]
- The service of summons may be made by the officer of the court or through courier service. [397]
- In addition to that, the Court may, on the application of the plaintiff, allow to affect the service by the plaintiff.[398]
- The Court may, in addition to the service of summons mentioned above, may cause the summons to be served by fax message or electronic mail by the plaintiff at his own cost.[399]
- The delivery of summons shall be made in person unless he has an agent empowered to accept the service. In the return of summon, it shall contain the name, manner of delivery, time of delivery of summons.[400]
- The serving officer shall take the signature of at least two witnesses in return at the time of delivery of the notice, if not possible two persons of the locality.[401]
- When the defendant or his agent refused to sign the acknowledgement, the defendant is absent. There is no likelihood of his being there in residence within a reasonable time: when there is no authorized agent or any member of the family upon whom the service can be made; the service by affixation can be considered as proper when the above circumstances are clearly mentioned in return, and the copy of summons are affixed in some conspicuous part of the house.[402]
- The Court may examine the serving officer on oath about the due service of summons

[396] Code of Civil Procedure 1908, Order 5 Rule 1 of CPC.
[397] Ibid, Order 5 Rule 9 of CPC.
[398] Ibid, Order 5 Rule 9A of CPC.
[399] Ibid, Order 5 Rule 9A of CPC.
[400] Ibid, Order 5 Rule 12 of CPC.
[401]Civil Rules and Orders (Volume 1) Rule 70.
[402] The Code of Civil Procedure, 1908, Order 5 Rule 17 of CPC.

in case of substituted service. The declaration made shall be the evidence of the service of summons. [403]

- In addition to the way mentioned above, the Court shall direct the summons to be served by registered post with acknowledgement due addressed to the defendant. The defendant shall receive summons if he gets the summons, or there shall be a declaration if the defendant refuses to accept it.[404]
- If the court is satisfied that summons has been served by any of the modes mentioned above, it shall be deemed that the summons was duly served.[405]

(b) Empirical findings on procedural loopholes

As is evident from the study of selected case files from Dhaka Judges Court, the issuance of summon and summon return remains one of the most time-consuming parts in civil suits. It could constitute a significant cause for backlog and protracted delay in courts. Different factors cause delay relating to delivery and return of summon are illustrated below in terms of in-depth study from selected case files as follows:

- In a partition suit, no 3505/08 of Senior Assistant Judge, 1st Court, on the date of institution of the suit, i.e. 18/6/2008, the plaintiff filed requisites for service summons to the defendant no 1-11. On the next dates of 21/08/2008 and 19/11/2008, the summons was not returned. On the date of 26/1/2009, the summons towards defendant no. 5-8 and 11 was duly served, and they appeared before the court and filed a time petition for submission of the written statement. But, the subsequent date of 8/4/2009 was fixed for the return of summons from defendant no ten and on that service remained unreturned. On the next fixed date of 9/6/2009, the summons was returned as not served on the ground that the defendant no 10 is dead. On the same date, on the plaintiff's application, the heirs of the defendant no ten were substituted as defendants no. 10(*ka*)-10(*Umo*). Thus, the next date of 19/8/2009 was fixed for step by the plaintiff for service of summons to the defendant's no. 10(*ka*)-10(*umo*). On that, the plaintiff brought an amendment petition for including all the co-sharers of the undivided property to make them as parties of the suit and filed a time petition for

[403] Ibid, Order 5 Rule 19 of CPC
[404] Ibid, Order 5 Rule 19A and 19B of CPC.
[405] Ibid, Order 5 Rule 31 of CPC.

taking a step to the defendant no 10(ka)-10(*umo*). The amendment petition was allowed, and the co-sharers were made defendant nos 12-20. The next date of 3/11/2009 was fixed for issuing summons to defendant nos10(*ka*) -10(*umo*) and defendant nos 12-20. On that date, the plaintiff took steps for issuing summons to the defendants. The subsequent dates of 8/2/2010. 4/4/2010, 13/6/2010, 16/8/2010, 1/12/2010 and 5/1/2011 were fixed for the return of summons, but the summons remained unreturned. On the date of 5/1/2011, summons to all the defendants was returned. Thus, it becomes evident from the occurrences mentioned above that the two and a half years have lapsed for service of summons which can be considered one of the main hindrances against the timely disposal of civil suits. Moreover, in the continuous dates, the summons remains unreturned for no sufficient cause, which indicates the failure of the duties of Nezarat for proper service of summons.

- During the scrutiny of suits among which 15 are trial suits and 15 are suit resolved by mediation, no summons have found to be served by plaintiff himself or courier service or fax message or e-mail. Only one is found to be served by the plaintiff himself as per the amended provision of rule 9A. In the title suit 1089/12 of Joint District Judge 1st Court, on the date of 13/10/2012, the suit was registered. On the same date, the plaintiff took steps for service of summons towards defendant nos 1-8. On the next date of 14/11/2012, the summons of defendant nos 1-3, and 8 were returned and the summons of the rest of the defendants remained unreturned. On that date, the plaintiff prayed for service of summons in an alternative way by publication in the newspaper. The date of 16/1/2013 was fixed for the submission of a copy of the paper. However, on the date of 26/11/2012, instead of publication in the newspaper, the plaintiff prayed for service of summon by the surveyor of *Nazarat*. Thus, though the plaintiff took the initiative to serve the summons by himself, it becomes apparent that he did not do it by himself.
- On perusal of five sample returns, the mode of service of the summons is not found to have been satisfactory. During scrutiny of five suits in 3rd Joint District Judge, in the declaratory suit no 169/2014, the summons was served by affixing a copy in the outer door as the defendant refused to receive the copy. On the next suit of 151/2015, the defendant was not found, and the whereabouts of the person was not known to anybody, so the summons was submitted unreturned. In the suit of 206/14, the defendant was found to be dead, and the court officer affixed the copy on the outer

door of the residence of the deceased person and has shown the summons to be duly served. In the suit of partition no 154/12, it is written in the return that the defendant was not found at the relevant time and the summons was served upon his staff. But there is no mention in the law that the staff is the agent of the defendant in charge of the property. Only in the suit of 29/2014, where the defendant is the Secretary, Housing Ministry, the summons was served on the person, but there is no signature of the witness as per the requirement of Rule 70 of Civil Rules and Orders. So, in none of those mentioned above cases, the summons can be said to have been duly served.

- In a suit bearing number 181/13 of Nawabganj Senior Assistant Judge Court, out of 8 defendants, all the summons were served by hanging except defendant no 2. The summons was personally served only to defendant two, but no signatures of witnesses are found in that return.
- In a suit bearing number 210/16, of 1st Senior Assistant Judge Court, the plaintiff filed a suit for declaration of title and recovery of possession. The suit was registered 29/4/2014, and the summons is shown to have been duly returned on the date of 27/1/2016. The date was fixed for submission of the written statement and due to the failure of submission of a written statement; the date of 23/3/2016 was fixed for *exparte* hearing. On 20/6/2016, the suit was decreed *ex parte*.

Later on, the defendant of the suit, being the petitioner filed a Miscellaneous case stating that they have not obtained any summon of that original suit. In return, the summons is shown to have been served upon their staff '*Malek*' but they do not have any staff named as 'Malek'. It was their further contention that the summons was not served to the address as mentioned in the plaint. The Court found all the claims of the petitioners as true and allowed the miscellaneous case and restored the civil suit in its original number. The miscellaneous case was disposed of on the date of 25/3/2018. Thus, it becomes evident that a period of near about four years is gone only due to malpractice in service of summons on the part of process serving peons.

As elaborated above, the following key points on delays at this stage are given below:[406]

[406] Civil Suit no 3505/08 of 1st Senior Assistant Judge Court, Dhaka; Title suit no 1089/12 of Joint District Judge 1st Court, Dhaka; Civil Suit no 169/2014 of 3rd Joint District Judge Court, Dhaka; Civil suit no 151/15 of 3rd Joint District Judge Court, Dhaka; Civil Suit no 206/14 of 3rd Joint District Judge Court, Dhaka; Partition suit no 154/12 of 3rd Joint District Judge Court, Dhaka; Civil suit no 29/14 of 3rd Joint District Judge Court, Dhaka; Civil Suit no 181/13 of Nawabganj Senior Assistant Judge Court, Dhaka; Civil Suit no 210/16 of 1st Senior Assistant Judge Court, Dhaka.

- Invariably, summons for none of the cases are delivered before several tries;
- Accelerated sending methods through fax, email, or couriers are rarely used;
- In many cases summons were served to an attendant who is neither the agent nor properly named, nor signed;
- Improper delivery of summon revives the opportunity of the case after *exparte* and creates another form of delay.

4.3.3 Submission of a written statement

Submission of written statement is a stage where the defendant places his case before the court. Filing a written statement is a vital part as filing ***written statement***(W/S)is obligatory and non-filing of it will be considered as an admission of facts by the defendant.[407]

(a) Legal provisions

- The defendant shall, at or before the first hearing or within such time not exceeding two months as the court may permit, present a written statement of his defense.[408]
- The defendant is required to submit the document on which he relied upon in W/S. [409]
- If the document fails to submit the documents, he relied upon the W/S, and the Court shall not receive those in evidence without leaving the court.[410]
- In case of the Government-defendant, if no notice is served under section 80 of CPC, three months may be given from service of notice to file the W/S.[411]

(b) Empirical findings on procedural loopholes

Once selected cases from the Dhaka Judges Court are reviewed, few common patterns were identified to submit written statements. The case studies with reference to the identity of suits are discussed below:

- Invariably in all the suits, the time limit of two months for filing written statements miserably lapse. In a suit numbered as 511/2010 of 1st Joint District Judge court for a declaration of *Heba-bil–eawj* to be void, illegal and not binding upon the plaintiff. The suit was registered by the presentation of plaint on the date of 2/9/2010. Summons was returned on 2/9/2010, and the date of 25/10/2010 was fixed for

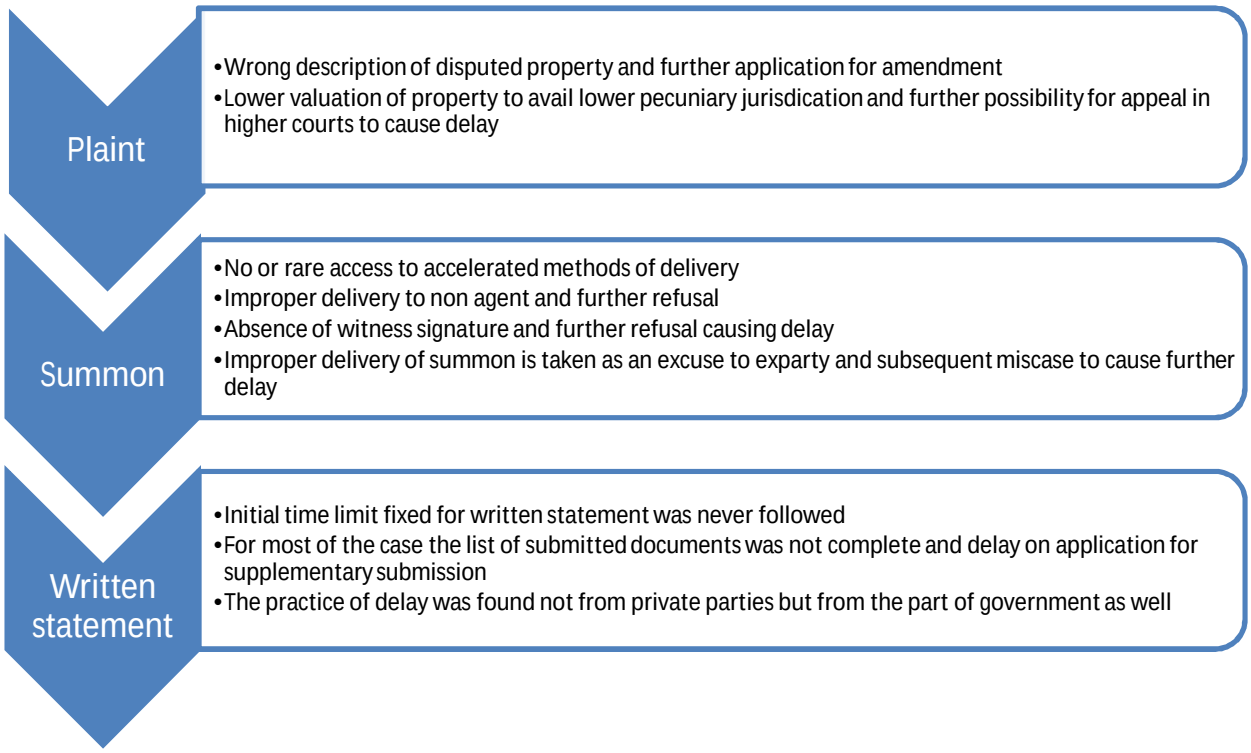
[407] Adamjee Jute Mills *v* Chairman, 3rdLabour Court and another 39 DLR 11.
[408] Code of Civil Procedure, 1908, Order 8 Rule 1.
[409] Ibid, Order 8 Rule 1(5).\\
[410] Ibid, Order 8 Rule 1(2).
[411] Ibid, s 80.

submission of the written statement. However, on subsequent dates of 25/10/2010, 5/4/2011, 16/5/2011 were fixed for submission of the written statement, but no written statement was submitted. Later on, 8/6/2011, 23/6/2011, 25/7/2011 was fixed for ex parte hearing in default of filing written statement. On 25/7/2011, the defendant filed a petition for withdrawing the suit from ex parte hearing and filed the written statement. Thus, it becomes apparent that a period of 9 months has been lapsed for filing the written statement, which seems to be a gross violation against thetime limit of filing the written statement. The defendants frequently seek adjournments for filing a written objection.

- In almost all the cases, the defendants filed the written statement, but in the note sheet, there is no mention as to whether the defendants have submitted relevant documents on which the written statement is relied upon. It is mentioned only 'the defendant has filed written statement'. In a case bearing number 377/12 of Senior assistant Judge Court, *Keraniganj*, the suit was instituted on the date of 23/7/2012. The defendant filed documents on the date of 14/3/2017 during further hearing. Sometimes this practice causes complexities at the later stage of the proceeding. At a subsequent date, the defendant seeks permission from the court for taking the document into evidence, and the Court invariably accepts it which is not in consistence to the relevant provisions of CPC.[412]
- In a suit against the government, numbered as 228/11 of Senior Assistant Judge, 1st Court, the plaintiff filed a suit for declaration that the city survey recorded in the name of the defendant, i.e., the government is wrong and not binding upon the plaintiff. The suit was registered on 10/5/2011and the dates of 15/9/2011, 17/11/2011, 12/2/2012, 15/4/2012, 19/6/2012 were fixed for submission of the written statement. The defendant-government sought for adjournment on the ground of non-receipt of summarized facts (SF) on those dates. Thus, the court fixed the suit for ex parte hearing on the dates of 15/9/2012, 18/1/2012, 25/2/2013, 7/4/2013, and 30/6/2013. Lastly, on 30/6/2013, the defendant government sought for withdrawing the suit from ex parte hearing and submitted written statement.

[412]Code of Civil Procedure, 1908 Order 8, Rule 1(5).

Figure 4.1: Reasons for delay in pre-mediation stage



Source: *Developed by analyzing case study data collected under this research*

The malpractices that are seen to have been frequently practiced are given above[413] in Figure 4.1:

1) Time limit fixed for submission of the written statement was never followed;
2) For most of the case the list of submitted documents was not complete; and
3) The practice of delay was found not only from private parties but from the part of the government as well.

4.4 Mediation Stage

To expedite the resolution of disputes of civil nature rapidly and effectively, the *Code of Civil Procedure (Amendment) Act, 2003* was introduced to incorporate the mediation mechanism in the formal adjudication system. The relevant provisions of mediation are, therefore, looked into:

(a) Legal provisions

ADR procedure contained in the *Code of Civil Procedure, 1908*, if implemented and materialized effectively, it can be the best response to the need for quick disposal of cases

[413] Civil Suit no 511/2010 of 1st Joint District Judge Court, Dhaka; Civil Suit no 377/12 of Senior Assistant Judge, Keranigonj Court; Civil Suit no 228/11 of Senior Assistant Judge, 1st Court, Dhaka.

pending in the civil courts.[414] Section 89A and 89B were incorporated through the amendment in 2003 and 89C through the amendment in 2006. Later on Code of Civil Procedure(Amendment) Act 2012 replaced the word 'may' with 'shall' to make the mediation mandatory in both trial and appellate stage. Further 89D and 89E were added to indicate that any process of Mediation started before the commencement of the *Code of Civil procedure (amendment) Act 2012* shall not be affected by the amendment.[415] For the purpose of effective discussion of the present research, the provisions of mediation as incorporated in section 89A are given below:

- The process of mediation is not applicable in the suits under *Artha Rin Adalat Ain*, 2003. The provision is applicable to all the suit, the procedure of which is governed by CPC.[416]
- The referral by the court for mediation is compulsory. The very provision of the section 89A(1)
- " After the filing of a written statement, if all the contesting parties are in attendance in the court in person or by their respective pleader, the court shall by adjourning the hearing mediate in order to settle' the dispute."[417]
- If all the contesting parties are willing to mediate, they will file an application to that effect or say so in the pleading, and only then the court shall so mediate or make a reference under this section.[418]
- Section 89A prescribes some persons through whom mediation may be conducted under CPC after receiving an application from the parties by adjourning the hearing. The court may apply any of the following persons to act mediation as a mediator:

    - **The judge may conduct the mediation by himself.**
    - **Mediation by a mediator selected by the pleaders of the parties**: A judge may refer the issue to the pleaders of the parties and ask them to undertake to settle the dispute. The pleaders, on mutual consultation and consent, appoint a mediator. That person may be any pleader who

[414]Sarvesh Chandra, 'ADR: Is conciliation the Best Choice?' P.C Rao and William Sheffield(eds) *In Alternative Dispute Resolution: What it is and How it works (New Delhi, 1997)* 83.
[415]Jamila A Chowdhury ADR Theories and ADR Practices A Glimpse on Access to Justice and ADR in Bangladesh, (London College of Legal Studies South 2013)P 151.
[416]The Code of Civil Procedure, 1908, s. 89A (1).
[417] Ibid, s. 89A (1).
[418] Ibid, Proviso to s. 89A(1).

is not involved in the case, a retired judge, or any mediator from the panel of the mediators prepared under sub-section 10 of 89A of CPC.[419]

- **Mediation by a mediator selected by the parties**: If no pleader or pleaders have been engaged by the parties, the court may refer the dispute to the parties for mediation.[420] "No further qualification is mentioned in the CPC when parties are asked to appoint their own mediator."[421]
- **Mediation by the mediator referred by the judge from a panel of mediator**:- The judge may refer the case to a mediator listed in the Panel of mediators prepared under sub-section 10 of section 89A. The panel shall consist of pleaders, retired judges, persons known to be trained in the art of dispute resolution, and other fit persons not holding the office of profit in the Republic. [422]
- **Mediation by District Legal Aid Officer**: The judge may refer the case to the District Legal Aid Officer to conduct post case mediation.[423]

- The Court shall not dictate or determine the fees. The parties upon mutual consent shall agree upon the fees to be paid by the pleaders.[424]
- **The time limit for mediation is as follows:**
  - Within ten days from the date when a judge refers a case for mediation, the parties shall inform the court in writing whether they have agreed to try to settle the dispute through mediation.
  - If the parties fail to do so within ten days, the reference for mediation is cancelled. If the parties inform the court on an agreement to mediate and appointment of a mediator, the mediation shall be concluded within 60 days and on the application of both the parties, the time may be extended

[419] Ibid, s 89A (2).
[420] Ibid,, 1908, Order 89A(1).
[421] Jamila A Chowdhury ADR Theories and ADR Practices A Glimpse on Access to Justice and ADR in Bangladesh, (London College of Legal Studies South 2013)P 154.
[422] The Code of Civil Procedure, 1908 ss, 10, s 89(A).
[423] Ibid, s 89A(2)
[424] Ibid, s. 89A(3)

for another 30 days.[425]

- **Consequences of successful and unsuccessful mediation:**
  - **Settlement agreement-**In case of a compromise between parties through mediation, the submitted report is a settlement agreement that the court shall pass as an order or decree.[426]
  - **Submission of the report-**Once the mediation process is over a report is submitted to the court through pleaders. Once the case is settled through mediation, the court issue a certificate to refund court fees that parties submitted with their plaint and written statement. Parties are entitled to get that refund within 60 days of the issuance of such certificate[427]
  - **No further appeal-**Once the settlement is reached through mediation and a decree is awarded by the court on the basis of the settlement agreement, no appeal can be made subsequently by parties against such decree[428]
  - **Continuation of trial for failed mediation-**A report is filed through pleaders even when a mediation effort fails. After that, the case continues following the provisions of mediation, as if there was no effort for mediation.[429]
  - **Continuation of trial with a different judge-** However, one important provision in CPC is that the same judge who conducts the case prior to and during mediation shall not continue with the same case [89A (9)] if mediation effort fails and the trial process resumes.[430]
  - As illustrated in CPC[431]. For example, A and B decided to resolve their dispute through mediation. They made an application to the presiding judge X. X admit the application and take the initiative to resolve the dispute by himself as a mediator. However, the mediation initiative fails, andthe trial resumes. There is no restriction to continue the case

[425] Ibid, 1908 s.89A(4) .
[426] Ibid, 1908S, 89A(5).
[427] Ibid, 1908 S. 89A (11).
[428] Ibid, S. 89A(12).
[429] Ibid, 1908 s 89A(7).
[430] Ibid, 1908 s. 89A(9).
[431] Jamila A Chowdhury *ADR Theories and ADR Practices A Glimpse on Access to Justice and ADR in Bangladesh*, (London College of Legal Studies South2013) 159.

in the same court if in the meantime X is transferred to a different court and a new judge Y replace X before the next hearing date of the suit between A and B.'

- No appeal shall lie against the decree passed under this section.[432]
- At the appellate stage, the court may mediate or refer the appeal for mediation in the same way as provided in section 89A.[433]

(b) Empirical findings on procedural loopholes

On perusal of record in 15 selective civil suits compromised under section 89A of CPC, some flaws and non-compliance of the provision have become apparent. Those are as follows;

- **Little or no application of mediation provision**

  In all the suits, the Court has fixed a date for mediation under section 89A of CPC. But in none of the suits, the Court had any scope to mediate the dispute or refer the dispute for mediation. Though all the parties are in attendance in the Court, the parties do not submit any application that they are willing to settle the dispute under section 89A. It is also notable that the parties do not seek any efforts from the court either under the relevant section. What happens is that on the date fixed for mediation, the parties file a petition for *solenama* under Order 23 Rule 3 of CPC. Sometimes, in *solenama* petition, the very caption of 'mediation through section 89A' is written down, but from the reading of the body of the application, it becomes apparent that the *solenama* petition is nothing but a petition under Order 23 Rule 3 of CPC.

From the analysis of those case files, it seems that courts are not using the amended provision *"the court shall"*, rather wait for parties to submit the application to show their intention for mediation as was done earlier under the provision *"the court may"*. The following are some case studies in this regard;

Case study - 1

In the suit, no 31/16 of the 1st Senior Assistant Judge Court the suit was registered on the date of 27/1/2016. The plaintiff contended in his pleading that the plaintiff by way of inheritance, has right, title and possession over the suit land. It is the further contention of the plaintiff

[432] The Code of Civil Procedure, 1908 s. 89A(12) .
[433] Ibid, s. 89(C) 1.

that the relevant record of rights has been wrongly recorded in the name of the defendants. After the lapse of several dates, the defendants submitted a written statement on the date of 6/4/2017. In accordance with the particular provision of CPC, the date of 26/7/2017 was fixed for taking steps under 89A of CPC. On that date, the parties without filing an application to the court for referral of the case for mediation, straightaway filed a *solenama* petition under the caption of 'mediation under section 89A'. On the same date, the plaintiff and the defendant gave their respective depositions to support their petition. From the very contents of the petition, it is apparent that the parties have decided to arrive at a compromise outside the court through their mutual consultation. On the basis of that petition, the court passed a decree declaring finding the terms and conditions of compromise petition as legal and valid. The court declared right, title and interest of the plaintiff over the suit land and also declared the recording of the *khatian* as wrong and not binding upon the plaintiff.

Thus, from the suit as mentioned above, it becomes visible that neither the parties have filed any application conveying their willingness to settle the dispute through mediation nor the Court got any scope to refer the case for the same purpose.

Case study -2

The suit bearing no 467/13 of 1st Senior Assistant Judge Court was for cancellation of power of attorney and deed of agreement. The plaintiff's case was that the defendant developer company procured a deed of agreement and power of attorney from the old plaintiff and his son by way of misrepresentation to complete the construction of a building approved by RAJUK. On the date of 12/9/2013, the suit was registered. On the date fixed for step by the parties for 89A of CPC but the parties took no steps under that particular section. Thus the suit proceeded, and on the date of 20/8/2017fixed for discovery and inspection, four years after filing the suit, the parties submitted a *solenama* petition under Order 23 Rule 3 of CPC. From the contents of the petition, it appears that the parties have compromised the dispute outside the court and came to a settlement to the effect that the defendants would not complete the construction and plaintiff, the owner himself would complete the construction and hand over the possession to the purchasers. The power of attorney and deed of the agreement will stand null and void. Thus, the entire case record reveals the fact that if the court could avail the scope to mediate the dispute or refer the same, the suit could have been resolved through mediation at least three years earlier. Only for non-exercise of the provision of section 89A, the suit had to be dragged for further three years, causing loss of both parties'

time and money.

Case study -3

In a suit of 230/16 of 3rd Joint District Judge Court, Dhaka, the plaintiff sought a declaration of title and City survey khatian to be wrongly recorded in the name of the school, the defendant of the instant suit. On perusal of the record, it appears that it is admitted by both the plaintiff and the defendant that the plaintiff owned and possessed 71 decimals of land. For the plaintiff also revealed that the plaintiff also admitted that the plaintiff transferred, in total, 50 decimals land by a registered sale deed and four registered deeds of gift. As per the contention of the plaintiff, he retained his title and possession over the rest of 21 decimals of land. But in city survey, the entire 71 decimals of land have been recorded in the defendants' name and hence is the suit. The summon was returned after due service, but the defendants did not appear before the court.

Consequently, the date of 27/7/2017 was fixed for *ex parte* hearing. On that date, the plaintiff and the defendant school filed a petition under the caption ‘ prayer for disposal of the suit under Order 23 rule 3 of CPC and section 89A of CPC’. The contents of the petition reveal that the plaintiff and the defendants through joint consultation without the intervention of the court have arrived at a settlement that the plaintiff would make a gift of 11 decimals land to defendant institution and sell the rest of land to the same institution. They also decided by mutual understanding that the suit would be dismissed. Accordingly, the Court passed a decree under section 89A of the Code. However, the suit has actually been settled under the provision of Order 23 Rule 3 of CPC.

- **The compromise completed outside the court is shown as ‘mediation under section 89A’, and such is shown in the later stage of the suit.**

  In the records of the trial, scrutinized in the Dhaka Judge Court depicts the scenario of non-exercise of the provision of section 89A of Code by the parties. In all the litigations, a date is fixed for mediation as required by the provision mentioned above, but the parties do not come before the court to seek relief under section 89A. Consequently, the suit proceeds for framing of issues in the subsequent date. In some case shown in Table 3.2 to 3.7 of chapter 3, the suits are shown to have been resolved under 89A of CPC, but on scrutiny of the record, the actual exercise of this section is disclosed. The true situation of the court is that in those cases which are shown to have been done

> through 89A is actually resolved through the application of Order 23 Rule 1/2 of CPC. There is no implementation of the procedure either by way of mediation by the court or referral for mediation to the proper forum. Thus, the scrutinized records reveal that the judges in order to get double points in disposal, require the parties to write the petition under section 89A but those cases are not resolved through mediation in the real sense of the term.[434]

Whenever the suit is resolved through compromise, there is a common practice that the compromise takes place at the later stage of the suit causing loss of time and money of both the parties and the time of the Court as well. Case study 2 is a glaring example of this practice.

Case study -4

In a suit with a prayer for compensation filed in the 1st Joint District Judge Court bearing no 1089/12, the plaintiff contended before the court that the defendant has real estate business and proposed selling some apartments. The plaintiff agreed to purchase two apartments worth of Tk. 1,29,84,300/- and an agreement was signed accordingly. Along with other terms and conditions in the agreement, the defendant, i.e., ANZ properties, promised to allocate two car parking space. But the car parking space was found to be defective, and the plaintiff served the defendant several legal notices. But the defendant also did not pay hid to the arbitration. Thus the plaintiff has been constrained to institute the suit. According to the case of the defendants, the car parking space was defective, and for that reason, the plaintiff was given compensation. Now the plaintiff is stopped from claiming any further relief from the court.

From a perusal of the facts mentioned above, it appears that the matter of dispute was a very trifle, and it was whether the plaintiff had received proper compensation for the defective car parking space. After service of summon and submission of a written statement by the defendants, date of 5/8/2013 was fixed for steps under section 89A CPC by the parties. But the parties took no steps on that date fixed for mediation. Subsequently, the suit proceeded for framing of issues, steps under section 30, settling a date for the peremptory hearing, peremptory hearing and further hearing. All the stages mentioned above consumed the period of 4 years due to the filing of frequent adjournment and interlocutory petitions.

[434] The honorable High Court Division issued circulars on 23.06.2003 vide its Memo No. 59(K) wR and 59(L) wR. This provision has been given into effect from the 1st of July, 2003. Through this circular, the High Court Division has given benefit of double disposal in case of successful mediation and single disposal in case of unsuccessful mediation.

At last, the date was fixed on 9/8/2017 for argument hearing. On the date of argument hearing, the parties filed a *solenama* petition. According to the contents of the *solenama* petition, the plaintiff admitted the contention of the defendants and the parties prayed for dismissal of the suit. Accordingly, the court passed a decree of dismissal as per the terms and condition of the *solenama* petition.

Thus, it becomes apparent from the suit that the dispute could have been easily resolved through the application of mediation under section 89A. That suit eventually was compromised by the parties. Still, unfortunately, it was done after the lapse of five years.

Case study -5

In a suit bearing number 903/14 of 1st Joint District Judge Court, the suit was for a declaration of title and recovery of *khas* possession. The case of the plaintiff is that admittedly, the defendant 11 was the owner and possessor of the suit land. It was also admitted that he appointed the defendant 1 as the power of attorney and invested him with the possession. Later on, the defendant 11 sold out the same property to the plaintiff by registered kabala, and the defendant 1 had no right and authority to sell the property. The defendant 11 appeared before the court contended and admitted the plaintiff's contention and further submitted that the power of attorney was revoked by another deed bearing no 4938 dated 5/7/2009. According to the defendants, as defendant 1 is in the possession by force of the attorney's earlier power, the plaintiff has been constrained to file the instant suit. Thus, on perusal of the fact of both the parties' case, it appears that the point of dispute is very nominal, and it was a fit case for settlement through mediation. But on the date fixed for mediation, the parties took no step, and the suit is still in the process of a further hearing.

Given the observation mentioned above as to laws and case records, it is evident that the laws are there in the legislation, but there is little application of that law in case of proceedings and disposal of civil litigations.

- **The tendency to file false and fabricated cases discourages the parties from mediating the disputes:** It is a very common phenomenon of the civil litigations that the plaintiff files false cases only to harass the defendants. On the other hand, it also happens frequently that the defendants take a false plea on the basis of fabricated facts to linger the time of litigations. Consequently, the plaintiff or the defendants, depending upon the facts and circumstances of each case, do not show

any interest in arriving at a conciliation through mediation.

Case study -6

In suit bearing number 268/14 of Senior Assistant Judge Court, Dohar the plaintiff sought for declaration of title in the property mentioned in the schedule to the plaint. According to the contention of the plaintiff, the plaintiff and defendants are the descendants of the same predecessor, and they used to possess the suit land by way of inheritance as co-sharers. At one point of time, the plaintiff and the defendants deiced to make partition of their property amicably, and plaintiff agreed to take the backward side of the property in more than half portion. The defendant agreed to take the property in front of the street in less than half the portion. By filing the written statement, the defendants contended that they had taken the property in equal portion. Apparently, it seems that all the matters are admitted by both the parties and the only matter to be decided as to whether the plaintiff obtained more than half a portion of the property. But the parties took no step at the date for steps under section 89A of CPC. The trial proceeded, and the court pronounced judgment thereafter. In the judgment, the court found that the plaintiff failed to prove his title and possession over the property due to his failure to establish the alleged amicable partition. Thus, from the observation mentioned above, the conclusion can be drawn to this effect that the plaintiff filed a false and frivolous case, and there was hostility among the parties. That is why, he was not interested at all to take any step under section 89A.

- **The parties obtain compromise decree by exercising fraud upon the court:-**In a considerable number of civil litigations, plaintiff and defendant institute concocted cases. In those cases, the parties manage to get compromise decree regarding the property upon which they have no right, title and interest by way of practicing fraud upon the court causing prejudice to the interest of third persons.

Case study -7

In the suit 172/13 of Senior Assistant Judge Court, Nawabganj the plaintiff sought a declaration of title and the concerned RS *khatian* to be wrong and not binding upon the plaintiff. According to the contention of the plaintiff, he has right, title and interest over the land appertaining to RS plot number 1316, 1317 and 1318 corresponding to CS plot no 873. He claimed the area of the land as the owner of 3 RS plots is 57 decimals, 44 decimals, and

44 decimals respectively. He further asserted that in the *khatian*, his name in those plots was wrongly recorded in a lesser portion, which is why he has been constrained to file the instant suit. The summon was shown to have been duly served upon all the defendants. The defendant nos 1- 4 and 12-13 were private persons, and they appeared before the court and submitted a written statement admitting the claim of the plaintiff. The defendants5-11 were government, and they did not appear before the court. Later on, at the date of PH, the plaintiff and defendants filed a *solenama* petition and sought a decree favoring the plaintiff. After an in-depth study of the record, it appeared that the papers upon which the plaintiff relied upon does not fully correlate with the area of land claimed by the plaintiff.

Moreover, some of the co-sharers named in RS *khatian* are not made parties in the suit. Thus, from the above observation, the court held that it would be unsafe to dispose of the suit through mediation under section 89A or under order 23, rule 3 as the decree may be on the plots upon which the plaintiff has no title and possession. Thus, it may affect the interest of the person, not a party to the suit. For this reason, the disposal of suits through mediation may cause a miscarriage of justice in a considerable number of cases.

Case study -8

In the civil suit bearing number 325/17 of Senior Assistant Judge Court, Keraniganj, the plaintiff’s case was that the suit land originally belonged to Mohij, Meraj, Nazim, Amin, Rabeya, Ambia and Asia. Afterwards, by way of an amicable settlement, on the basis of a partition deed, no 10121 dated 3/2/1966 Amin and Asia obtained the entire property, and the defendant 1 purchased the property by sale deed no 5184 dated 30/6/1998 and acquired the possession. After that, defendant 1 sold it out to the plaintiff. The defendant, submitting the written statement, admitted the plaintiff's case and sought a compromise decree. However, the court on perusal of the record, found that the plaintiff has not filed the alleged partition deed upon which both the defendant and plaintiff sought relief.

Moreover, all the RS and SA recorded tenants were not impleaded as the parties in the suit. Consequently, the court rejected the *solenama* petition. Thus, the record demonstrates that among the civil litigations, many of them are not suitable and safe for mediation.

- **Two Instances where the attempt for mediation under section 89A of CPC failed due to disagreement among the parties. (With case file details)**

Case Study-9[435]

It was a suit for declaration of title. At the time of mediation, there was no attempt for mediation from the parties. At the time of taking step under section 30, there was no step from the parties in this respect. The date of 4/2/2014, 2/6/2014, 20/11/2014, 9/6/2015, 23/11/2015, were fixed for SD. 5/5/2016, 14/6/2016, 16/10/2016, 22/11/2016, 16/4/2017 were fixed for peremptory hearing. On the date of 3/10/2017 the court passed the order which is as follows;

After taking apart deposition of PW1, both the parties expressed their willingness to mediate the dispute. At that stage, the concerned judge pronounced the following judgment; Therefore, this suit seems appropriate for mediation under section 89A of the Code of Civil Procedure, 1908. The District Legal Aid Officer is hereby appointed as the mediator. According to the due process of law, the mediator will submit the mediation report within 60 days. Let a copy of this order be sent to the District Legal Aid Office. The mediator can call for the record from this court if necessary. The date of 30/11/2017 is hereby fixed for submission of mediation report.'

On the date of 29/10/2017, the record was sent to the office of District Legal Aid Officer. On 2/1/2018, the record was sent back because the attempt for mediation was failed. The District

[435] 298/2012 of 5th Joint District Judge Court.; Name of the plaintiffs; Md. Jakir Hossain; Father's name Md. Ali Hossain.
Md. Sharif Hossain; Father name: Md. Nurul Islam; Address 89/2/3/A/1 , RK Mission Road , Thana- Jatrabari, District- Dhaka.
Name of the defendants; Md. Dilu Mia; Father's name Md. Ali Hossain; Md. Selim; Father's name: Alauddin, Saharbanu.
Atorbanu; Md. Nurul Islam; Father's name: Ali Hossain; Address same; Name of the judges; Md. Saidur Rahman Gazi-(5//7/2012-7/1/2014); Md. Sharif Hossain Haider–(4/2/2014-23/11/2015); Sheikh TareqEjaj –(23/11/2015- till today).
This is suit for partition; The valuation of the suit is Tk. 36,68,352/- ;The valuation of plaintiff's part Tk. 24,45,568/-.
District Dhaka, Thana Keraniganj now Motijheel; Name of the plaintiff's lawyer: Sharif Uddin , Advocate, Judge Court, Dhaka, Name of the defendant's lawyer: Md. Ekhlauddin, Advocate, Judge Court, Dhaka.

Legal Aid Officer took the case for post-case mediation based on the plaintiff's application. The date of 22/11/2017 was fixed for the mediation meeting. On the date of 28/11/2018, the mediator sent a report to this effect that mediation was attempted three times. But no party could reach any settlement in respect of the dispute. Consequently, the suit record was sent back to the trial court. The subsequent dates of 26/2/2018, 20/5/2018, 4/7/2018 were fixed for FPH.

Plaintiff's case: The case of the plaintiff was that Rajjab Ali and Ali Hossain purchased 2.25 kathas land from CS recorded tenants Afsar Ali and others by registered *kabala* deed and obtained possession of the same. The SA record was published in the name of them in 8 *anna* share each in SA *daag* number 3098 and 3099. Likewise, the RS *khatian* was recorded in their names regarding RS plot no 2885 and 2886.They recorded mutation *khatian* in their names. Ali Hossain had three sons named Nurul Islam, Dilu Mia, Jakir Hossain, and two daughters Atorbanu and Shohorbanu. Ali Hossain died on the date of 24/5/2005 and before his death, he executed a will demarcating the area of land to each of his sons and daughters. According to the contents of the will, plaintiff no 1 and father of plaintiff no 2 obtained land in the eastern and middle side of the plot respectively. The defendant no 1, the other son of Ali Hossain acquired the land in the plot's western side. The father of plaintiff no 2executed a gift deed no 1986 dated 4/5/2010 in the name of his son and in that deed, defendant no 1 was one of the witnesses. The defendant nos 2 and 4(Atorbanu and Selim) decided to use the northern part of the plot as a pathway. The defendant no 1 told the plaintiff no 2 to give away his portion of land, and when the plaintiff no 2 denied doing so, he threatened the plaintiff no 2. He also forcibly tried to make construction over the land owned by plaintiff no 2. In such circumstances, the plaintiffs have been constrained to institute the suit with a prayer for partition in respect of 2/3 share in the suit plot.

Defendant's case: It is admitted by the defendant no 1 that their father executed a will before his death. According to the will, the property the suit property measuring 96 *ojutangsho* was divided among three sons and gave away non suit 96 decimals land to the pro forma defendants. After the death of their father, they possessed the land by way of preparing mutation. After an amicable settlement presided over by the ward commissioner, the plaintiff no 1 obtained the eastern side of the land measuring 32 *ojutangsha*, the defendant, no 1 acquired land in the middle portion and the father of the plaintiff no 2, obtained land in the western side measuring 32 decimals of land each. The defendant no 1 has been possessing the

middle portion of the land constructing semi *pacca* residence by way of paying electricity and other bills. The plaintiff no 2 through creating a forged *heba* deed from his father has illegally claimed that portion of land. In such circumstances, the present suit is liable to be dismissed.

Initiation for mediation: The plaintiff submitted the alleged deed dated 8/5/2003 through their father delivered the title and possession to his 3 sons. The specific portion of the land to be transferred to each of the sons is not found in the will. The authenticity of alleged *heba* deed was not possible to be determined through the settlement proceedings, and therefore the mediation attempt taken by the judge himself was failed.

Case study no-10[436]

Plaintiff's case: In a suit for partition, Alauddin Mullah owned and possessed 16 *anna* land in the scheduled properties, and the *khatian* was correctly recorded in his name. Alauddin Mullah died leaving behind a wife and 2 sons Abdus Selim and the defendant no 1 Anowarul Azam. Afterwards, Abdus Selim died, leaving behind wife, i.e., plaintiff no 1 and 2 sons, i.e., plaintiff no 2 and 3. The plaintiffs and the defendant no 1 are in joint ownership and *ejmali* possession of the schedule properties. The plaintiff no 1 asked for an amicable partition to the defendant several times, but the defendant paid no heed to their words. The plaintiffs are, in fact, enjoying less than their share. In such circumstances, the plaintiffs have filed the instant suit.

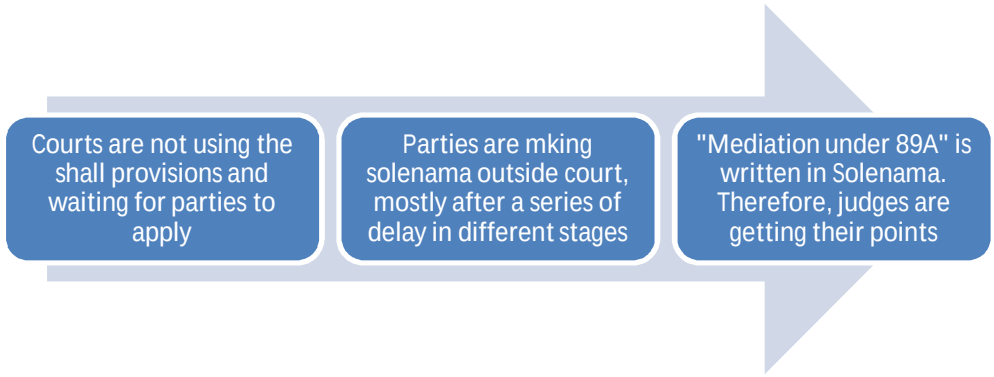
Defendant's case: 0.0191 *Ajutansha* land was recorded in Mr Alauddin Mullah's name and the SA, and RS *khatian* was correctly registered in his name. He was living peacefully with his wife Aysa Khatun and 2 sons. At his death, 2 sons obtained .0084 decimals of land each, and his wife acquired .0024 decimals land. Abdus Salam died, leaving behind mother, wife

[436] Civil suit no 154/10 of 3rd Court; Transferred to Joint District Judge 4th Court and renumbered as 37/17.
Plaintiff's name; Shahnaz Begum; Husband's name –Late Abdus Salam, Selim Sabir(Minor), Selim Saijb (Minor); Fathers name Late Abdus Salam Defendant's name; Anowarul Azam; Father name Alauddin Mullah; Suit for partition of ejmali properties; Suit valued at one crore, Plaintiff's share valued at Tk. 90,0000/-, Name of plaintiff's advocate; Md. NurulAlam, Lovely Yeasmin, Mulla Osman Gani, Kamrun Nahar, Syda Lutfunnessa, Ishrat Jahan; Name of the defendants lawyers ; Mohibul Haqim, Mohibur Rahman, Iftekhar Md. Javed , Md. Mahabur Hassan; Scheduled property.
Schedule A- District Dhaka, then Lalbag, present Dhanmondi. 001050 ojutangsha.
Schedule B-Gazipur, Thana –Kapasia, 1.59 ojutangsha.
Schedule C-District Dhaka, Thana Gulshan, .2152 ojutangsha.
The judges present ; Md. Saiful Islam (21.6.2010-17/7/2013); Shahriar Kabir (5/9/2013-24/2/2016).
Md. Abdul Karim (13/3/2016 to till today).

and 2 sons as his heirs. Plaintiff no 1 succeeded .0010.5 *ojutansha,* his mother .0014 ojutangsha and each of the sons obtained .0059.5 *ojutangsha* of land. Thus, the plaintiffs are entitled to get in total .0070 *ojutangsha*. After the death of Abdus Selim, plaintiff no 1 along with his sons left their house. Moreover, Ayesha Khatun purchased .0697 *ojutangsha* land through registered *kabala* no 5816 dated 23/10/1961 in the property mentioned in schedule no A.

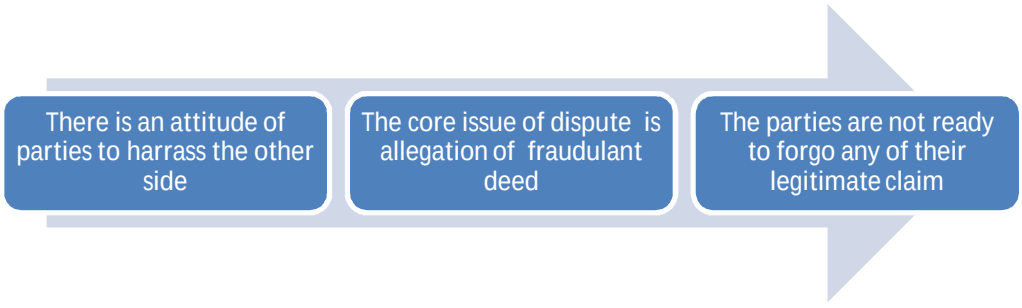
Initiation for mediation: The case was transferred to 4th Joint District Jude Court from 3rd Joint District Judge Court on the date of 2/2/2017. The 3rd Joint District Judge Court judge attempted to settle the dispute through mediation when the suit reached the stage of PH. The attempt failed as the plaintiff disagreed with the case of the defendant that Ayesha Khatun obtained a piece of property by purchase. Then the parties decided to transfer the suit from 3rd Court and filed a Miscellaneous transfer case to the District Judge Court, and the case was allowed accordingly. Resultantly, the suit was transferred to Joint District Judge, 4th Court. The suit is still in PH stage.

Figure 4.2: Limited pro-active practice of mediation in courts



As shown in the panel below, disinterest among the parties on mediation may also cause a mediation attempt's failure.

Figure 4.3:Disinterest among the parties cause the failure of a mediation attempt



Source: *Developed by analyzing case study data collected under this research*

- **No way to review the decision in compromise decree and other after effect**

As discussed above, settlement through mediation under CPC is not yet a common practice in civil courts of Bangladesh. Once the settlement is reached through mediation and a decree is awarded by the court on the basis of the settlement agreement, no appeal can be made subsequently by parties against such decree[437] In several cases, after the resolution of the suit through compromise, the improper terms and conditions of the suit cause prejudice to either party of the suit and in such case, they find no other way but to institute another suit to avoid the effect previous suit.

Case study no-11

Civil suit no 245/13 in which the plaintiff has sought for declaration of the judgment and decree of the suit no 240/07 to be void and not binding upon them. The plaintiff's case is that his elder brother created a forged heba deed from their father regarding 2.50 decimals land. After knowing about it, their father filed a suit against his son and then through the co-operation of the court, a compromise was reached among the father and 12 children including the plaintiff of the instant suit. One of the terms of compromise decree was that in 11 decimals of land in the plot, his elder brother would get 2.5 decimals land according to that deed and other brother and sisters including the plaintiff of the instant suit will get rest of 8.5.deciamls land. In the compromise deed, the deed was not declared void however for preserving the interest of their elder brother. Subsequently, the elder brother by way of hiding the compromise decree, through power of attorney contracted a developer company for selling the entire property in the plot, including that 8.5 decimals land to the developer company. Now the plaintiffs have filed the suit for declaration of title, establishing the terms of *solenama* and cancelling the deed in which their elder brother and developer company are the defendants. The defendant and developer company are contesting the instant suit by filing written statement in the written statement, and the suit is at the peremptory hearing stage.

The case study mentioned above demonstrated that though limitation of appeal after mediation provides an opportunity to reduce the backlog of cases in courts, it also increases the possibility of an unequal agreement between parties, as there is no provision of judicial review before passing decrees on agreements made through mediation.[438]

[437] The Code of Civil Procedure, 1908, s. 89A(12).

[438] Jamila A Chowdhury, *ADR Theories and ADR Practices A Glimpse on Access to Justice and ADR in Bangladesh*, (London College of Legal Studies, South 2013) 159.

The things that are clear from the case as mentioned above studies are that on the one hand, the practice of mediation within the meaning of section 89A of CPC is very limited and any attempt within that section becomes unsuccessful due to lack of reaching any agreements among the parties. The malpractices as shown above that undermine the efficiency of the mediation are given below;

- The parties do not show their interest in the mediation session, and therefore, it does not happen. [439]
- The parties make a compromise by themselves, and the court shows it as mediation under section 89A.[440]
- Parties file false and frivolous cases to harass the other parties.[441]
- The parties enter into compromise by practicing fraud upon the court.[442]
- Parties do not want to forgo their claim.[443]
- There is no provision to review the decree through *solenama*.[444]

Further reasons for the failure of mediation have been discussed in the succeeding chapters on the basis of responses from different stake-holders of the civil justice delivery system.

4.5 Post mediation stage

4.5.1. The framing of issues

The framing and settlement of issues have an essential bearing on trial and adjudications, and therefore, it is necessary for the right decision in a suit.[445] It gives precision to the point of a dispute of civil litigation.

[439] Civil suit no 31/16 of the 1st Senior Assistant Judge Court; 467/13 of 1st Senior Assistant Judge Court Dhaka; Civil Suit no 903/14 of 1st Joint District Judge Court, Dhaka.
[440] Civil Suit no 230/16 of 3rd joint District Judge Court, Dhaka;Civil Suit no 1089/12 of 1st Joint District Judge Court, Dhaka.
[441]Civil Suit no 268/14 of 1st Senior Assistant Judge Court, Dhaka; Civil Suit no 325/17 of Senior Assistant Judge Court, Keraniganj.
[442]Civil Suit no 172/13 of Senior Assistant Judge Nawabganj Court.
[443]Civil Suit no 298/2012 of 5th Joint District Judge Court, Dhaka; Civil Suit no 154/10 of 3rd Senior Assistant Judge Court, Dhaka.
[444]245/13 of 1st Senior Assistant Judge Court.
[445] Md. Akhtaruzzaman, *Case Management and court Administration in Bangladesh*(Advocate RaziaKhatun 2013) 92.

(a) Legal provisions:

- Issues are of two kinds: (a) issues of fact, (b) Issues of law.[446]
- Duty to frame issues primarily rests on the Court.
- At the first hearing, the court shall, after reading the plaint and the written statements, if any, and after examination of the parties as may appear necessary, ascertain upon what material proposition of fact or law the parties are at variance and thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.[447]
- "The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit."[448]
- Every issue should form a single question and as far as practicable should not be put in an alternative form.[449]
- The framing of unnecessary issues should be avoided.[450]

(b) Empirical findings on procedural loopholes

As observed in the analysis of case files from the Joint District Judge Court of Dhaka, some practice were identified which are mentioned below;

- Issues are not carefully framed by judges as per Order 15 Rule 1(5) of the CPC. In most of the cases, court officials write down issues, and judges just put their signature. However, inaccurate issues cause the further need for the amendment and take time
- Issues are never formed within 15 days of the submission of Written Statement, rather takes the time that may even take around a year
- The court himself frames the issues in a sporadic case. The court staffs actually write down the issues very casually, and the concerned judge only puts down the signature. In this practice, crucial mistakes are left at the stage of framing of issues. In a suit bearing number 560/13 of Joint District Judge Court, the plaintiff being the teacher of a Madrassa sought for a declaration that the suspension order by the authority was illegal, void and not binding upon the plaintiff. However, the issues have been framed

[446]The Code of Civil Procedure, 1908, Order 1 Rule 1(4).
[447]Ibid, Order 14 Rule 1(5).
[448]Ibid, Order 14 Rule 5 (1).
[449] Civil Rules and Orders(Volume 1), Rule 132.
[450]Civil Suit Instruction Manual, Paragraph 12(5).

as follows;

- Is the suit maintainable in its present form?
- Whether the plaintiff has right, title and interest over the suit land.
- Whether the plaintiff is entitled to get the relief as prayed for?

As mentioned above, the issues do not constitute the correct issues for determining the matters in controversy. The issues are framed by the court very casually and negligently because the courts usually take resort to the provision of rule 5. As per this rule, the court may at any time before passing a decree to amend the issues or frame additional issues on such terms as it thinks fit and adds any further issues. It often happens that at the time of writing the judgment, the Court recast the issues while determining the real matter in dispute. Thus, it can be said that in practice, the provision of framing issues of a suit by the court himself is frequently violated.

- As per Order 14, Rule 1(5), issues have to be framed within 15 days from the date of filing W/S or failure of mediation. In the suit bearing number 467/13 of 1st Senior Assistant Judge, dates of 19/6/2016, 6/10/16, 25/4/2016, a time of 10 months lapsed only for the purpose of framing issues and the same suit was ultimately resolved by mediation. In another suit bearing number 560/13 of 1st Senior Assistant Judge Court, the dates of 5/11/2014, 27/1/2015, 23/3/2015, 11/5/15, 14/7/2015, 5/10/2015 were gone only for framing issues. Thus, it is evident that the time frame of 15 days is vehemently violated in practice. Thus the loopholes that appears while reviewing the individual case files are
- Issues are not framed in due time.
- The issues are frequently amended at the time of writing judgment.
- In no cases, the judges themselves write down the issues, rather the court staffs do the same.

4.5.2 Steps under section 30 of CPC

The stage of discovery, inspection, interrogatories as provided under section 30 of CPC is an essential provision for enabling a party to require information from his adversary for the purpose of maintaining his own case or to destroy the case of the adversary. By way of proper utilization of this provision, the trial may be shortened and save time and expenses.[451]

[451] Md. Akhtaruzzaman, *Case Management and court Administration in Bangladesh*, (Advocate RaziaKhatun 2013)P 98.

(a) Legal provisions

The Court may either of its own motion or on the application of any party make such orders, as may be necessary order any party to answer an interrogatory, admission of documents and facts, discovery, inspection, production of documents and other material objects producible as evidence.[452]

- The law, as mentioned above, is elaborated in the following provisions:
  Discovery and Inspection (Order XI)
  Admissions (Order XII)
  Production, impounding and return documents(Order XIII)
  Commissions(Order XXVI)
  Preservation, Inspection of the subject matter(Order XXXIX) Rule 7
- The time limit for discovery, inspection, interrogatories and admission, the time limit is 14 days. Report on local investigation shall have to be submitted within three months.[453]

(b) Empirical findings on procedural loopholes

During scrutiny of the records in Dhaka Judge Court, it appears that invariably in all the litigations these provisions are practiced by the parties and lawyers very casually and negligently.

- In most of the cases, after framing of the issues, a date is fixed for taking steps under section 30. But both the parties are by passing the provision by taking no steps at this stage.
- In almost all the suits which have been scrutinized, it seems that the defendants raise a plea in their written statement about the defect of parties, misjoinder and non-joinder of parties, limitation, vague description of the schedule of the property, barred by any other law, lack of cause of action and so on. Thus, at this stage of the civil litigation, parties especially the plaintiffs may put interrogatories for the purpose of elucidating the defense pleas put forward by the defendants. It can lead to shortening the subsequent procedure, and the parties can concentrate on the real matter of dispute. But after individual case file studies, not a single case showed the exercise of this provision of law.

[452]The Code of Civil Procedure, 1908, s 30.
[453]Ibid, Order 26 Rule 9 and 14.

- At this stage of the suits, the plaintiffs frequently seek an adjournment in consecutive dates, causing a delay in the disposal of suits.
- In the case number 532/14 of 1st Senior Assistant Judge Court, the plaintiff prayed for a declaration of title in the property and declared the city *khatian* to be wrong, baseless and not binding upon the plaintiff. In the written statement, the defendant raised the issue relating to a defect of parties. At the stage of steps under section 30, the plaintiffs could have put the interrogatory to this effect, and by answering the question, the points of disputes could have been minimized. But, the defendant did not do so and filed a petition for amendment of plaint for adding some persons as defendants at the peremptory stage. Consequently, the entire procedure ultimately prolonged.
- The same situation happened in the suit bearing number 1089/12 of 1st Joint District Judge Court. It was a suit for compensation for providing insufficient car parking space mentioned in the schedule. RAJUK was one of the parties in the suit, and no notice was served upon RAJUK before the institution of the suit. On the ground, as mentioned above, the defendants sought for rejection of the plaint. However, this issue could have been resolved at the stage of steps under section 30 by way of putting interrogatories to the plaintiff as to why the plaintiffs have not served notice upon RAJUK.
- On perusal of the record bearing no 181/13 of Nawabganj Senior Assistant Judge Court, The suit was registered on the date of 21/8/2006, the defendant at the concluding stage, i,e, further hearing stage of the proceeding sought for the local investigation to ascertain whether the concerned RS *khatian* relates to the disputed latest *khatian*. The application was allowed, and the advocate commissioner submitted the local investigation report after six months which seriously hampered the trial procedure at the later stage. This problem could have been easily settled if the parties took a proper interest in this matter at the stage of steps under section 30.

The empirical findings in this regards are as follows:

- None of the parties or their lawyers utilizes this stage by putting interrogatories.[454]
- At the later stage of the suits, the parties to the suits seek amendment, the appointment

[454]532/14 of 1st Senior Assistant Judge Court.

of advocate commissioner, which ultimately hinders the suit's quick disposal.[455]

4.5.3. Settling date for peremptory hearing

At this stage of settling a date for the peremptory hearing, the parties are required to take all necessary steps for final hearing during the interval between 'settling date' and date of the final hearing.

(a) Legal provisions:

The relevant provision as regards this stage is as follows;

- After issues are framed, the court shall fix a date for the final hearing of the suit within one hundred and twenty days thereof.[456]
- Not more than 100 cases may be kept in PH stage.[457]
- The presiding judge should himself decide several suits for peremptory hearing from the list of the suits kept in the 'settling date' stage for peremptory hearing.[458]

(b) Empirical findings on procedural loopholes

The stage of 'settling date' is targeted for accommodating the suit for a peremptory hearing so that the Court can keep the suits for peremptory hearing not more than 100 in number.

- On perusal of the records, it appears that at the date of SD, the suit is shifted to the peremptory hearing stage without any further delay. However, it also seems that a considerable number of litigations are piled up at the next peremptory hearing stage, which exceeds the maximum limit of 100 cases at the peremptory hearing stage.

4.5.4 Peremptory hearing

After the parties have taken all steps necessary to prepare a suit for hearing, the court has to fix a date for its peremptory hearing. Peremptory hearing should be regarded as the essential trial stage as it covers the recording of evidence in a suit. Recording of evidence includes determination of the admissibility of the evidence and exhibiting the documents.[459]

(a) Legal provisions

The relevant provisions as regards the smooth continuance of peremptory hearing are as follows:

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[455] 1089/12 of 1st Joint District Judge Court; 181/13 of Nawabganj Senior Assistant Judge Court.
[456] The Code of Civil Procedure, 1908, Order XIV Rule 8.
[457] Ibid, Order 18 Rule 20.
[458] Civil Rules and Orders (Volume 1) Rule 24; Civil Rules Instruction Manual, Paragraph 18(6).
[459] Justice M. H. Haque, *Trial of Civil Suits and Criminal Cases* (Universal Publishers2011) 68.

> Notwithstanding anything contained in the Code, the Court shall not grant any adjournment at the peremptory hearing stage and thereafter in a suit at the instance of either party to the suit:
>
> Provided that if for ends of justice any adjournment is granted to the party under this sub-rule, the court shall direct the party to pay a cost of not less than two hundred takas and not more than 1 thousand taka to other party, within the time specified by it, non-compliance with which, by the plaintiff shall render the suit liable to be dismissed and by the defendant shall render the suit liable to be disposed of ex parte. However, the Court shall not grant more than three adjournments to a party even with a cost under the above proviso.[460]

A suit dismissed or disposed of ex parte shall not be revived for hearing unless the party upon whose instance the suit was dismissed or disposed of ex parte makes within thirty days an application for revival together with a cost of taka two thousand.[461]

The presiding judges should personally attend to the fixing of dates for the peremptory hearing. The number of the cases fixed for each day of the peremptory hearing and other purposes should be restricted to such a number. After making allowance for unavoidable postponements, the Court may reasonably expect to be in a position to deal with.[462]

On the date finally fixed for the hearing of the suit, the trial shall begin, and the evidence of witnesses shall be recorded from day to day until the trial is completed. Under exceptional circumstances, an adjournment may be given after recording reasons necessitating such adjournment.[463]

(b) Empirical findings on procedural loopholes

A detailed study of individual case files demonstrates that parties make frequent time petition during the peremptory hearing stage and cause unnecessary delay.

Case Study-1

In suit bearing number 228/11 of 1st Senior Assistant Judge Court, the suit was instituted on 10/5/2011 for a declaration of title in the suit land. On the date of 15.9.2014, the date was

[460]The Code of Civil Procedure, 1908, Order XVII Rule 1 (4).
[461] Ibid, Order XVII Rule 1 (7).
[462]Civil Rules and Order (Volume 1).Rule 124.
[463] Ibid, Order 125.

fixed for the peremptory hearing. The subsequent dates of 15/9/2014, 30/11/2014, 10/3/2015, 6/5/2015, 12/7/2015, 14/9/2015, 4/11/2015 lapsed, and in every date, there was a prayer for adjournment by either party of the suit. On the date of 24/1/2016, the hearing started by taking the evidence of PW1 on the side of the plaintiff. On the date of 20/3/2016 further hearing proceeded. On the next fixed date of 5/4/2016, the plaintiff filed a petition for amendment of the plaint to add the secretary of housing ministry as the defendant of the suit and copy was served upon the existing defendants. The court allowed the petition, and on the date of 9/8/2016, the court ordered for issuing summons to the newly added defendants and the next date of 30/10/2016 was fixed for the return of summons. On such date, the summons was duly returned, and the date of 14/3/2016 was fixed for submission of a written statement by the newly added defendant. On that date, the recently added defendant 8 did not submit the written statement, and the date of 28/4/2017 was again fixed for the further hearing. On the subsequent dates like 28/4/2017 and 21/5/2017, the court was pre-occupied with the hearing of other suits. On 12/7/2017, the plaintiff filed a time-petition, and the same was allowed accordingly. On the dates of 13/8/2017, 9/10/2017, 28/11/2017, 26/2/2017, the evidence of both the sides was recorded, and the court heard argument on the date of 1/4/2018.

Thus, it is apparent from the proceeding of the suit as mentioned above that after the suit reached the stage of the peremptory hearing, the parties sought time petition frequently. The court allowed those in a very lenient manner without imposing any cost on either party. In several dates, the court was itself busy with other litigations. The most devastating part of the proceeding was that due to the allowance of the amendment petition, the suit went back to the stage of issue of process, the return of service and submission of the written statement. Consequently, a period of 3 and half years was gone due to this kind of irregularity which tantamount to the gross violation of existing laws relating to peremptory hearing proceedings.

Case study-2

Similarly, in the suit bearing no 511/10 of 1st Joint District Judge Court, the plaintiff sought for declaration that the *heba* deed is false, frivolous and not binding upon the plaintiff. The short fact of the case was that the plaintiff and the defendants were husband and wife, and the husband bought the suit land in the name of the wife. The plaintiff claimed that the defendant handed over the property to the wife by a heba deed. However, the defendant rejected the contention and contended that he never transferred the property through a gift to the wife.

Thus, the point of dispute in the suit appears to be small and trifle in the sense that the only question is to determine the genuineness of the concerned *heba* deed. In this suit, the peremptory hearing stage was started on 14/9/2011 and a period of 4 years lapsed only for the proceeding of peremptory hearing. In the meantime, the volume was called for examining the genuineness of the deeds, and lastly, the date of 30/5/2017 was fixed for pronouncement of judgment. In this situation, it seems that there is total noncompliance with the provisions relating to the proceeding of peremptory hearing.

Case study-3

In a suit for partition bearing number 3505/08, the same was instituted in the 1st Senior Assistant Judge Court. There were several sets of defendants in the suit. The suit reached at the stage of peremptory hearing on the date of 19/4/2011 and the hearing stage was ended on 26/7/2017. In the period of more than seven years, the court allowed time petitions of parties on several dates, sometimes with cost and sometimes without cost. In some dates, the court was pre-occupied with other suits. There was a petition for amendments for substitution of parties on the death etc. In total, there were 60 dates for the peremptory hearing. Later on the date of 30/1/2018, the judgment was pronounced dismissing the suit on the ground that the CS and SA *khatian* were not recorded in the name of the plaintiffs.

Case study-4

In a suit under *Orpito Shompotti Prottorpon* Tribunal of Nawabganj Senior Assistant Judge Court bearing number 868/13, the plaintiff sought for releasing the property from vested property list and give back the property to the plaintiff. The government defendant contested the suit. During the trial, 21 dates of PH and FH were wasted, and a period of two years was gone by for this purpose. The plaintiff failed to submit the required documents, and the suit was dismissed. It is unfortunate and frustrating the law's spirit to waste so many dates for such a simple suit.

4.5.5. Argument hearing and judgment: Legal provisions and empirical findings

CPC or CRO provides for no specific provision for hearing the argument and to fix a date for it and to hear and finish it within a particular time period. After the case has been heard, the judgment is pronounced at once or within seven days.[464]

[464] Code of Civil Procedure 1908, Order 20 rule 1.

As per the Civil Rules Instruction Manual, arguments should be heard on the evidence given by both the parties as soon as the evidence has been closed, i.e., immediately after closure of evidence.[465]However, on scrutiny of the records, there are gaps and lapses of time at the stage of both argument and judicial pronouncement. Thus the empirical findings can be shown in the summarized way:

- The parties get frequent adjournment from the courts, causing delayed disposal of suits.[466]
- At the peremptory hearing stage, several interlocutory matters.[467]

4.5.6. Interlocutory matters in civil proceedings: Legal provisions and empirical findings

Interlocutory matters in relation to a civil proceeding are inevitable for proper adjudication of the matter in dispute. For example, applications for a temporary injunction, amendment of the pleadings[468], appointment of a receiver[469], seeking expert opinion[470], attachment before judgment, [471]the appointment of advocate commissioner for local investigation[472] are laid down in different provisions of the Code of Civil Procedure. These interlocutory matters must be dealt with by the court to arrive at an accurate decision in particular litigations. However, from a perusal of different records of the courts of Dhaka Judge Court, it appears that it is a widespread practice that parties submit interlocutory petitions very frequently causing a delay which actually prolongs disposal of the suit. In many occasions, those petitions are filed unnecessarily at the belated stage of the suit only for the purpose of harassing the other side causing wastage of time leading to a huge backlog of cases in the courts.

Case study -1

In a suit bearing number 1089/12 of Ist Joint District Judge Court, the plaintiff sought compensation as the defendants have failed to comply with the terms of the contract while selling the property. The suit was instituted on the date of 14/10/2012. The defendants appeared before the court and contested the suit accordingly. At the stage of the further

[465]Civil Courts Instruction Manual Chapter XIII Rule 28.
[466] Civil Suit no 511/10 of 1st Joint District Judge Court, Dhaka; Civil Suit no 3505/08 of 1st Senior Assistant Judge Court, Dhaka; Civil Suit no 868/13 of Senior Assistant Judge Nawabganj Court, Dhaka.
[467]Civil Suit no 228/11of 1st Senior Assistant Judge Court, Dhaka.
[468] The Code of Civil Procedure, 1908, Order 6 Rule 17.
[469]Ibid, Order 40 Rule 1.
[470]The Evidence Act, 1872, s 45.
[471]The Code of Civil Procedure, 1908, Order 38 Rule 5-13.
[472]Ibid, Order 26 Rule 9 and order 39 Rule 7.

hearing, the defendants filed a suit for rejection of the plaint on the date of 13/8/2015 on the ground that in order to file a suit against RAJUK, the RAJUK must be given notice earlier to the institution of the suit. The plaintiff filed a written objection, and ultimately the petition was rejected. From the ground mentioned in the petition, it appears that the petition could be filed at the initial stage of the suit but with a mala fide intention, the petition was filed at the belated stage. Against the order, the defendant preferred a civil revision to the high court division, and the suit stayed for another one and a half years. On the date of 20/4/2017, the stay order was vacated, and the parties once again appeared before the court, and the suit was ultimately disposed of through *solenama* petition.

Case study - 2

In a suit bearing number 181/13 of *Nawabganj* Senior Assistant Judge Court, the plaintiff sought a declaration of title and the concerned RS *khatian* to be wrong and not binding upon the plaintiff. The defendant appeared before the court contested the suit. At the stage of the further hearing, on the date of 22/4/2015, the plaintiff filed a petition for appointing advocate commissioner. The court imposed a cost upon the plaintiffs as a condition for hearing the petition. Then on subsequent dates, the plaintiff submitted the cost, and the petition was allowed upon hearing both the parties. Later on, the plaintiff filed the advocate commissioner's fee after failing different dates and writ was issued to the advocate commissioner. The advocate commissioner did not submit the report on the fixed dates of 8/7/2015, 10/9/2015, 8/10/2015, 15/10/2015, 16/10/2015. Lastly, on 16/10/2015, the advocate commissioner submitted the report. On the subsequent dates of 19/1/2016, 16/3/2016, 7/4/2016, 3/5/2016, 29/5/2016, 21/6/2016, 24/7/2016, 4/9/2016, 19/10/2016, 28/1/2017, 9/3/2017 was fixed for evidence by the advocate commissioner, but the advocate commissioner did not appear before the court. After recording evidence of the advocate commissioner, the Court heard argument on the date of 28/1/2018. Thus, it took more than two years in the suit for disposing of the matter of advocate commissioner.

Case study - 3

In a suit bearing number 336/07 of Senior Assistant Judge Court, Keraniganj, and the plaintiff sought to relieve partition. In this suit, at different stages, both the parties filed different kinds of interlocutory petitions. For example, the plaintiff filed a transfer of miscellaneous case on the date of 21/4/21011, and consequently, all the proceedings were stopped till the date of 21/6/2012. Later on, the defendant filed a petition for a simultaneous hearing of 4 suits of the

same nature as the parties, facts and suit land are similar to those suits. Such a petition was allowed. Till to date, the further hearing of the suit is still continuing mainly due to the interlocutory petitions hindering the smooth progress of the particular suit.

4.6. Mediation at the stage of appeal

As mentioned in the introduction, mediation under CPC can be conducted in the pre-trial stage at the stage of appeal. According to section 89C of CPC, an Appellate Court may mediate in an appeal or refer the appeal for mediation in order to settle the dispute or disputes in that appeal through mediation. Such provision applies if the appeal is an appeal from original decree under Order XLI. It is between the same parties which contested in the original suit or between parties who have been substituted for the original contesting parties.[473] For conducting mediation at the appellate stage, the Appellate Court shall, as far as possible, follow the provisions of mediation as contained in section 89A with necessary changes (mutatis mutandis) as appropriate[474]It has already been shown in Chapter 3, section 3.7. that no case has actually been attempted for mediation under section 89C. Therefore, the study of individual case files does not appear to be necessary for arriving at any decision in this regard.

4.7 Conclusion

The empirical finding from individual case reviews reveals that legal mechanisms as laid down in CPC are not sufficient to mitigate the existing case backlog under CPC. The provisions as regards the mediation mechanism under CPC suffers from non-exercise in the courts. Consequently, this machinery for resolving disputes is not working up to a satisfactory level. In Chapter 3, we observed the ineffective practice of mediation in civil courts and tried to explore its bottlenecks through analysis of in-depth case studies in this chapter. The next chapter has deep feed this issue by analyzing key informants' responses, including judges, lawyers, and clients in civil disputes under CPC, and try to explore how these obstacles can be mitigated through effective legal and institutional changes.

[473] The Code of Civil Procedure 1908, s. 89C(1)
[474] Ibid, s 89A(2)

CHAPTER 5

AN EMPIRICAL ANALYSIS ON THE EFFECTIVENESS OF MEDIATION IN CIVIL CASES UNDER CPC: JUDGES' AND LAWYERS' PERSPECTIVES

5.1 Introduction

In the former chapters, an effort has been made to evaluate the functioning of the justice delivery system in the civil disputes existing in different courts in Bangladesh. In the first chapter, it has been discussed that laws relating to ADR are incorporated in order to accelerate the disposal of civil ligations in Bangladesh. Amongst them, the scope and nature of the provision of section 89A of the *Code of Civil Procedure, 1908* which deals with civil suits' mediation mechanism has also been elaborately discussed. However, the empirical evaluation of the court registry data, as shown in chapter 3 has given an idea about the less significant impact of mediation in reducing the backlog of cases in civil courts. The Tables 3.10 to 3.26 in chapter 3 reveal that the low rate of disposal of cases through mediation resulting in the increase of backlog of suits in all the courts irrespective of their pecuniary and geographical jurisdictions. Later on, an effort was made in chapter 4 to explore the loopholes in legal provisions and practices of court-connected mediation on the basis of analysis through individual case studies. In that chapter, different stages of civil suits in the light of relevant provisions are elaborately discussed. Simultaneously, on the basis of not less than 30 individual case studies, an effort has been made to explain the procedural loopholes that are widely prevalent in each of those stages. More particularly, in respect of mediation stage, the in-depth study of individual cases has shown that despite the suits being fixed for mediation, neither the parties apply for availing the scope of mediation, nor the judges and lawyers take any initiative to settle the case through mediation. The study in chapter 4 also shows that in several instances, parties are making *solenama* outside the court mostly after a series of delay, and the same are shown as mediation under section89A.

Thus, the chapter has also reiterated the low rate of effective application of mediation in civil disputes and pinpointing the reason lying behind it. The findings detailed in the chapter clearly reveal the fact of meager application of mediation mechanism. So, this machinery is not working up to a satisfactory level for disposal of the civil litigations. The present chapter attempts to find out the potentiality of mediation in reducing case backlogs, causes of low application of mediation and possible ways to eradicate the situation based on responses of different stakeholders, particularly judges and lawyers. Those two groups who can more

precisely be called members of bar and bench are selected as the respondents, and a total number of 80 judges and lawyers of Dhaka court have shown their opinion in respect of the matter mentioned above. Apart from this, a comprehensive field study has been conducted on 30 judge-mediators, who have been acting as district legal aid officers. They have categorically identified the reasons behind ineffective court-connected mediation in civil suits and achievable solutions in this field.

In Chapter 6, an attempt has been made to capture responses from the litigants and evaluate their opinion in the background of the existing situation that has been already disclosed in the previous chapters. The objective of the present chapter is to elicit answers from the interviewees, namely judges and lawyers for the purpose of gathering reliable and valid data in connection to the research mentioned above topic.[475]

5.2 Methodology revisited

Though the methodological outline is provided in Chapter 1[476], each of the empirical chapters includes a detailed methodology while collecting empirical data used particularly in that chapter. Therefore, the following section discusses the methodological details such as nature or respondents interviewed, number of judges and lawyers interviewer, etc.

5.2.1 Interview of Judges and lawyers to share their perspectives

The very purpose of this research as has been narrated in chapter 1 is to explore the role of legal professionals (lawyers and judges) on the performance of mediation under CPC and identify existing legal and institutional loopholes that cause poor performance of mediation. [477] One of the primary methodologies of the research is to analyze the role of legal professionals played in this regard and for such reason the judges and lawyers have been chosen, to interview about their experience and understanding about the performance of mediation. [478]

One should be very careful in selecting the respondents to gather actual and comprehensive data.[479] From the reading of the very provision of section 89A, it appears that the existing law

[475]H.J.M Boukema, Judging towards a Rational Judicial Process, W.E.J. TjeenkWillink, Zwolle-Holland (1980) P 98.
[476]Detailed in topic no 1.6 of chapter.
[477] This matter is elaborated under the sub-title 'objective of the research' of chapter 1.
[478] This matter has been elaborated under the sub-title 'Methodology' of chapter 1.
[479]Abdullah Al Faruque, *Essentials of Legal Research* (Palal Prokashoni, 2009) 107.

imposes the responsibility of conducting in court mediation upon the sitting judge himself, District Legal Aid Officer, respective pleaders of the parties or the lawyer mediators appointed by the respective pleaders of the parties(panel prepared by District Judge).[480] Thus, existing laws have discussed only procedural aspects of ADR, the practical ideas on how to conduct such a process largely dependent on the expertise of practitioners.[481] In the light of their being closely associated with the process of mediation, a comprehensive survey was launched upon the judges and lawyers as per research design.

5.2.2 Semi-structured and un-structured questionnaire to explore subjective views of respondents

The questionnaires prepared for the respondents were structured, semi-structured and unstructured. Structured questions were put forward to the respondents to get definite opinions in respect of a particular matter. Semi-structured questionnaires were formulated to get all the information the interviewees are willing to provide but not included in options.[482]The type of interview was focused as an extensive effort to obtain the experience, attitudes and opinion regarding different aspects of court-connected mediation of civil disputes from the persons known to have been involved in a particular concrete situation.[483]

The questions put forward to them are categorized into three parts. Firstly, certain types of questions were dealt with the prospect of mediation compared to the trial of civil litigations and the current application of mediation in the suits. Secondly, a group of questions was formulated to dig out the reasons behind poor performance of mediation. Third groups of questions were prepared for finding out the pathway for developing legal and institutional reform to formulate the practice of mediation in its firm footing. Information was enumerated in the light of the knowledge, experience and attitude from the respondents such as lawyer and judge who act as the prime stakeholders for conducting the procedure of civil litigations.

[480] As per section 89 A, the Court shall by adjourning hearing mediate in order to settle the dispute or disputes in the suit, or refer the dispute or disputes in the suit to the engaged pleaders of the parties or to the District Legal Aid Officer'...or to a mediator from the panel as may be prepared by the District Judge under section (10) for undertaking efforts for settlement through mediation'.

[481]Jamila A Chowdhury, *ADR Theories and Practices, A Glimpse On Access to Justice and ADR in Bangladesh* (London College of Legal Studies South 2013) ii.

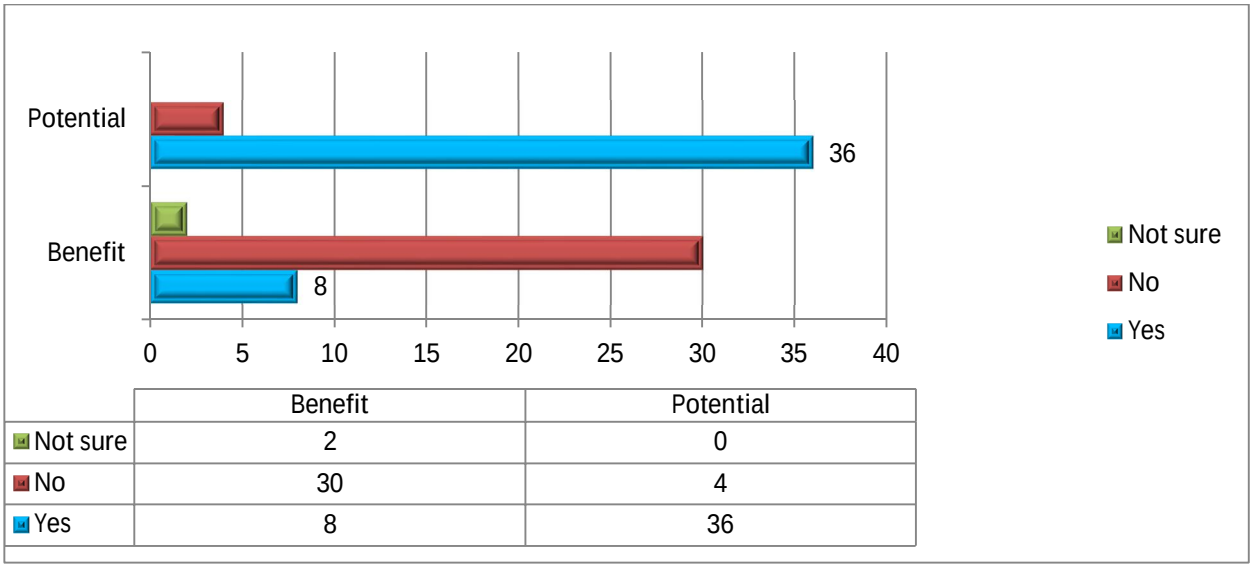
[482]Martin P. Golding, *Legal Reasoning*, (Alfred A. Knoph, Inc, New York, 1984) 1.

[483] Brian Bix, *Jurisprudence: Theory and Context*, (2nd edn , Sweet and Maxwell 1999) 133.

5.3 Judges' perception on the effectiveness of mediation under 89A of CPC

Before asking the question of impediments of effective practice of mediation, 40 judges of civil courts were asked about the current state of application of mediation in their respective courts. During this study, the question was *'Do you think the mediation under 89A as dispute resolution mechanism has brought any benefit in reducing the case backlogs in your court?'*[484] As shown in Figure 5.1 below, among the judges, 30 of them said that a very negligible amount of cases are solved through mediation. Therefore, this mechanism has not brought any benefit in reducing the case backlog in their courts. They have mentioned the reason for no actual application of the provision of section 89Ain civil litigations. They have further stated that judges find no time to sit for mediation and the lawyers and parties are also not willing to initiate the same. A number of eight judges have said that it has brought some sort of benefit in their courts as they tried to settle the same by their own expertise and initiative, but eventually, the effort was ended with failure in the maximum number of cases. Only two have replied that they are not sure about whether the mediation has brought any benefit in reducing the case backlog in the civil court.

Figure 5.1: Benefits and Potentials of formal mediation under civil courts



	Benefit	Potential
Not sure	2	0
No	30	4
Yes	8	36

5.4. Judges' perception on prospects and problems of mediation

As demonstrated through the analysis of empirical data, judges in civil courts interviewed under this research also shared their shocking experience about the ineffective operation of mediation in civil courts. However, the purpose of this research was to surface out the

[484] See appendix C(i).

potentials of mediation and identifies barriers that hinder the successful operation of mediation in civil courts. Therefore, judges of civil court interviewed in this process were asked about the prospect of mediation in resolving civil disputes and specific barriers that hinder the current progress of mediation in the civil courts of Bangladesh.

5.4.1 Judges' perception on the prospects of mediation in civil suits

In its current state, the performance of mediation in civil courts showed dismal performance compared to the worldwide success of mediation discussed in Chapter one. Therefore, concentrating further on the development of mediation is justified only if the stakeholders are confident about the prospects of mediation in civil courts. Thus, the next question asked to the judges was *'Do you think section 89A of CPC or mediation has the potential to reduce case backlog in civil courts?'*[485]

Figure 5.1 above demonstrates that 36 out of 40 judges have replied affirmatively. The judges said that in a good number of cases like partition suit, declaration suit, cancellation of deed etc. where the parties are willing to settle the disputes among themselves, the mechanism of mediation has the potentiality to reduce the backlog. Only four judges replied that under the existing legal and infrastructural framework, the mechanism of mediation has no potentiality to reduce the case backlog. Therefore, though at present mediation does not have enough force to ensure quick resolution of cases under CPC, most civil court judges expressed their confidence in the potential of mediation to reduce the backlog in civil courts.

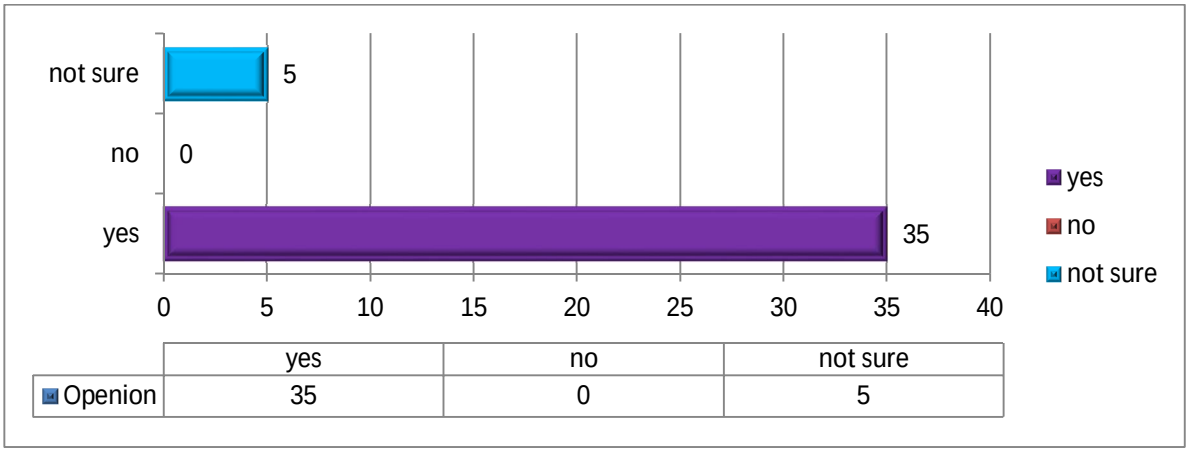
Another question about the prospect of mediation was asked to the respondents, and the question was:'*Do you think by way of resolving cases through mediation, parties may get better justice than that of a trial?'*[486] 35 judges have answered that the disposal of the litigation through mediation indeed brings better justice to the litigants than that from the trial. To justify the answer, the judges have stated that when a suit is disposed of through mediation, it saves time and money of the litigants. On the other hand, the litigants get a finality of adjudication by arriving at a final settlement of the dispute, which is costly and time-consuming. On the other hand, five judges have replied that they are not sure about whether in all cases the parties get better justice by way of settling through mediation as the terms and conditions of the settlement may not be fair to both the parties. One gave an

[485] See appendix C(ii).

[486] See appendix C(i).

example that a party to the suit may not be solvent enough to run the suit and therefore, they may agree to the term of forgoing their legitimate right instead of receiving a sum of money.

Figure 5.2: Judges' perception on whether mediation can ensure fair justice for litigants



After analyzing the Table above, the response of the judges reveals that except for some exceptions, provision of mediation has the potentiality to reduce case backlog in the courts but due to some reasons and situations, the mechanism is failing to achieve the desired efficiency. To explore the reason for less effectiveness of mediation, a set of questions that are given below were asked to the judge respondents.

5.4.2 Judges' perception on the problems in practicing mediation under CPC

In the earlier set of questions, almost all the judge respondents replied positively about the potentiality of mediation. Still, they stated in respect of less efficiency of the mediation mechanism in the given situation. Consequently, the reasons for the incompetence of mediation to the required level deserve proper investigation for the research purpose.

The first question that was asked to the judge respondents was *'According to your opinion, which of the following group may have the highest reservation on the success of mediation in civil courts?'*[487] The options were judges, lawyers, legal aid officers, lawyers' assistants and court clerks. In reply, 35 judges answered that lawyers and their assistants create the highest reservation for mediation's effective result. Whereas, five judges answered that due to the shortage of time, the judges have difficulties taking the initiative for a successful mediation. The response can be shown in the diagram given below

[487] See appendix C(i).

From their responses, it appears that lawyers have the highest reservation in materializing the effective utilization of mediation in civil litigations. In many cases, the judges also do not take proper steps to initiate mediation procedure in the courts.

A supplementary question was also asked, and the question was '*which of the following are causing major hindrances in the effective application of mediation in civil courts?'*[488] Survey data reveals that a number of 25 judges ranked the low motivation of lawyers as the most vital hindrance for effective mediation. Whereas, judge respondents selected the parties' lack of interest as the second vital hindrance behind theineffective application of court-connected mediation. The rest of the 15 judges stated that parties' disinterest is the most prominent reason behind inefficiency in the court-connected mediation. Those 15 judges said that lawyers' low motivation is the second important reason for lack of success in mediation. While selecting the third significantbarrier of ineffective mediation, 30 judges marked inadequate training of mediators and ten judges selected easy approval of time petition that may encourage delay.

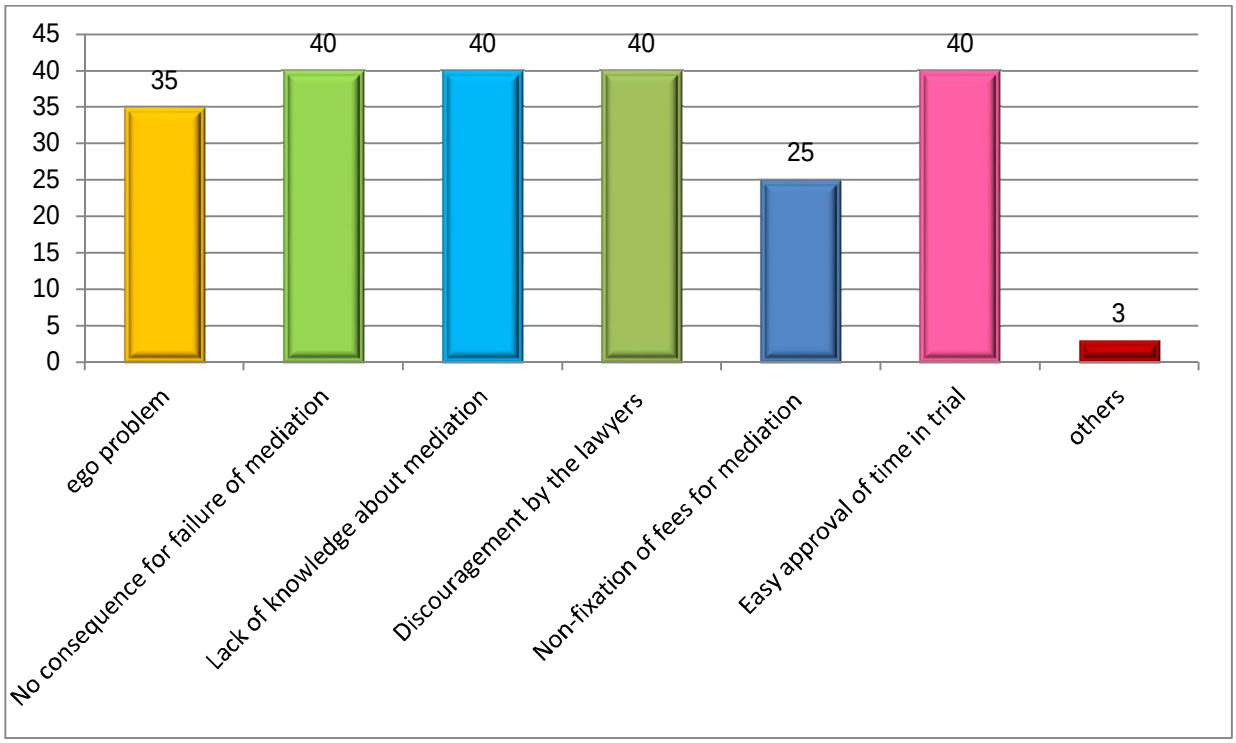
However, the majority of judges consider inadequacy of training to the mediators as the third important reason for non-application of mediation. In the given situation, it becomes apparent that due to non-co-operation from the litigants and lawyers, the judges do not find any favourable state to attempt mediation. Even giving the benefit of disposal for mediation by the Hight Court Division circular, the judges are not motivated enough for conducting themediation session.[489]The judges' response also depicts that immense pressure of trial occupies their mental state, and therefore, they are yet to manage mood and time for sitting to meditate.[490]Therefore, judges' low motivation and easy approval of time petition are also taken as an important reason in this respect.

[488] See appendix C(i).

[489] The honorable High Court Division issued circulars on 23.06.2003 vide its Memo No. 59(K) wRand 59(L) wR. This provision has been given into effect from the 1st of July, 2003. Through this circular, the High Court Division has given benefit of double disposal in case of successful mediation and single disposal in case of unsuccessful mediation.

[490] In the discussion of point no 5.4.1, the judges provided this response to the question, 'Do you think the mediation under 89A as dispute resolution mechanism has brought any benefit in reducing the case backlogs in your court?'

Figure 5.3: Judges' opinion on reasons for ineffective mediation in civil courts



As discussed above, the parties' disinterest is one of the main reasons for the non-application of mediation. A question was asked to the respondents, which are as: '*What do you think is the reason behind less interest of the parties in resolving their disputes through mediation?*'[491]The options given to them were ego problem, no-consequence of the failure of mediation, lack of knowledge about mediation, discouragement by lawyers, and non-fixation of fees for mediators and others. Twenty-five judges stated that all the five reasons mentioned above jointly create the hindrance for the failure of the mediation process.

As shown in Figure 5.3 above, among rest of the fifteen judges, ten judges marked ego problem, no consequence for mediation, lack of knowledge and discouragement of the lawyers as the reason for the disappointing situation of mediation. The remaining five judges replied that no-consequence of the failure of mediation, lack of knowledge for mediation and discouragement by the lawyers as the foremost reasons. What is significant in the above responses is that all the 40 judges commonly specified lack of knowledge and discouragement of lawyers as reasons for parties not to choose mediation.

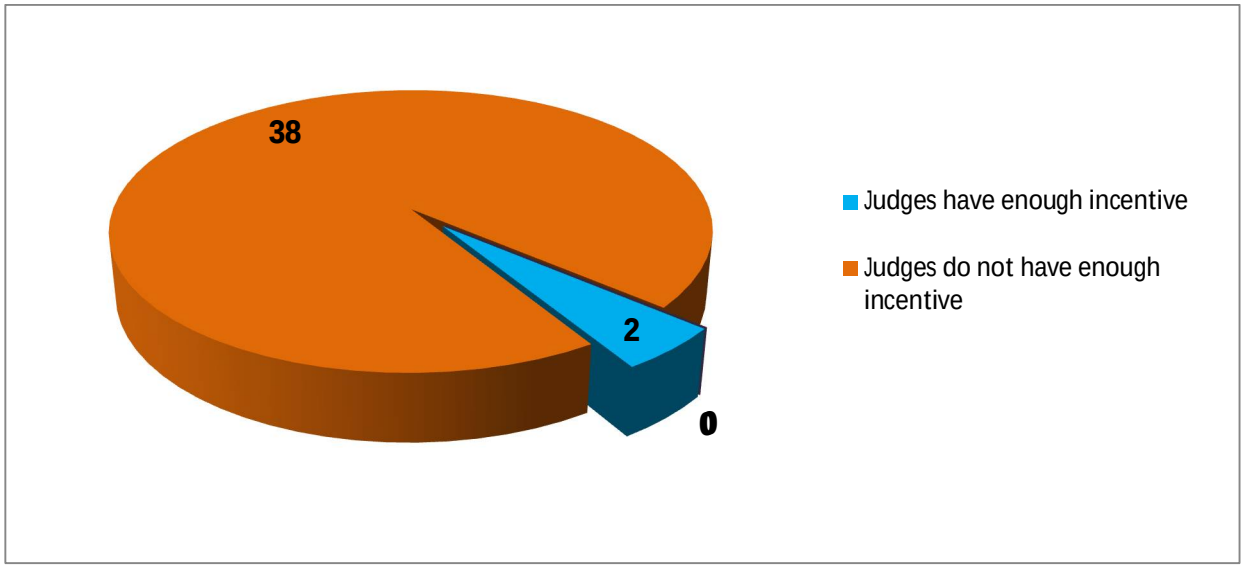
Another co-relating question that was asked to the respondents was: '*Do you think the delay in other procedural stages in trials may encourage some parties to make the protracted delay*

[491] See Appendix C(i).

through trial rather than quick resolution through mediation?'[492]The survey reveals that all 40 judges have answered in the affirmative. Thus, it is apparent that because of the chance of abusing the procedural aspects of the trial, the parties do not feel interested in taking resort to mediation.

The next question that was asked to the judge respondents was, '*Under the existing system, do you think judges have sufficient incentive to resolve cases through mediation instead of trial?'*[493] 38 judges out of 40 asserted that the judges do not have enough incentive to resolve the cases through mediation. Only two judges stated that there is a rule that a successful mediation amounts to disposal of 2 suits through trial. If the authorities take strict monitoring in this regard to acknowledge this aspect, the judges will be able to enjoy the benefit of successful mediation.

Figure 5.4: Judges' perception on whether they have sufficient incentive to promote mediation



Another supplementary question was: '*Do you think that judges are trained enough on techniques of mediation to resolve the suits through mediation?'*[494] As per the survey result, all the 40 judges are of the opinion that judges are not competent enough to deal with this matter. The response can be shown in Table 5.1 below:

[492] See appendix C(i).
[493] See appendix C(i).
[494] See Appendix C(i).

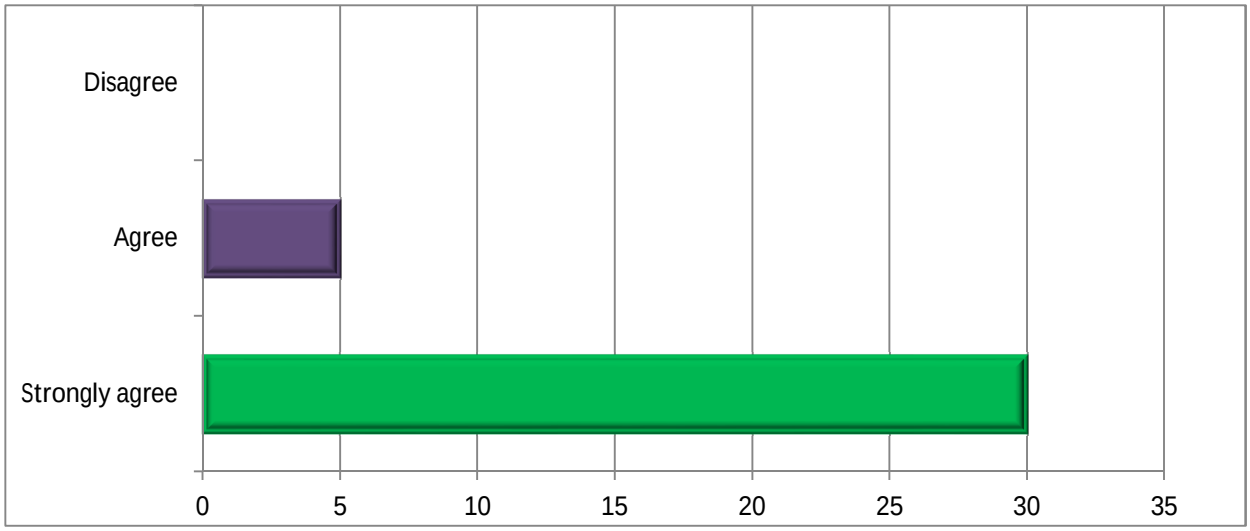
Table 5.1: Judges' perception on their current incentive to conduct mediation

Question	**Under the existing system, do you think judges have sufficient incentive to resolve cases through mediation instead of trial?'**
Number of Judges replied in the affirmative	2
Number of judges replied in the negative	38

Thus it becomes evident from the above Table that incompetence, lack of training, and lack of incentive of judges under the current system could be two prominent reasons for the failure of the mediation mechanism**.**

To explore the physical aspect for the less effective performance of mediation, the question that was asked to the judges was: *'Do you agree that the courts do not have enough logistic strength to provide effective service of mediation?'*[495] In reply, 35 judges replied that they strongly agree with the proposition that the court does not have enough logistic strength in proper environment and infrastructure for effective mediation. The response can be shown in Figure 5.5 below:

Figure 5.5: Judges' perception about lack of court logistic to conduct mediation



In light of the judges' opinion mentioned above, it becomes evident that the following are the main reasons for ineffective mediation or low resolution of civil litigation through mediation under CPC were identified:

[495] See appendix C(i).

1) *Low motivation and discouragement of the lawyers*
2) *Disinterest of the parties*
3) *Inadequate training given to the mediators*
4) *Scope of taking unnecessary time discourage mediation*
5) *Low motivation of judges due to lack of incentive.*
6) *Absence of rule about the procedure of mediation.*
7) *Lack of logistic support in the courts.*

After exploring the problem stated above, the survey of the next segment elaborates the way outs for effective mediation mechanism.

5.4.3 District Legal Aid Officer (DLAO) Judge-mediators' perception as to the effectiveness of mediation under 89A of CPC

While discussing the different options improving infrastructural facilities and in this connection, about 30 judge-mediators serving as legal aid officers (DLAO Judge Mediators) stated that developing the legal aid office was a proper way to improve mediation mechanism. Moreover, 27 out of 40 judges in civil courts have suggested improving the legal aid office as one of the way outs for improving the situation. In this connection, the existing district legal aid office's existing features and the possible methods for developing a legal aid office for effective mediation become very relevant. To collect the actual pictures of the legal aid office, 30 legal aid officers were asked some questions. The district legal aid officers (DLAO Judge-mediators) are categorized as mediation judge, and a separate set of questionnaires were made to ask them those questions.

According to the provision of Legal Aid Services Act, 2000, the District Legal Aid officers have three jurisdictions to give legal aid to insolvent litigants, provide legal advice to them, and conduct mediation among the parties to settle disputes.[496&497]Regarding mediation, the first question that was asked to them was, *'How many civil cases did your office receive from trial court during your tenure as a legal aid officer?'*[498]Among the 30 legal aid officers, 15 have the working experience to work as legal aid officer for more than one year, other 20

[496] Legal Aid Services Act, 2000 s. 21ka(2) defines the duties and responsibilities of District Legal Aid Officer.
[497] According to section 21(ka) of Legal Aid Services Act, 2000, Government according to the procedure determined by the rules shall appoint District Legal Aid Officer and fix their duties and responsibilities. As per section 21Ka(2), The Legal Aid Officer will be able to give legal advice and under any law having force, if any court sends any matter for alternative dispute resolution, the officer shall have the authority to resolve the matter.
[498] See appendix C(ii)

judges have been working in this office for about two years, and rest, comprising five judges has been discharging this duty for more than six months. In these circumstances, their response can be considered to understand the real existing situation. Their suggestion for possible way outs to improve the situation is also worth mentioning for this research. In replying to the above mentioned first question, two officers responded that they had received 10/12 civil cases in a year, on the other hand, 17 judges have stated that they have received 3-6 cases whereas, ten judges have replied that no case was sent to their office from the trial courts. The above-mentioned response makes one thing clear that the practice has not yet been developed to send the case for post-trial mediation which has been included in the amendment of 2017 in the CPC. Thus the response of the judges can be shown in the Table below:

Table 5.2: Less efficacious use of legal aid services to promote mediation

Number of the district legal aid officers	Number of reception of civil cases from the trial court (in a year)
2	10/12
15	3-6 cases
10	Nil
3	80/90

Thus, as seen from Table 5.2 above, except 3 Judge-Mediators, all the respondents have stated an unsatisfactory situation of sending the case to the district legal aid office. According to the response of 3 Judge-Mediators, there are 80/90 cases sent due to the order made by the district judge. But the officer has explained the situation stating that among those cases, most are very complicated in nature and therefore not suitable for disposal through mediation.

Based on this response, the next question asked to the respondents was, *'In which type of cases, mediation as a dispute resolution mechanism may be more effective?'*[499] From their reply, it seems that almost all 30 Judge-Mediators have mentioned that simple form of civil suits like partition suits[500] among siblings are suitable cases for mediation. They have further

[499] See appendix C(ii)

[500] "Partition" is a re-distribution or adjustment of pre-existing rights, among co-owners/coparcener, resulting in a division of lands or other properties jointly held by them, resulting in a division of lands or other properties jointly held by them , into different lots or portions and delivery thereof to the respective allottees."-R.V Raveendran J.

added that irrespective of the nature of relief the parties want such as a declaratory suit[501], suit for injunction[502], suit for pre-emption[503]etc., every suit if they are simple in nature, are suitable for disposal through mediation. The reasons they stated was that in the cases where the parties admit most of the facts, and there is no allegation of fraudulent deeds etc., effective mediation could be conducted in those cases. Five judges have replied also that in a suit for declaring the record of RS *khatian* to be wrong and baseless, if the defendants admit that their predecessors have sold out the property to the plaintiff and their name have been recorded mistakenly, then such suit can be regarded as suitable for mediation. Similarly, seven judges answered that in a suit for injunction, if the possession is admitted by the parties, then those suits can be regarded as suitable for mediation.

Similarly, suit for cancellation of deed and rectification of the deed and declaration of a deed to be void and not enforceable by law, when the other party renounces his right over the particular deed through admitting the right of the plaintiff, such suit also becomes eligible for mediation. Whereas, 30 judges have replied that in every type of suits when the disputed facts become complicated and subject to presenting proper evidence, then such suits becomes unsuitable for disposal through mediation. Their opinion, therefore, can be shown in the Table given below against the question: *"In which type of cases, mediation as a dispute resolution mechanism may be more effective?"*

Table 5.3: DLAO Judge-mediators' response about the suitability of suits for mediation

Number of judges	**Response**					
30	All the cases where the nature of the dispute is simple and mostly admitted are suitable for mediation.					
	Types of suits					
	Suit for partition	Suit for declaration of title	Suit for injunction	Rectification of deed and cancellation of thedeed	Suit for pre-emption	Suit relating to service matter

[501] According to section 42 of The Specific Relief Act, 1872, "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person, denying or interested to deny, his title to such character or right, and the court may in its discretion, make therein a declaration that he is so entitled …

[502] According to section 54 of The Specific Relief Act, '….When the defendant invades or threatens to invade te plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction ….'

[503] Pre-emption is a right by which a co-sharer in the property or the adjacent owner of an immovable property possesses to acquire by purchase another immovable property sold to another person. (Hossain, Md. Milan, 2015 'Pre-emption: Bangladesh Approach' Horizon Research Publishing, p. 1.

20	All those suits are suitable for disposal through mediation depending upon the facts and circumstances of the particular suit.	These suits are less in number in trial courts, and therefore, the suitability of these suits through mediation has not yet been tested.

From the discussion above, the fact which transpires is that there is a necessity for categorizing the suits appropriate for mediation. If those suits are sent to the legal aid office for mediation, the officers can proceed towards taking necessary steps for mediation.

The next question that was asked to the district legal aid officers was, '*Which stage is convenient to the parties for resolving the disputes through mediation? Pre-Trial or post-trial'*.[504],[505]

According to the response of legal aid officers, 18 judge-mediators stated that post-trial stage mediation has some advantages, and therefore, it is convenient for both the judges and parties to resolve through mediation. As for reasons, they have stated that after filing the suit, the district legal aid officer as a mediator has specific cases of plaintiff and defendant before him and for such cause, it becomes easier for comparison between those two cases, and then they can try to reach a specific solution. On the other hand, in the pre-trial stage, there is no particular case before them between the parties. Secondly, in post-trial stage, if the district legal aid officer can convince the parties to reach a settlement through agreement, such agreement gets the force of decree after sending it back to the concerned trial court. Thirdly, in post-trial stage, the necessary parties to the suit are present before the district legal aid officer, and therefore, it is safe for the judge mediator to reach any agreement without prejudging the interest of any absent party.

However, it is pertinent to mention here that mediation is an alternative to trial and art of making a compromise. Therefore, more certainty in the points of agreement/disagreement at the post case scenario may not be convincing enough to delay the process of mediation up until the lengthy trial process is completed. With proper training on the skills of mediation, it

[504]Post trial mediation has been introduced through the amendment in the provision of section 89A in CPC in 2017 in which it is stated that '….after filing of written statement, if all the contesting parties are in attendance in the Court …the court shall by adjourning the hearing ….refer the dispute or disputes in the suit to concerned Legal Aid Officer Appointed under Legal Aid Act, 2000…'

[505] See appendix C(ii).

would be even more manageable at the earlier stage of a dispute, when parties have not built their strong adversarial mind. In the same line, 12 judges stated for mediation before filing the suit as in that case the parties are flexible enough to arrive at any agreement about the dispute. Moreover, in their opinion, as the pleaders are not involved in the dispute, it is much easier for the parties to reach a settlement. The response of the judge mediators can be shown in the Table below:

Table 5.4: Judge-Mediators' Response about the proper time to mediation

	Post case mediation	Pre case mediation
Response of judges	18	12
Reasons	1) There is a specific case of the parties 2) The agreement gets the force of the decree 3) All the necessary parties are present before the court.	1) The parties are flexible to reach any agreement 2) The pleaders' interest are not involved in the case.

From the above-mentioned reaction from the District Legal Aid Officers, it seems that the effective use of court-connected mediation under 89A of CPC is many ways a better option than pre-case mediation as the earlier option, the parties can get the benefit decree of a civil suit without facing the hassle of trial in the civil courts.

Thus from the previous discussion, it appears that court-connected mediation by the district legal aid officer has the potential to provide remedies to the litigant public. In an earlier study, it was found that mediation in the district legal aid office did not perform up to a level of satisfaction. In order to find the reasons behind that, the question that was asked was, *'What problems do you face while discharging your duty as a mediator in the civil suits?'*[506]

In response, they pointed out several reasons behind less efficiency of district legal aid office in resolving the civil suits. Among the 30 officers, 28 officers stated that the judges are not willing to send the required number of civil cases to the District Legal Aid Office. That is why, the officers can not avail enough opportunity to deal with the mediation of those cases.

Among those 30 legal aid officers (DLAO Judge-Mediators), 15 stated that the lawyers lack interest in dissolving the case through mediation and, therefore, discourage the parties in this regard. Among those 30 judges, 14 stated disinterest of the parties as a vital barrier for

[506] See appendix C(ii).

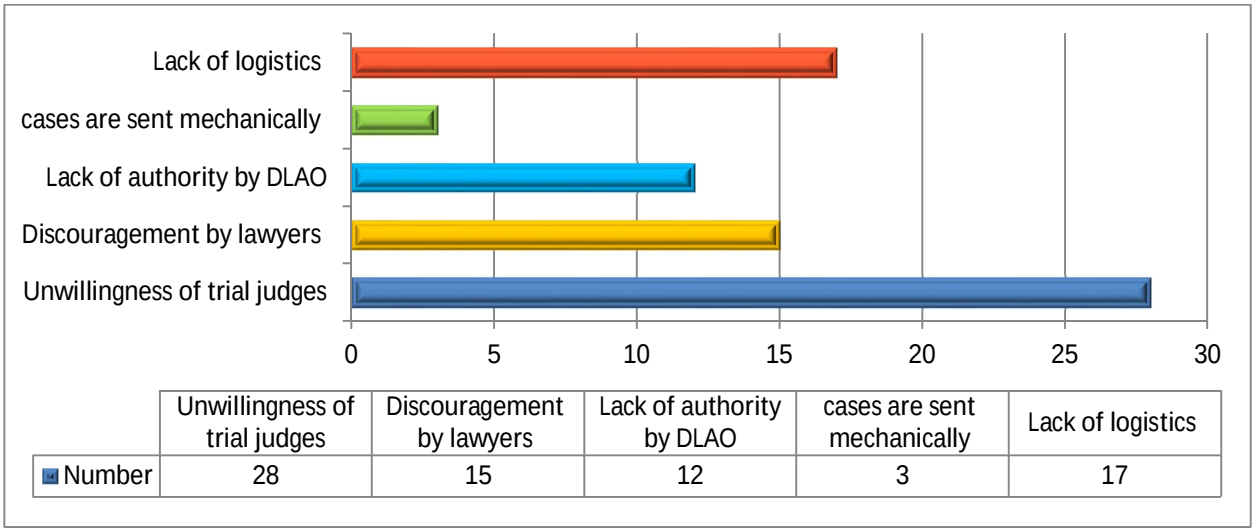
fruitful mediation attempt. They responded that there is a lack of public awareness in respect of mediation mechanism, especially in court-connected mediation. The non-government organizations raise public awareness to some extent in connection to the precise mediation, and different foreign projects are working in many districts in conducting awareness campaign. But those awareness-raising program is limited only to pre case mediation aspects, and in the continuance of their effort, the NGOs send disputes to the District Legal Aid Office, and those disputes are the subject matter of pre-case mediation. Thus, in the absence of any public sensitization in this regard, it becomes difficult for the District legal aid officers to motivate the parties to go through the procedure of court-connected mediation.

Twelve respondent officers have pointed out their lack of authority which the trial court can exercise in case of handling and deciding different issues of a particular civil suit. For example, to settle a specific dispute, the appointment of an advocate commissioner, call for the volume from sub-registry office etc. are essential to reach any decision. But the district legal aid offices do not have any such capacity, and therefore, the attempt at resolving a suit through mediation remains unsuccessful.

While pointing out other reasons, 20 judges stated that in case any party to the mediation remains absent in the sessions or do not cooperate in the mediation procedure by non-compliance of orders of the mediation officer, the district legal aid officers do not have any capacity or authority to impose an impact upon such non-cooperating party. They have added that due to lack of their authority in this regard, the parties do not pay enough importance to the processes initiated by the district legal aid officer.

Seventeen judges have responded that even in case the suits are sent to the district legal aid office in plenty, the office does not have enough capacity, staff strength and equipment to deal with those cases. In each district legal aid office, family suits, criminal and other types of cases are pending for settlement by the single district legal aid officer. In such situations, it becomes challenging for the district legal aid officer to spare enough time for conducting effective sessions for mediation of civil cases. The barriers that the respondents have pointed out can be shown more clearly in Figure 5.6 below:

Figure 5.6: Reasons for failure of mediation at DLAO



Thus, as per the responses of the 30 district legal aid officers, the situation mentioned above is hindering the effective functioning of the District Legal Aid office.

The next questions asked to the respondents were regarding their co-ordination with the District Legal Aid Committee[507] and Upazilla Legal Aid Committee[508] for promoting the activities of mediation under section 89A of CPC. The question that was asked was that, *'Did you address the issue of mediation of Civil suits in District Legal Aid Committee?'*[509] In answer, about 19 judges out of 30 judges stated that though they did not communicate this issue to the formal meeting of the District Legal Aid Committee, they have informed this issue of not sending the case by the trial courts to the District and Sessions Judge and the district judge has rendered direction to the judges of the trial court to send the appropriate cases to the District Legal Aid Office. Rest of 11 judges have answered that they have communicated this issue to the meeting presided over by the District and Sessions Judge. The next question was, *'Did you submit any report regarding the efficiency of mediation in civil suits?*[510]Six judges replied that there is no provision in the Act to submit any report regarding the matter of mediation under section 89A to the District Legal Aid Committee. Fourteen officers stated that they had submitted a report about sending a fewer number of cases by the

[507] According to section 9 of Legal Aid Services Act , 2000, in each District, there will be a district legal aid committee and District and Session judge will be chairman of that Committee.
[508] According to section 12 of the Act of 2000, the organization with prior approval of the Government and through publication of government gazette constitute Upozilla and Union Legal Aid Committee. The committee will be formed with a chairman and 14 member and the responsibilities of the committee will be laid down in the rules.
[509] See appendix C(ii)
[510] See appendix C(ii)

trial judges. Other twenty judges stated that they had submitted pre-case mediation report, not the court-connected mediation report as the laws regarding sending court-connected mediation report do not exist either in the Act or in the rules.

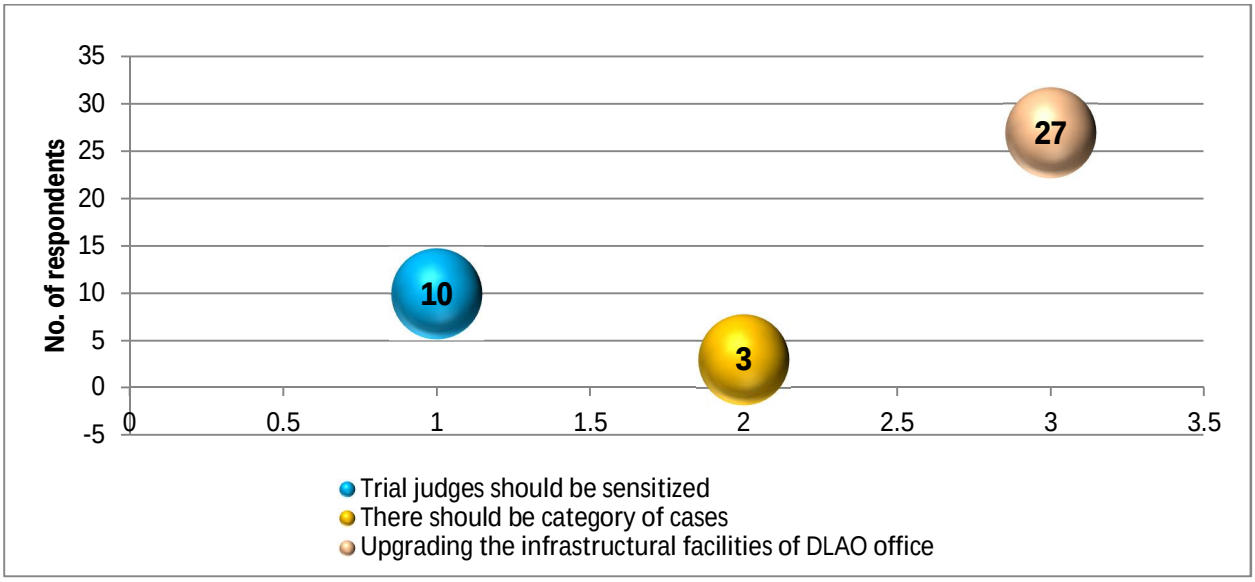
The next question that was asked to them was *'Does Upozilla Parishad Chairman act as a mediator in Upozilla Legal Aid Committee for disposing of land-related disputes after filing the suit in the court?' If your performance is yes, how is their performance?*[511] In answer, 30 legal aid officers answered in the negative. They have further stated that there is no provision of empowering Upazilla Legal Aid and Union Legal Aid Committee to deal with the matter of post case mediation under section 89A.

The next question that was put to them was, *'If your answer is "there is no legal provision", do you think their part should be integrated into the court-connected mediation under 89A of CPC?'*[512] In reply, nineteen legal aid officers stated that Upozilla and Union Legal Aid Committee should not be integrated. They have provided two reasons for it. First, the Upozilla and Union Legal Aid Committee take the initiative to settle the dispute through mediation before filing the suit, and if they fail, the litigants file the suit for the formal trial of dispute. After the suit is filed, the litigants want the dispute to be adjudicated by the court itself. The litigants are not even sufficiently aware of mediation by the judge himself. In such a situation, the inclusion of their part in the court-connected mediation will minimize its formal nature before the public.

[511] See appendix C(ii).

[512] See appendix C(ii).

Figure 5.7: Suggested options by DLAOs to enhance the effectiveness of mediation underCPC



Therefore, in their opinion, it is not the proper time to amend the law in this regard. Another six legal aid officers stated that they have no idea that the Upozilla and Union Legal Aid Committee is not functional enough with District Legal Aid Office. The Chairman and other members of the Committee do not get any honorarium or any other benefit for holding those positions. Due to the lack of vehicles, the officers cannot reach the areas of those committees to monitor their activities and develop a pleasant atmosphere for working together. Irrespective of that situation, as a part of their duty they send land-related disputes to the District Legal Aid Office for settlement, but that effort has not reached a satisfactory level and therefore, as per their opinion, they do not have an idea whether their inclusion in post-trial mediation will bring any benefit or not. Other five judges have answered that if the honorarium is fixed for the chairman and members of those committees and public awareness is built up for their involvement in court-connected mediation, then the amendment of law can be made in this respect.

From the above discussion, it becomes apparent that the district legal aid committee and Upozilla Legal Aid committee are not connected with the post-trial mechanism of District Legal Aid Office because there is a lack of legislation in this regard. Such as, there is no law empowering the Upozilla Chairman to deal with this type of mediation. Moreover, there is no kind of institutional framework to provide them with financial and infrastructural benefit so that they can discharge their duty in this field.

5.5. Lawyers' perception on prospects and problems of mediation

Lawyers are considered important contributors towards developing a sound justice delivery system as they represent a client and engaged in protecting the rights, liberties, and interest in front of a judge. Also, a lawyer is a trusted legal advisor and a counselor who is recognized by the government.[513]Similarly, the litigant people who are the justice seekers and ultimate beneficiary of the reducing case backlogs are guided and advised by the lawyers. In the provision of section 89A, there is a mention of lawyers both as representatives of the clients as well as mediators of particular disputes.

From the reading of section 89A, it appears that lawyers are mentioned in different capacities, like, a) the contesting parties are in attendance in the court …by their respective pleaders, b) the case can be referred to the engaged pleaders or c) refer the case to a mediator from the panel containing pleaders under sub-section 10.[514] If the reference for mediation is made to pleaders, they have several responsibilities like a) the pleaders shall by their mutual agreement in consultation with respective clients appoint another pleader not engaged by the parties in the suit, or, b) to a mediator from the panel under sub-section 10.[515] After the appointment of mediators, the responsibilities of the pleaders are a) the pleaders, their respective clients, and the mediator will mutually agree on and determine the fees and procedure to be followed for settlement; b) the mediator shall without violating the confidentiality of the parties to the mediation proceeding submit to the court a report of the result of mediation proceedings.[516] They play a vital role in the appointment of mediators, fees for mediators, time frame to conduct mediation and submission of reports regarding the mediations sessions.

Thus, it appears that the process of mediation is closely associated with and governed by the pleaders both as representative of the respective parties and mediators in appropriate cases. Therefore, the perception of the lawyers in respect of prospect, challenges and way outs for developing the mechanism of mediation deserves to be analyzed empirically in order to attain a thorough understanding about the instant research topic.

[513]Amarasinghe, Kusal Kavinda (The Role of a Lawyer and Professional Ethics' Academia edu. P. 1.
[514] The Code of Civil Procedure, 1908, s. 89A(1) .
[515] Ibid s. 89A(2) .
[516] Ibid, 1908, s. 89A(5) .

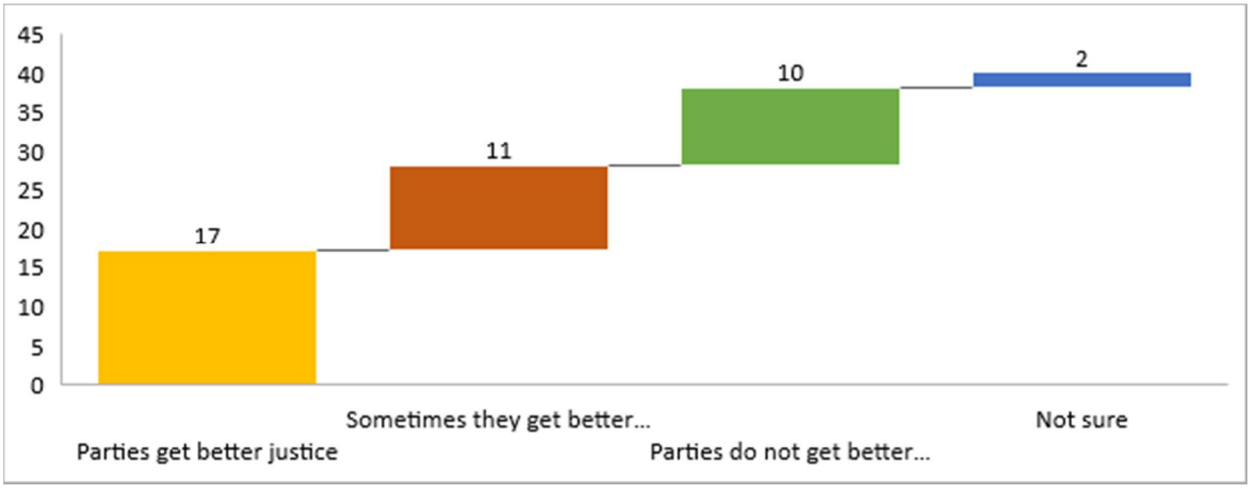
5.5.1 Lawyers' perception on the prospects of mediation in civil suits

For the purpose of analyzing the potentiality of mediation in mitigating case backlog, the first question that was asked to the lawyers was, *'Do you think section 89A of CPC has the potential to reduce case backlog in civil courts?*[517] In response, the 19 out of 40 lawyers stated that it has that potentiality to reduce the case backlog existing in the courts. On the other hand, 19 lawyers responded that it does not have that potentiality to reduce the case backlog in the present situation where the practice, infrastructure, and mentality of the people do not suit the mediation mechanism. Other two lawyers stated that if the process gets fair support from the judges who will accept the mediators as an integral part of the system, the mechanism will be proved to have potential in this field.

Another co-related question that was asked was, *'Do you think by resolving cases through mediation parties may get better justice than that from a trial?'*[518] The responses of the lawyers were divided into several parts, and they substantiated their answer with different reasons. Among 40 lawyers, 17 lawyers stated that through mediation, the parties get better justice if the suit is resolved through mediation as it saves time, money, relationship and energy of the parties. In their opinion, mediation can resolve the disputes more quickly, cheaply and cooperatively than formal adjudication. Moreover, by this type of settlement, the dispute is resolved finally and therefore, the parties can get the fruit of the decree passed by the court without going through the procedure of trial. Another set of 11 lawyers has replied that getting justice from mediation depends on each case's facts and circumstances. They stated that in a particular type of suit for declaration of title, partition suit, suit between developer and landlord are comparatively more appropriate for mediation and in such suits the parties get aproper remedy through mediation. Those lawyers asserted that mediation is fruitful in a particular type of cases such as a suit for compensation or money suit where the remedy can be obtained through money, then parties can get benefit through mediation. Ten judges stated that sometimes the financially and socially weaker party becomes bound to compromise with the powerful parties. At the same time, the vulnerable party becomes unable to continue the suit.

[517] See appendix C(iii).
[518] See appendix C(iii).

Figure 5.8: Lawyers' perception on whether parties get better justice through mediation than trial under CPC



Lawyers have further stated that due to the pressure of local influential persons the litigants are forced to compromise on any terms and conditions unfavorable to them. 2 of the judges commented that they are not sure whether justice can be ensured to the parties because mediation in maximum cases does not depend upon the appreciation of documents and other evidence. Rather it depends upon the willingness and cooperation of the parties. If the parties are not committed to reaching a settlement, the mediation mechanism will not bring any benefit to any of them.

Therefore, from Figure 5.8 above, it becomes apparent that 28 judges out of 40 judges have responded positively regarding getting better justice from mediation than that of a trial. Another 12 judges have opined that sometimes the weaker parties become bound to compromise because of their inability to drag out the suit. So, from the overall discussion, it appears that the lawyers consider the mediation mechanism an effective one for ensuring justice to the litigants. In light of the above-mentioned expression of the lawyer respondents, this part of the chapter intends to explore the underlying problems and solutions to find an effective mediation mechanism through the interviews with those lawyers.

5.5.2 Lawyers' perception on problems in practicing mediation under CPC

In our legal system, lawyers act as a connecting factor between judges and clients seeking justice from formal courts. The same chain continues even in mediation under 89A of CPC, as lawyers are assigned a number of responsibilities to set the mediation process. Further, lawyers themselves have some financial interest for the sake of their own profession. As we have already discussed the problems faced by judges, this section has highlighted the issues

faced by lawyers from their own problems caused by their clients that may hinder the effectiveness of mediation in civil courts.

(a) Problems in practicing mediation originated from lawyers:

The present research aims to find out the barriers of improper exercise of mediation mechanism under section 89A of CPC. To inquire about the matter, certain questions were put forward to the lawyers to find out whether the lawyers and litigants are exercising and utilizing the provision of section 89A of CPC. The first question that was asked to them was, **'Have you ever attempted to mediate under section 89A of CPC?'**[519] Among the 40 lawyers, 22 lawyers have stated that they have not attempted to mediate the suits after filing the same. Eighteen lawyers stated that though they have not attempted to mediate particularly in the stage of 89A, they have made an effort to meditate at any time after filing the suit depending upon the facts and circumstances of each suit. Only five of them (or 12% of total) gave a specific example that in cases for declaration of title regarding the wrong record of *khatian*, cancellation of deed, simple partition, they have attempted to mediate among the parties. Thus, their opinion can be expressed in the Table below,

Table 5.5: Response about lawyers attempt to mediate

Number of lawyers	Response	Further comments
n=18 (45%)	Though they have not made an attempt to mediate under 89A but tried to do the same at any point of time after filing the suit.	In fit case of declaration of title, cancellation of deed, partition etc.
n=22 (55%)	They have never made an attempt.	

Thus, from the analysis of the responses given in Table 5.5 above, it becomes apparent that none of them has the experience of dealing with cases under section 89A. Still, about 50% of the lawyers have the experience of initiating mediation among the parties in fit case after filing the suit. However, more than 50% of the lawyers have not yet invoked the provision of mediation as the pleaders of respective parties. So, the inference can be drawn that none of the lawyers has previously utilized the provision of 89A though they are acquainted with the benefit of this provision and made an effort from their own initiative. However, the other 22 judges out of 40 judges are not at all experienced and have made themselves involved in respect of the matter of mediation.

[519] See appendix C(iii).

The next questions were intended to find out the situation of pre case mediation. The question asked to them was, *'How often you suggest your clients for settling the dispute amicably before filing the suit?' The options were, a) Always, b) Most of the time, c) Very few times and d) Never.*[520]In response to that question, thirteen lawyers stated that they suggested the clients very few times settling the dispute through mediation. While identifying the reason for their not suggesting about mediation, they stated that the clients find no confidence upon them and go to another lawyer. Those lawyers have further noted that being suggested by the lawyers, if any party approaches the opposite party for settlement, the opposing party considers the approaching party as too weak for mediation. Another set of 27 lawyers answered that they suggested to the clients settle the dispute through mediation before filing the suit always or most of the time depending upon the merit of the case. They have further stated that as a lawyer, they have to serve the people by giving them good advice to save them from loss of money, time and energy. Among those 27 lawyers, 15 lawyers shared their experience that after meeting the client, they study the nature of the suit. If it seems to them suitable to be disposed of through mediation, they try to convince the party and contact the lawyer of another party.

From their responses, it seems that 27 out of 40 lawyers or a slightly more than two-third lawyers co-operate with the parties for settlement among themselves before filing the suit. In the previous discussion, it was also evident that 18 out of 40 judges or only 45% mentioned their experience of invoking section 89A from lawyers.

In order to verify the genuineness of their remarks in this respect, it is necessary to compare the monetary benefit they gain from mediation and trial. For this purpose, the next question asked to them was, *'Generally, which type of resolution is financially more beneficial to you?'*[521] In response to that question, 33 lawyers have stated that settlement through trial is financially more advantageous than resolution through mediation. To find out the reason for such an experience, the next question that was asked to them was, *'If you think mediation is financially less rewarding, what is the reason behind it?'* They were given four options such as; *a)It takes too much time for settling the dispute, b)lack of logistic support to conduct mediation, c) it is too difficult to convince the parties for an amicable settlement and d) parties are not willing to pay much for settlement through mediation.*[522]All the above lawyers

[520] See appendix C(iii).
[521] See appendix C(iii).
[522] See appendix C(iii).

expressed that parties are unwilling to pay much for settlement through mediation. They have further stated that the mediation sessions are held only a few times, and therefore, the amount of honorarium is also small in amount because of those sessions lasting only a few days. 2 lawyers stated that the fee for mediation is fixed and as such the lawyer with a more extensive brief does not feel interested in mediation with the parties. One lawyer expressed his opinion that the party who has an excellent chance of getting a decision of the suit in his favor, is disinterested to sit for mediation and therefore that party is not willing at all to pay any fee for mediation. Whereas, in the trial procedure, the process goes for a long time, and on each occasion, the lawyers get an amount from the litigants and therefore the amount from trial they get is more rewarding. Among those 33 lawyers, 27 lawyers agreed that it is a time-consuming and difficult job to convince the parties to reach an agreement among themselves. Among those 33, 10 added lack of logistic support as a reason for the disinterest of the lawyers in initiating mediation.

On the other hand, Only seven among the 40 lawyers have stated that resolution through mediation is financially more beneficial to them. To rationalize their opinion they have stated that if they can resolve the suits through mediation, the litigant public will regain confidence in the lawyer and will come to them more frequently for legal advice and other related services. Thus, the opinion of lawyer respondents can be shown in the Table below;

Table 5.6: Lawyers response about the financial reward of mediation

Number of lawyers	Response	Reasons
6	Resolution through mediation is less rewarding than resolution through trial.	1)Parties do not pay much for mediation. (33) a)The number of session of mediation is fewer, and thus the total amount is small. b)The fee for mediation is fixed and thus insufficient. c) The party having a good case is not willing to renounce any portion and therefore no interest to pay anything for mediation.
17		2)It is time-consuming and difficult for them to convince the parties
10		3) The courts do not have enough logistic supports.
7	Resolution through trial is not more rewarding than resolution through mediation	If the disputes are resolved quickly through mediation, then parties will frequently come for legal assistance, and ultimately that will be more rewarding.

If the above findings in Table 5.6 are summarized in a few words as regards the lawyers' commitments to resolve the suits through mediation, it can be safely stated that though they showed their interest and analyzed the option of mediation from a positive viewpoint, but from their subsequent opinion, it clearly appears that by invoking the option of mediation the lawyers cannot benefit financially. Consequently, there is less prospect and benefit for the lawyers to utilize this provision in the present situation.

A supplementary question asked to the lawyers was, *'Do you think that lawyers are competent enough to resolve the suits through mediation?'*[523] In response to this question, the lawyer respondents expressed a mixed opinion. For example, 19 lawyers have stated that the lawyers do not have enough competencies for resolving the suit through mediation. Eleven lawyer respondents have opined that competency of the lawyers in this regards depends upon the particular lawyers with their own working experience and knowledge. The rest of 10 lawyer respondents stated that the lawyers as mediators are competent enough to deal with the cases. However, all those 40 lawyers have expressed the opinion that they have a shortage of skill and experience to conduct the mediation process.

Among them, ten lawyers have added that as the lawyers get more financial benefit by dragging the case for an indefinite period and most of the lawyers have less earning option other than proceeding of the suit, they feel less interested in developing their competence for conducting mediation. Another five lawyers have opined that due to non-activity of the judges in the court in initiating mediation, the lawyers also get the chance to avoid this mechanism and, therefore, do not increase their expertise. Thus, the opinion of the lawyers can be shown in Table 5.7 below.

Table no 5.7: Response of lawyers about their competence to conduct mediation

Number of lawyers	Response of the lawyers	Reasons
40	The lawyers do not have enough competence	1) They do not have enough expertise for lack of training. 2) Their competence does not develop due to less financial benefit. 3) As the court remain inactive, the lawyers do not get enough opportunity to develop their skill.
None	The lawyers have enough competence	

[523] See appendix C(iii).

From the analysis of responses in Table 5.7 above, it can be stated that lawyers' low competence as one of the primary reasons for the low efficiency of the mediation process., Thus, the opinion of the lawyers reveal the fact that their less interest in taking the initiative for mediation and little financial gain from this mechanism discourages the lawyers in increasing their competency in this field. For such reason, the mechanism of mediation is not gaining optimum efficiency in decreasing the case backlog.

(b) Problems in practicing mediation originated from litigants

After getting the response from lawyers about their contribution in mediation both before and after filing the suit, a different set of questions were asked of the lawyers. The questions were aimed to sort out the problems in the practice of mediation because of the litigants. The first question that was asked to them was that, *'Do parties to civil suits usually show their interest to settle their case through mediation under 89A of the CPC?'*[524] In response to that question, 13 lawyers answered in the affirmative. But in addition to that, they said that the parties show their interest to sit for mediation if they get proper counseling from the lawyers. According to the different opinion of one lawyer, the parties show interest in mediation in order to delay the proceeding of the suit. On the other hand, 27 lawyers have stated that the parties do not show any interest in the mediation process under section 89A of CPC. They have further noted that in exceptional cases, parties agree to renounce their claim instead of monetary benefit. For example, in a suit for compensation, one party sometimes agrees to settle the suit. In a simple partition suit or a certain type of declaration suit, the parties show interest in compromising their claims. Their expression can be shown in Table 5.8 below:

Table 5.8: Lawyers' response on expression of interest by parties for mediation

Number of lawyers	Response	Further comments
n=13 (32.5%)	The parties show their interest to mediate under section 89A.	They show the interest if they are properly counseled by the lawyers. Sometimes they sit to mediate only to drag the case.
n=27 (67.5%)	The parties do not show their interest in mediation.	However, in exceptional cases, like a suit for compensation or simple partition or declaration suit,

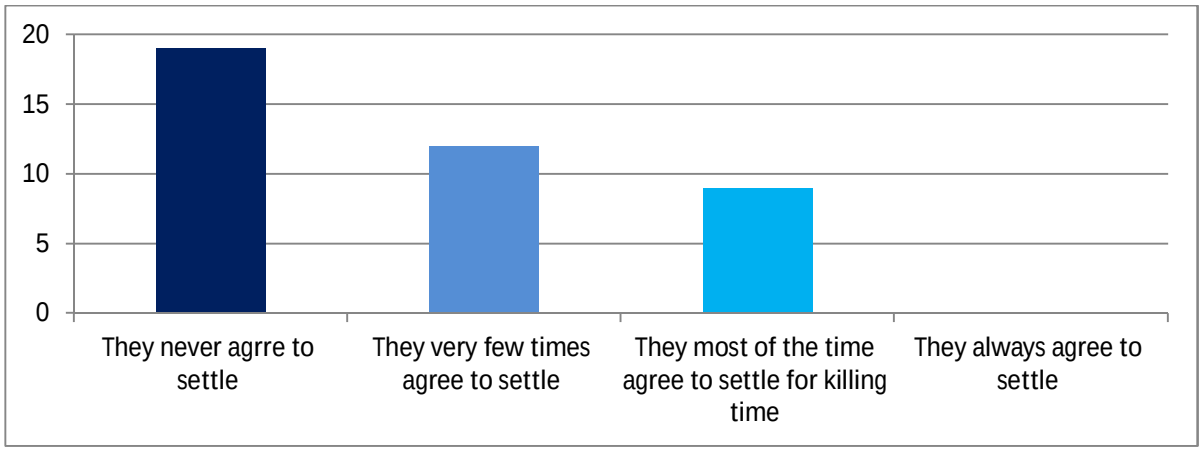
[524] See appendix C(iii).

Therefore, as far as the earlier discussion is concerned, except in some situations, according to most of the lawyers the parties do not generally show their interest for mediation after filing of the suit.

The next question that was asked to them was, *'Following your suggestion, how often do your clients agree to settle the dispute amicably before filing the suit?' The options were (1). Always, (2) Most of the time, (3).Very few times and (4).Never.*[525] It appears from analyzing the responses of the lawyers that 31 lawyers have answered in the negative. They have stated that the parties never or only on very few times agree to settle the disputes. Among them a number of 12 lawyers who answered 'very few times' said that though the parties sometimes agree to sit for settlement before filing the suit, in no case, such sitting or initiative becomes successful. Out of 40 lawyers, nine lawyers have stated that in certain particular cases, 'most of the time', the parties agree to settle the dispute through mediation. For example, the party wants to file a fake suit only to harass the other party, and if they are offered some monetary benefit, they agree to settle the terms with that other party.

In other cases, the parties *'most of the time'* agree if the party genuinely claims right for example declaration of record of RS *khatian* wrong and baseless and after getting the legal notice the other party admits the claim. In the third type of situation, in simple forms of dispute like partition among the siblings, the parties more often agree to settle the suit through mediation. However, all the nine lawyers have stated that despite agreeing to sit for mediation, the effort and initiative do not become successful. Thus their viewpoint can be shown in Figure 5.9 below;

Figure 5.9: Response about litigants' interest about mediation after getting suggestion from lawyers



[525] See appendix C(iii).

Thus, unlike in post-trial mediation, in the pre-trial mediation, in most of the cases, the parties are not willing to sit for mediation which hinders the effective functioning of mediation mechanism.

The next question that was asked to them was that, According to your opinion, '*What is the reason for the disinterest of the parties for resolving suits through mediation?*'[526] In the previous discussion, the view of the lawyers revealed that the parties are not willing to sit for mediation; this question is targeted to search for the reason of their unwillingness. The options given to them were, ego problem, Non-fixation of fees for lawyers, Lack of knowledge about mediation, and **discouragement by the lawyers and others.**

After analyzing the responses, 38 out of 40 lawyers have opined about lack of knowledge of parties as the reason for the parties' disinterest. While explaining the situation, they have stated that the surroundings and culture have not yet been developed in our justice system to encourage the mechanism of mediation among the litigants. There are no awareness-building programs around the country to promote its implementation. Five lawyers have further mentioned that if the lawyers tell their clients to sit for mediation, they consider the lawyer less efficient and biased to the other party. Then they switch their lawyer and search for another lawyer. Among those 38 respondents, 31 lawyers also added ego problem as the co-relating reason for their disinterest. While explaining the situation, those lawyer respondents have stated that many persons file false suit in order to harass the other persons and therefore, they do not feel interested settle the dispute through mediation.

On the other hand, many litigants who have genuine claim does not want to renounce any portion of their legitimate claim. Among those 38 judges, 19 lawyers have identified discouragement of the lawyers as a factor of disinterest of the parties in this regard. While analyzing the underlying logic of their discouragement, those lawyers have stated that parties are unwilling to pay remuneration for mediation to the lawyers. Among those 19 lawyers, 9 of them have stated that parties are unwilling to pay any money before the mediation (if initiated) and do not pay anything if the mediation effort becomes unsuccessful. The parties only pay when the mediation becomes successful though such successful mediation happens very rarely.

[526] See appendix C(iii).

In their opinion, as the parties do not pay the fees, they feel no obligation for going through the mechanism of mediation. In the former discussion, it has already been revealed that lawyers get more financial benefit in trial than that of mediation. The respondents have also identified this situation as the reason discouragement by the lawyer, and in consequence of that discouragement, the litigants feel less interested in resolving the suit through mediation. But the 21 lawyers have expressed a dissenting opinion about discouragement stating that they, from their professional responsibility, always encourage the parties to sit for mediation and do not bother about the fees that the parties pay to them. If more suits are resolved through mediation, then ultimately, they will become financially benefitted by getting more litigations in their hands.

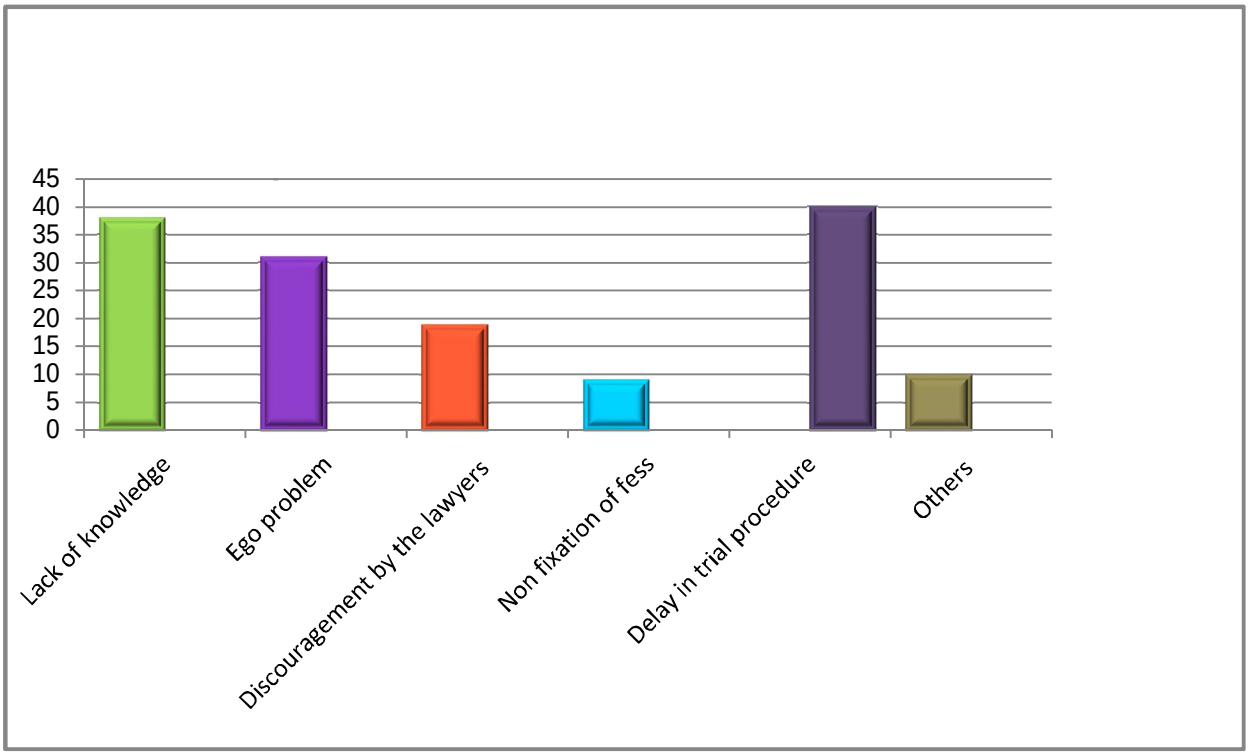
Lastly, in the option of other reason, ten lawyer respondents have opined that the litigants have a fascination for getting decree from the court after a full trial. They consider it highly prestigious and effective for enforcing their claim than the resolution through mediation. In the option of other reason, 15 lawyer respondents have stated that local influential persons advise the parties to proceed with the trial instead of mediation only to obtain their personal interest. Those parties are surrounded by those touts. Even the lawyers try to understand the parties about the good effects of mediation. They remain influenced by the wrong impression of those touts.

To find out the other reasons for the disinterest of the parties for mediation, a supplementary question that was asked was, '*Do you think the delay in other procedural stages in trial encourage parties to go for trial and discourage them from seeking quick resolution through mediation?*'[527] It is mention-worthy that all the 40 lawyer respondents have answered in the affirmative. Thus, in the above discussion, the lawyers identified the tendency of litigants to harass the other side as one of the main reasons for disinterest of the parties for mediation. So, this group of persons naturally becomes encouraged when they find a way of delaying the suit through instead of mediation.

Figure 5.10 below indicates lawyers' perception above why parties may not be interested in mediation. It appears that ego problem and lack of knowledge are the main contributing factors behind the disinterest of the parties. However, some of the lawyer respondents have identified discouragement of lawyers and non-fixation fees for mediation as primary reasons for their indifference to the mediation process.

[527] See appendix C(iii).

Figure 5.10: Lawyers response about reasons for litigants' disinterest on mediation



5.6 Need for legal reform: Judges' and lawyers' perception on the way out to seal procedural loopholes for effective mediation under CPC

In the previous discussion, several reasons were analyzed that cause hindrance to the effective practice of mediation. At this stage of the study, the part of the interview that deals with several solutions for mitigating the mediation problem has been looked into. The research tends to identify legal and institutional issues, which requires reforms to enhance the effectiveness of mediation in civil courts. This section deals with two different sets of reforms suggested by lawyers and judges in this regard.

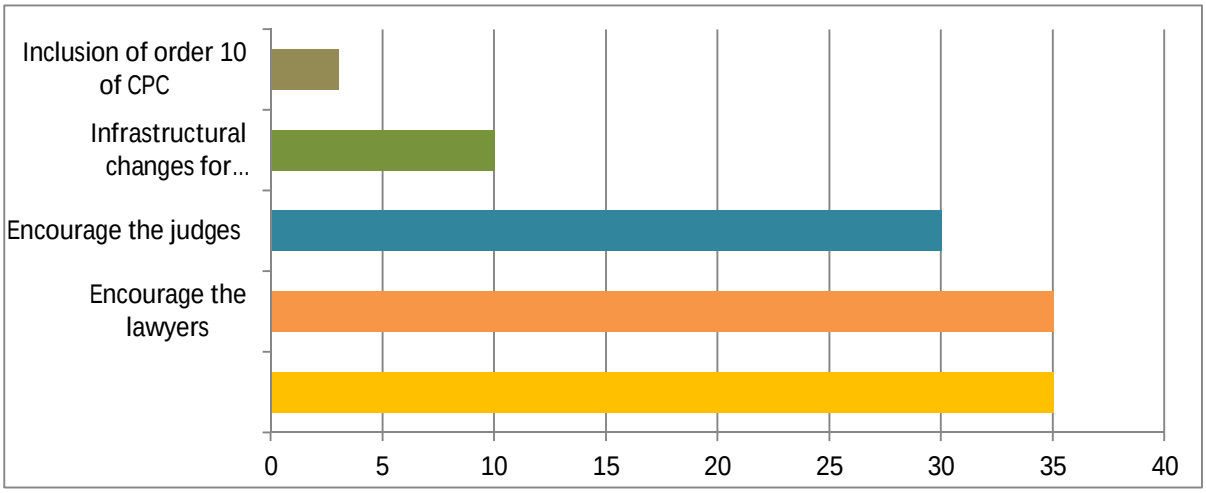
To find out a way of expanding the success of mediation, specific recommendations are collected from judges in respect of the development of the legal and institutional framework. For this purpose, the question that was asked to the judges was, *'Do you think the amendment is required in CPC in respect of mediation in order to promote its application?'*[528] The survey implies that 37 judges replied in affirmative. The next question that was asked to them was, *'If you have any specific proposal for amendment, please specify'.*[529] The judge respondents have recommended several points for amendment of 89A. From their responses,

[528] See appendix C(i).

[529] See appendix C(i).

the following amendments were proposed to make the mediation mechanism more effective and functional.

Figure 5.11: Judges view on the required amendment in law for effective mediation

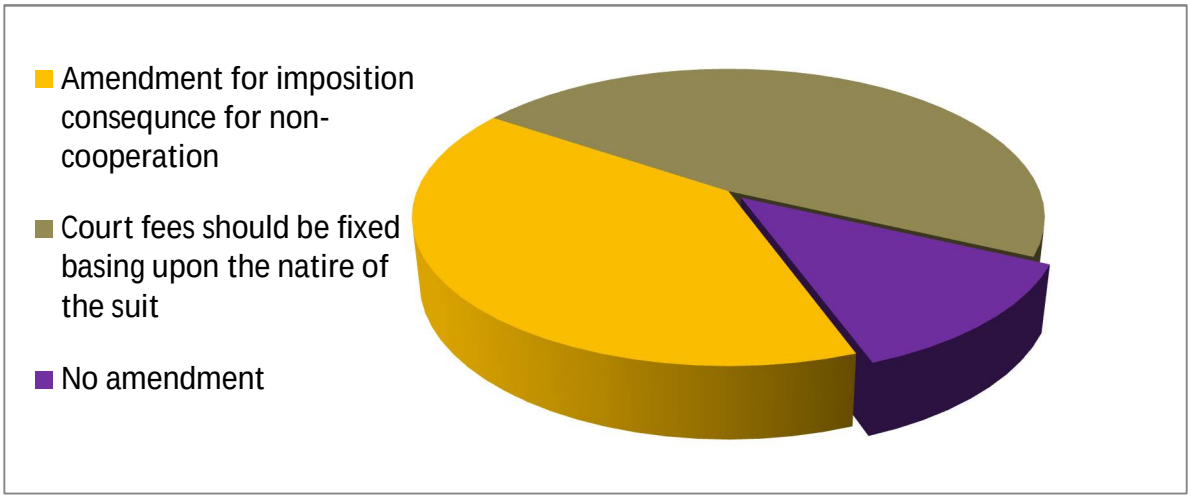


Similarly, it has already been found in the answers of previous questions that most of the lawyers do not attempt to mediate under section 89A. Even if they do, the parties very rarely agree to sit for mediation. The lawyers have further responded unanimously that mediation is financially less rewarding than resolution through trial due to various reasons such as the parties does not pay much for mediation. It is challenging and time consuming to convince the parties to make them agree on a particular issue. Thus, the reasons of non-satisfactory performance of mediation have been identified by the lawyer respondents.

In these premises, the same question was asked to the lawyer respondents for exploring the necessary amendment in the provision of 89A of CPC. The question was, *'Do you think that further amendment is required in CPC in respect of mediation in order to promote its application?'* [530] Among 40 lawyers, except for 5, all the respondents answered that amendment of mediation provision is required in CPC to promote its application.

[530] See appendix C(iii)

Figure 5.12: Lawyers' view about the amendment in law for improving mediation



Other views:5 other lawyer respondents expressed their opinion that there was no necessity for amendment. For the purpose of making the trial procedure more efficient, they proposed specific changes in the legal provision. For example, one respondent stated that there must be no adjournment in the trial procedure [531] and the summon procedure should be digitalized. [532] Some significant changes in law suggested for the effective functioning of mediation are elaborated further in this section.

5.6.1 Activating mediators' panel with eligible persons as registered mediators

The amendment to incorporate mediation under CPC also indicated a formation of a Panel of mediators from which parties may choose their mediator. However, after the amendment of CPC in 2003 that incorporates the idea of penal mediators, this panel in the civil courts has not activated yet. As both judges and lawyers emphasized the activation of this mediators' panel as specified in law, another corollary query was to identify persons who would be more competent to perform this post.

In respect of matter mentioned above, the next question asked to the respondents was, *'According to you, who is the most suitable person to be a mediator?'*[533] In response to the question, judges seem to have been fragmented in their opinion. Nine judges replied that the district legal aid officer is the most suitable person for mediation. In support of their answer, they stated that District legal aid office has the institutional setup to settle the suit through mediation. Being judges, they enjoy the confidence of the litigants, but like sitting judges of

[531] According to their opinion, the court must strictly follow the provision of order 17 Rule 1(3) of CPC.
[532] The amendment of order 5 rule should be strictly maintained.
[533] See appendix C(i).

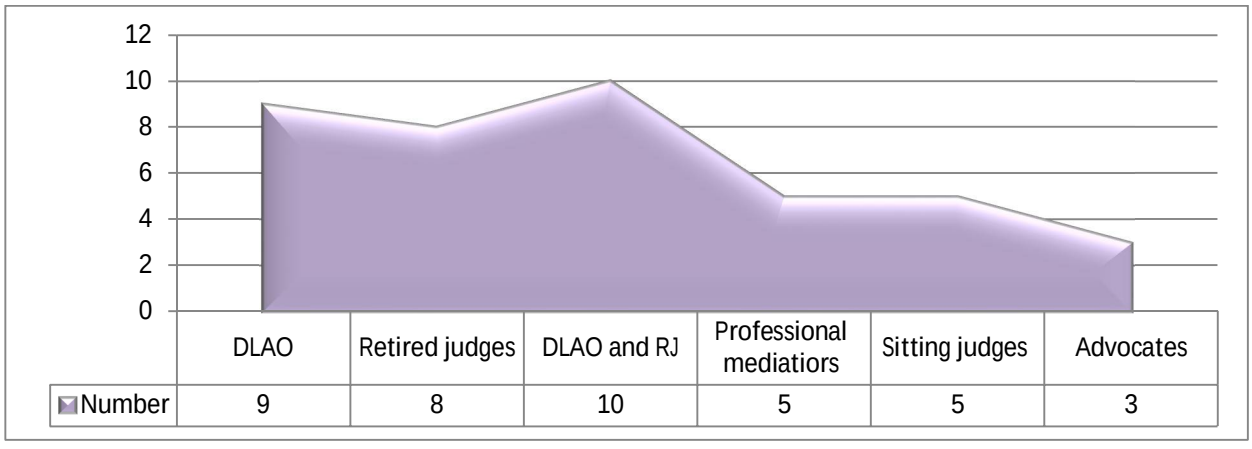
the dispute, they are not overburdened with the trial cases. They have further stated, subject to further enlargement of the legal aid office, and the civil suits have good chances of disposal through mediation in the civil suits. Eight judges noted that both retired judge and district legal aid officers are most suitable for disposal of the case through mediation.

While justifying the qualification of a retired judge, they have stated that they have time and experience to deal with settling disputes through mediation. Other ten judges have expressed the opinion to the effect that both retired judges and legal aid officers are capable of dealing with the cases through mediation. Among the remaining 13 judges, five judges opined that a separate professional group of mediators could effectively deal with this matter.

An organization for conducting mediation can be established in which the professional mediators appointed by the state shall perform the mediation according to the existing provisions of law. In that case, only the mechanism of mediation can be institutionalized to accelerate this process of settlement. Of the remaining eight judges, 5 stated that sitting judges and retired judges are most suitable as the litigants have confidence in the judges as the mediators. Only three judges chose advocates as mediators as they believed that advocates need to be provided with proper fees and a Panel maintained properly by the district judges. Thus, the opinion of the judges can be shown in the Table below; 'According to you, who is the most suitable person to be a mediator?'

After analysis the Figure 5.13 below, it becomes apparent that 32 judges out of 40 have opined for District Legal Aid Officer, sitting judges and retired judges as their first choice. On the other hand, the remaining eight judges have stated that professional mediators and advocates have the scope if they are provided with separate professional facilities and fees, respectively.

Figure 5.13: Judges' perception on who could be an effective mediator under CPC



Therefore, as per the opinion of the majority, district legal aid officers and retired district judges have the highest capability to conduct mediation for disposal of suits and they should be chosen as mediators.

In the previous discussion, several reasons were analyzed that cause hindrance to the effective practice of mediation. At this stage of the study, the part of the interview that deals with several solutions for mitigating the problem of mediation have been looked into. The question that was asked the judge respondents was, *'According to your understanding, who is the most suitable person to be a mediator?' The options were judge of the dispute, parties themselves, retired judges, advocate, district legal aid officer and others.*[534]

The next question was, *'What is the reason for choosing this group as your first choice?'*[535] This question was asked with a view to identifying the person by whom the activities of the mediation mechanism can be accelerated. Another objective of this question was to find out whether being an advocate, they choose themselves as a suitable mediator or not. Among the 40 lawyer respondents, 15 have chosen the advocates as the most suitable mediators. While discussing the reason for their choosing the advocates, they stated that senior advocates of the bar having experience of 10 to 15 years should be selected as mediator. However, in order to make them active and vigilant in this task, proper fees should be provided to them. Those fifteen respondents have mentioned that the litigants can get a comfort zone to discuss every advantages and disadvantages of the dispute without reservation. Therefore, the advocates get an extra advantage of motivating the justice seekers by utilizing the flexibility. As further reasons for choosing this group, they have discarded the sitting judges stating that judges have no time and mood to deal with persons for mediation after discharging the burden of conducting the trial.

Moreover, as per their different opinion, the litigants remain reserved while discussing with the judges because of his identity as a judge. They have also said that the judges, due to the nature of their profession always put more emphasis upon the papers and related laws rather than the social and other surrounding situation prevailing among the parties.

On the other hand, the senior experienced lawyers always deal with different types of people and understand the mentality of different status of people and utilizing that experience they

[534] See appendix C(iii).

[535] See appendix C(iii).

can contribute more efficiently than that of a judge. Regarding retired judges, those respondents have expressed the same opinion that judges have a preconceived idea of emphasizing legal rights. In addition to that, they have mentioned that retired judges claim excessive fees in the arbitration case and therefore, in mediation, they will also charge more fees which the parties will not be able to bear. Regarding the district legal aid officer, they have conveyed the same attitude because of them being judges.

Furthermore, they have stated that in the present and existing infrastructural situation, he has no time and logistic support to deal with the mediation procedure successfully. Based on such reasoning, the number of 15 advocates have chosen the advocates as the most suitable person as mediator. Of the remaining 25 lawyer respondents, 16 selected a sitting judge as to the most suitable for this purpose. While justifying their eligibility, the respondents have stated that the sitting judges have the advantage of winning the confidence of the litigants. Therefore, it becomes easier for them to motivate the parties towards resolving the suit through mediation.

Among those, 16 respondents, ten lawyers have added that along with the sitting judge, the retired judge can be one of the most suitable persons for mediation as he has time and experience to deal with this matter, but like a sitting judge, he does not have the burden of the cases to proceed with a trial. Another group of 7 lawyer respondents has stated that a separate professional group of mediators should be appointed for this purpose, either from advocates, retired judges and other fit persons. They will discharge their duty exclusively as mediators under specific institutional setup and defined rules and regulations. The two remaining identified the local elites and other influential persons as the most suitable one as they can motivate the parties with their full knowledge about the social position, mentality and nature of the relationship between the conflicting parties. In the lawyers' given opinion, they were all asked about the prospect of district legal aid officer as mediator.

All of the lawyer respondents have stated that if the office is developed with proper logistics and authority, it will attain the credibility as the most suitable mediator for success as a mediator. But in the existing situation, this office is not achieving the required functionality for different reasons. Thus, the expression of the lawyer respondents can be shown in the Table below:

Table 5.9: Lawyers' perception about most suitable mediators

Number of lawyers	Most suitable as a mediator	Reason for choosing as most suitable	Reason for not choosing other as most suitable
n=15 (37.5%)	Advocate with more than 15 years of experience	They have a comfort zone to discuss any issue with clients understanding all the related matters.	The sitting judges are overburdened with cases, and retired judges charge excessive fees. DLAO do not have required logistics to deal with mediation mechanisms.
n=16 (40%)	Sitting judges	People have confidence in them as knowledgeable and impartial.	The advocates do not feel interested because of low fees and biasness
n=7 (17.5%)	A separate professional group of mediators	Mediation mechanism need to be institutionalized first with specific rules and regulations	Judges, advocates and DLAO do not have time, fees and logistics, respectively.
n=2 (5%)	DLAO mediators	Though not the reality, they could be treated as the best mediation professional having separate institutional setup to deal with mediation.	As a separate professional group of mediators, they need separate training and initiative to promote their career in mediation.

Among those 15 lawyers who have opined for lawyers with 15 years or more as most appropriate mediators, 5 of them proposed that the mediation panel contained in sub section 10 of section 89A has to be strengthened with those competent and experienced lawyers. They stated that a rule might be incorporated like this, for the purpose of sub-section 10, the District Judge shall create and maintain a panel of mediators consisting of lawyers/pleaders licensed to practice in law in respective District Bar Association and a separate Panel of non-lawyer mediators from retired judges, academicians and professionals. A committee shall select the Panel of mediators including the representative of respective District Bar Association. For the purpose of this sub-section, the District Judge shall invite application from lawyers/pleaders, retired judges, academicians and professionals with required qualifications mentioned in such invitation. The applicant shall submit a statement of professional qualification, experience, training and other qualifications required by the District Judge.

Based on the information shown in the Table , according to the 15 lawyer respondents' opinion, lawyers with proper experience are a better option for settling the suits through mediation. They expressed their opinion mentioned above to establish a system of enrollment

and accreditation of Panel mediators. Moreover, according to their other opinion, if the judges and District Legal Aid Officers are equipped with proper time and other facilities, they are also the suitable persons to act as mediators.

5.6.2 Fix Pre-trial stage as the proper time for mediation

Amendment in CPC provides parties with equal opportunity to opt form mediation both at pre-trial or at any time later during the proceeding. However, as argued by most respondents, mediation at the pre-trial stage needs to be prioritized as parties grow more rigidity and adversarial mindset as they involve time and money to progress with the trial. Sometimes, opponents use this delay as an indirect financial pressure to financially less capable persons to make more concession on mediation held at a later stage of the process.

A question that was asked to the judges was, *'Which stage is easier for the parties to resolve the case through mediation under CPC'*.[536] 37 out of 40 judges replied that pre-trial mediation is easier than post-trial mediation. In support of their reply, they said that both the parties remain flexible in their position at the initial stage. Moreover, before the parties expend time and money for the suit, it is much easier for the mediators to motivate them at that stage. But at the post-trial stage, after obtaining the decree and placing all the evidence before the court, the decree-holder party becomes reluctant to go through the procedure of mediation.

Moreover, after complying with all the formalities of trial by expending money and time, both the parties try their best to continue the case through the procedure of trial. But another dissenting opinion that was prominent was that at the post-trial stage, the evidence of both the parties are presented before the court, and for that reason, mediation becomes easier after verifying all the facts and evidence. So, according to the opinion of 37 judges, the pre-trial stage is much easier for mediation for the disposal of the civil suits. Judges who are supporting post-trial settlement are clearly confusing between mediation and arbitration. Though arbitration is much more comfortable at the post-trail stage, the contrary is true for mediation. It also indicates that judges need proper training to identify various arbitration tools and their proper timing for application.

[536] See appendix C(i).

Table 5.10: Judges' response about a suitable stage for mediation

Number of judges	Opinion	Reason behind the opinion
37	Pre-trial stage is easier	At the initial stage, the parties are flexible, and it can save time and cost of the parties.
3	Post-trial stage is easier	Contrary opinion: At this stage, all the facts and evidence are established before the court. So mediation becomes more manageable at this stage by sorting out all those facts and evidence.

A similar question that was asked to the lawyers was, '*Which stage is easier for the parties to resolve the case through mediation under CPC'*.[537] 36 out of 40 lawyers replied that pre-trial mediation is easier than post-trial mediation. In support of their reply, they said that both the parties remain flexible in their positions at the initial stage. Moreover, before the parties expend time and money for the suit, it is much easier for the mediators to motivate them at that stage. But at the post-trial stage, after obtaining the decree and placing all the evidence before the court, the decree-holder party becomes reluctant to go through the procedure of mediation.

Moreover, after complying with all the formalities of trial by expending money and time, both parties try their best to continue the case through the procedure of trial. But a dissenting opinion that was prominent was that at the post-trial stage, the evidence of both the parties are presented before the court, and for that reason, mediation becomes easier after verifying all the facts and evidence. So, according to the opinion of 36 lawyers, the pre-trial stage is much easier for mediation for the disposal of the civil suits. Lawyers' opinion and its reason thereof is shown in Table 5.11 below.

Table 5.11: Lawyers' perception about a more suitable stage for mediation

Number of lawyers	Opinion	Reason behind the opinion
36	Pre-trial stage is easier	At the initial stage, the parties are flexible, and it can save time and cost of the parties.
4	Post-trial stage is easier	At this stage, all the facts and evidence are established before the court. So mediation becomes more manageable at this stage by sorting out all those facts and evidence.

[537] See appendix C(iii)

The above-mentioned findings from both judge and lawyer respondents reveal that at the pre-trial stage under 89A as distinct from 89C, pre-trial mediation should be selected as an effective means. Therefore, while setting the incentive mechanisms for lawyers and judges or imposing the cost of delaying the process, the required legal mechanism may be created to reward pre-trial initiatives for mediation and award successively more cost for delaying the process after the pre-trial stage.

5.6.3 Encourage lawyers through fixation of lump-sum fees for mediation

A group of 30 judges, who identified discouragement of judges as the prime reason for the failure of mediation mechanism, recommended a necessary amendment for encouraging the lawyers for conducting mediation. Those judge respondents stated that the lawyers do not get proper fees for mediation and therefore, the necessary amendment should be made to ensure proper fees to the lawyers. Those judges among the group have put the opinion that in the provision of 89A, there is no option for a mediation fee if the pleaders of the respective parties conduct the process. In their opinion, the amendment is necessary so that judge will have to fix the fee depending upon the nature and value of the suit and the parties will submit the fees accordingly. According to a number of 9 judge respondents, rules should be formulated in which the different criteria shall be elaborated for fixing the different amount of fees. While giving an opinion about the rules, the judges have suggested following the rules of BIAC,[538] SIAC,[539]WIPO[540] etc.

The lawyer respondents in their interview marked mediation mechanism as less rewarding than trial, and while identifying the reasons, majority of them stated that the parties are not willing to pay much for mediation and the lengthy procedure of mediation for convincing the parties does not justify the payment of such small amount as a fee.[541] From their responses, it becomes apparent that an alternative way should be initiated to ensure proper fees for the lawyers for mediation. Keeping this notion in mind, the question asked to them was, *'Do you think the determination of fees by the court would encourage the lawyers to sit for*

[538] BIAC Arbitration Rules 2019, Annexure rule 4; According to Rule 4, the arbitrators fee(maximum and minimum) is determined on the basis of 'sum in dispute'.

[539] Arbitration Rules of the Singapore International Arbitration Centre, Rule 3; According to Rule 31(1), 'The fee of the Tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators, and any other relevant circumstances of the case.'.

[540] Fees and Costs for WIPO Mediation and Expedited Arbitration for Film and Media, Schedule of the Fees for WIPO Mediation and Expedited Arbitration for Film and Media; The schedule sets criteria for determining fees for mediation on hourly basis.

[541]Topic no 5.6.2.1 of this chapter.

mediation?'[542] Among 40 lawyers, 28 have replied in the positive. To those 28 lawyer respondents, a supplementary question was asked, and the question was that, *'What would be the mode of fixing up the fees? (a) whether it would be on the basis of an agreement between the pleaders and parties, or; (b) whether it would be on the basis of value and complexity of the particular suit?'*[543]

As shown in Figure 5.14 below, 28 out of 40 lawyer respondents or 70% have stated that the court should take the responsibility to determine the fee and in such case, the value of the subject matter of the suit and nature (simple or complex) should be the criteria of determination of such fee. Among those respondents, five added that half of the fee would have to be paid before starting mediation, and the other half have will have to be paid if such mediation becomes successful. The other six lawyers said that to create an obligation upon the mediators and the lawyers, a provision should be inserted to this effect that in case of failure to submit mediation report, the mediators will not get any fee.

However, a group of the other nine lawyers stated that fixation of fees by the court and imposing it upon the parties would amount to oppression upon the parties. Moreover, three other lawyers stated that fees could not be fixed for the lawyers as the amount of fees depend upon the standard and category of the lawyers. Therefore it would not be wise to fix the amount of fees payable to the lawyers.

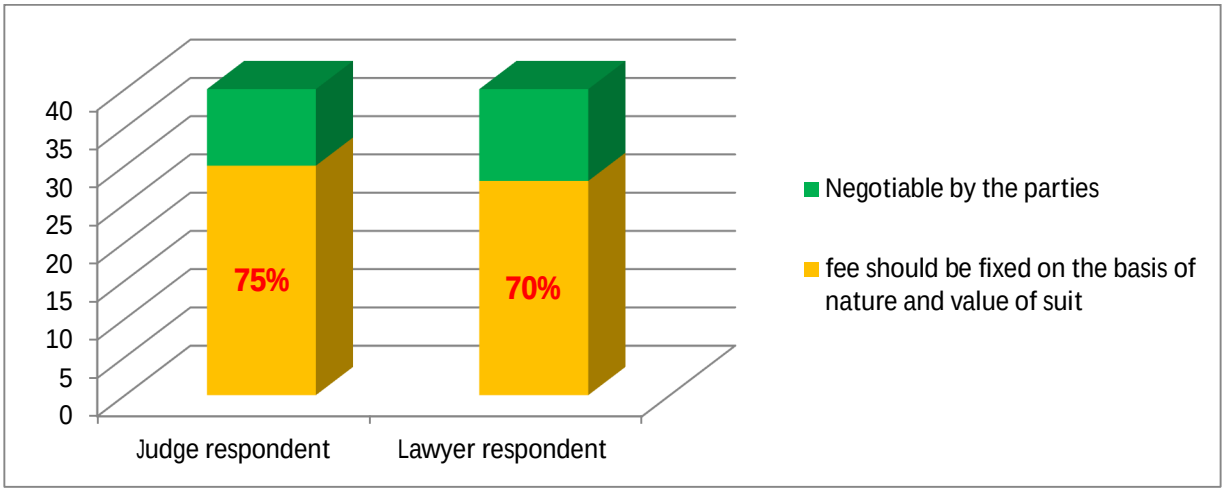
5.6.4 *Categorizing the suit according to its nature (simple or complex)*

It has revealed above that the suit should be categorized according to its simple/complex nature to differentiate the amount of fee to be provided to the pleaders. It is noteworthy that, while interviewing, three judge respondents recommended a way for such categorization. They suggested an amendment for the inclusion of Order 10 in the provision of section 89A of CPC. The essence of such provision is that at the first hearing of the suit, the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party and not expressly or by necessary implication admitted or denied by the party against whom they are made. The court shall record such admissions and denials. In the subsequent proviso of 2 and 3,it is stated that at the time of the first hearing, the parties may be examined by the court and the

[542] See appendix C(iii).
[543] See appendix C(iii).

substance of such examination shall be reduced in writing by the Judge and shall form part of the record. Those three judges have opined that the procedure laid down in the provision of order ten may be adopted to categorize the suit fit for mediation or less fit for mediation.

Figure 5.14: Judges and Lawyers response about the way of providing a lump sum amount of fees



5.6.5 Amendment to impose a consequence for non-cooperation in mediation

Judges view: According to their opinion of 25 judges amongst 40 judges, in the provision, there is no consequence for non-cooperation of parties in the mediation procedure. So a provision must be inserted to make the parties involve them to go into the process of mediation. For this purpose, they proposed an amendment like this, If the party, either plaintiff or defendant, does not come to a session of mediation initiated under this section, or according to the opinion of the mediator, any of the parties shows an unwillingness to comply with the required formalities of the mediation procedure, the mediator shall prepare a report in this regard, and submit it to the sitting judge and such report will be a part of the evidence in the proceedings.

Another opinion was formed within this group. Fifteen judges included an opinion to this effect that only preparing the report mentioned above will not suffice to create enough obligation upon the parties and pleaders for complying with formalities of mediation. For that reason according to their view more stringent measures have to be taken. They proposed the amendment like this, If the party, either plaintiff or defendant does not come to the session of mediation initiated under this section, or according to the opinion of mediator shows unwillingness to comply with the required formalities of the mediation procedure, the mediator shall prepare a report in this regard, and submit it to the sitting judge and on the

basis of such report, the sitting judge shall decree the suit exparte, if according to the report, the defendant was absent or unwilling in the mediation session. The suit will be dismissed if the defendant is absent or unwilling in the mediation procedure. One group of judges' dissenting opinion was that such action would impair the flexible, informal, non-binding and confidential character of the mediation procedure.

Another group of 10 judge respondents stated that for the purpose of inclusion of consequence, fine might be imposed upon the unwilling party at the time of disposal of the suit if that party ultimately fails after trial. Thus, the proposed amendment could or should be 'If any party does not co-operate at the time of mediation and the result of such mediation goes against that party, the presiding judge shall impose upon them a fine at the time of disposal of the case towards that party on the basis of the report prepared by the mediator. The opposite opinion was that in our justice delivery system, there is no finality of the trial procedure as the parties always have the option to go to an upper court to review the decision. In such cases, the imposition of a fine will not be a practical way of inserting consequence.

While replying to this question, 17 lawyers stated that necessary amendments have to be made in order to ensure the sitting of the parties for mediation. The appointed mediator whoever he or she may be (a sitting judge, respective pleader, district legal aid officer or third party mediator under sub-section 10), shall prepare a report of mediation proceeding containing the signature of the mediator and the parties in every session and submit it to the trial court. The court shall take necessary actions upon that non-cooperating party and the actions that may be taken by the judge are; a) imposition of a fine upon that non-complying party, b) pass an order of decree or dismiss the suit depending upon whether the non-complying party as plaintiff or defendant. 2 respondent lawyers have proposed that in consequence of non-compliance of the process of mediation by either party, such party will have to suffer the same procedure as laid down in order 11 rule 21 of CPC.[544]

5.6.6 Encourage judges for mediation through professional points on the resolution

Among the judges interviewed, a group of 13 have specified inactivity of sitting judges for initiating mediation, and therefore, they have emphasized establishing accountability of judges in this regard. At this point, they have proposed an amendment of the provision for

[544] Where any party fails to comply with any order to answer interrogatories ……he shall, if a plaintiff, be liable to have his suit dismissed and if a defendant, to have his defense, if any struck out and to be placed in the same position as if he had not defended …'

making the judges active in this regard. One way is to provide the option for an honorarium to the judges if the mediation conducted by him becomes successful. The judge mediator will prepare a bill on the basis of his successful mediation report, and get an amount from revenue. However, a group of 17 judges have stated that it will encourage some judges to file fake mediation reports in cases where the parties file compromise agreement prepared by themselves. Another 13 judges replied that High Court Division's circular about the credit of disposal of 2 cases in a successful mediation should be implemented.[545]In such case, those judges said that the concerned judge should prepare the report containing a number of sessions, details of all the formalities of those sessions with signatures of parties and their pleaders. To ensure the authenticity of the report, the monitoring authority should strictly take measures for effective monitoring. But all the 40 judges have responded that due to the heavy burden of trial cases, they cannot spare time and mood for insisting the parties for mediation. Therefore, in their view, there is an inevitable necessity to create the post for separate mediation judge to make its efficiency to an optimum level.

Above mentioned amendments are expected to bring necessary changes to accelerate functions of mediation.[546]

5.7. Judges perception as to institutional reform: establishing hard and soft infrastructure for mediation

As mentioned earlier, mediation is a type of alternative resolution that has proven success worldwide but, in many cases, requires reform not only in our legal system but also in our institutional mechanism to attain sustained success over time. As evident from the writing of other scholars, the initial enthusiasm for mediation and consequent mounting success to resolve cases and remove backlog in family cases may not fail to sustain in another part of our judicial system that has neither experienced such initial motivation nor have any support system to sustain that change. Therefore, in light of the significant objective of conducting this research, the purpose of this sub-section is to highlight the institutional reforms suggested by respondent lawyers and judges in civil courts.

The next question that was asked to the judges was, *'Do you think institutional reform is required for the effective practice of mediation in mitigating case backlogs in the*

[545] The honorable High Court Division issued circulars on 23.06.2003 vide its Memo No. 59(K) wRand 59(L) wR. This provision has been given into effect from the 1st of July, 2003. Through this circular, the High Court Division has given benefit of double disposal in case of successful mediation and single disposal in case of unsuccessful mediation.

[546] See appendix E for proposed law and rules.

courts?'[547]From the response, it appears that all 40 judges have answered in the affirmative. The judges provided several options or way outs for making the institutional reforms when asked the question; '*what sorts of institutional reforms do you suggest for effective mediation practice?'*[548]Among the judges, all 40 judges replied that an increase in the number of judges and development of infrastructural facilities of the court are essential for effective mediation practice. Thirty judges also added another way out, namely improvement of the activities of the District Legal Aid Office to develop effective mediation. 30 out of 40 judges chose the option 'others (please specify), and in such option, a number of 15 judges have proposed for mediation court in which a judge will have the sole jurisdiction to conduct mediation. The lawyer respondents stated that it is necessary to build up a mediation services organization where the professional mediators will settle the suits. Thus, the judge respondents' opinion for the development of infrastructural facilities can be shown in Table 5.12 below:

Table 5.12: Judges' priority on infrastructural development for mediation

Question	**Answer of the judges**				
Do you think any infrastructural development is required for the effective practice of mediation	All the 40 judges answered in the affirmative. From the opinion of judges, it is evident that the development of hard infrastructure gets the first priority among different options chosen by judges.				
Specific Requirement	Option 1	Option 2	Option 3	Option 4	Option 5
What sorts of institutional reform do you suggest for the effective practice of mediation?	15 Judges proposed for establishing a separate mediation court.	All 40 judges wanted infrastructural development of the court	All the 40 judges suggested an increase of judges	30 judges suggested the development of legal aid office	10 judges chose the establishment of a central mediation organization

5.7.1 Establishment of separate mediation courts

The group of judges gave another opinion to the effect that necessary laws should be changed to create ~~a~~ separate judge mediator courts whose duty would only be to conduct the mediation

[547] See annexure C(i).
[548] See annexure C(i).

procedure. They were asked a question as to *'what sorts of institutional reforms do you suggest for the effective practice of mediation?'*[549] In reply, they said that there should be a separate provision establishing a mediation court. The jurisdiction of that court would be to deal with the mediation of the civil litigation referred by the trial courts. The logic behind establishing the mediation court was that the judges of the trial courts are overburdened with proceedings of litigations, and therefore, it is difficult for them to allocate time for conducting mediation. But the previous findings[550] reveal that a good number of judge respondents and lawyer respondents have chosen judges one of the most appropriate mediators for settling cases. In their opinion, the suggested amendment may be like that on the date fixed for step under section 89A, the trial judge shall send the case to the mediation judge, and the mediation judge shall initiate required formalities under 89A of CPC.

As a supplementary to that mechanism, one judge proposed the creation of a mediation committee. In his opinion, the new law may be like this, 'In each of the districts, there will be a mediation committee. The head of such committee would be an officer equivalent to District Judge and under his control, there would be other two judges. Their duty would be to monitor the mediation courts' activities, and the mediation courts would be accountable to submit their activities before that committee.

5.7. 2 DLAO Judge Mediators' view on the development of District Legal Aid Offices

To get the view of District Legal Aid Officers (DLAOs) towards raising the efficiency of District Legal Aid Offices in conducting mediation an open-ended question, *'Give recommendations for the development of District Legal Aid Office for increasing efficiency in resolving cases through mediation' was placed before 30 DLAOs who are equivalent to Assistant Judges in other civil courts.* [551]

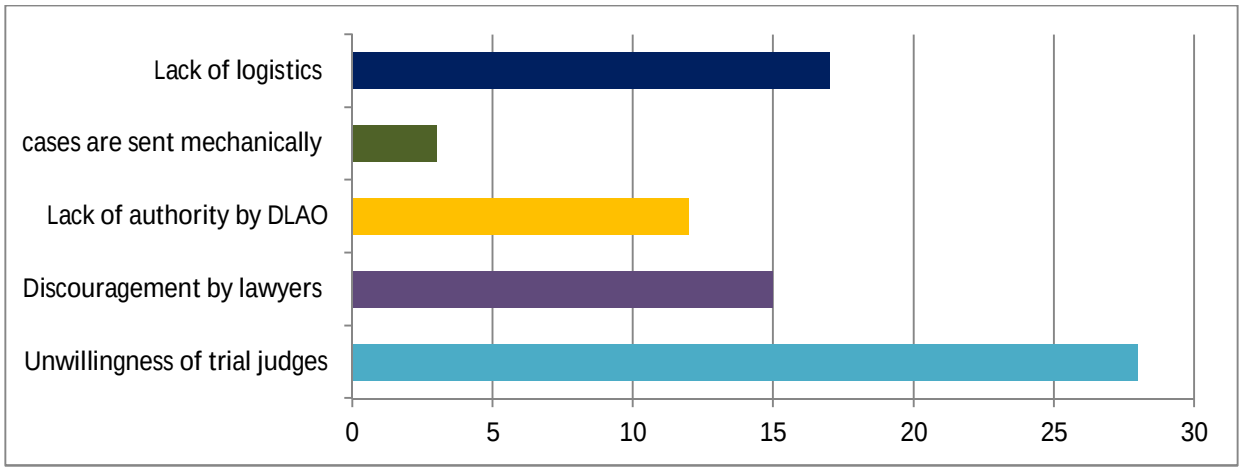
In the discussion mentioned above, firstly, an attempt has been made to present the state of efficiency of the District Legal Aid Office on the basis of opinions from respondents. Subsequently, recommendations were sought for developing its further efficiency. As summarized in Figure 5.15 below, amongst the thirty respondents, ten judges stated that the trial courts have not yet started to send civil suits for mediation to their office. Therefore, the capacity of the legal aid office in this sector has not yet been tested. So as per their opinion,

[549] See appendix C(i).
[550] Detailed in topic no 5.6.2.
[551] See appendix C(ii).

there should be widespread awareness-raising among the judges and litigants for starting the implementation of amendment of 2017. For this purpose, the District and Sessions Judge may provide direction to trial courts to send competent cases for legal aid.

The rest of the 17 judges have expressed that they have dealt with a limited number of civil cases while conducting mediation procedures. According to their opinion, there are several ways to develop this machinery. Firstly, manpower, equipment as well as infrastructural facilities have to be improved to handle this. For example, among the judges, ten legal aid officers stated that the post of district legal aid officer has to be upgraded so that an officer equivalent to joint district judge can hold the post. With him, two or more officers' equivalent to senior assistant judge can also perform the duty of district legal aid officers Similarly, the staff strength, such as office assistant, typist, and serving officer, should be recruited in this office.

Figure 5.15: DLAO mediators' view for the development of District Legal Aid Offices



Secondly, if the mediation effort fails, the district legal aid officers should be given an authority to conduct a binding arbitration, with consent from both the parties. In such a case a DLAO may be authorized with passing interlocutory orders like a judge of the trial court to decide a particular fact existing between the parties.

Thirdly, the district legal aid officer should be given some authority to compel the parties to sit for mediation and therefore, prepare a report against the party who is unwilling to sit at the same time. The report should also have the evidentiary value at the time of disposal of the suit after trial. Fourthly, the pleaders should be provided with fees so that they feel interested in involving the parties with mediation. Fifthly, the NGO's and Upozilla and Union Legal Aid Office should raise widespread awareness among the litigants in case of pre-case mediation and post-trial mediation.

5.7.3 Judges' perception on required logistic support to existing courts for conducting better mediation

Enactment of new laws or amendment of existing laws with new provisions may not be sufficient if required physical infrastructures are not in place to implement those laws. Therefore, the next question that was asked was, *Do you agree that courts do not have enough logistic strength to provide effective service on mediation?'*[552] Thirty-eight judge respondents replied that they strongly agreed with the question. The remaining two judges agreed with this proposition. The next question asked to them was *'If your answer is (a) or (b), how could logistic support be improved to this end?'*[553] In reply to that question, 35 judges stated that the courts do not have enough environment, space, staff strength and other economic utilities to conduct mediation procedure in the court. In the chamber of the court, there isn't the required atmosphere to motivate the parties through consultation in presence and cooperation with the lawyers. So, the above 30 judges have suggested establishing a separate mediation room with other utilities in which the judge mediator may preside over the mediation session. In addition to that, as per their opinion, increasing the staff strength, other equipment and a separate fund should be created for refreshment to create an environment among the parties to encourage negotiations properly.

Other ten judges have answered that only logistic strength inside the court-room will not suffice to create a favorable environment for a successful mediation. To promote the efficiency of mediation mechanism, a mediation centre should be instituted centrally, which will provide logistics to the courts as well as monitor the requirements and fulfill the same accordingly. Thus the opinion of the judges can be shown in Table 5.13 below:

Table 5.13: Judges' view on lack of logistic strength in courts for conducting mediation

Question asked to the respondents	**Number of the respondents**		
	Strongly agree	Agree	Disagree
Do you agree that the courts do not have enough logistic strength to provide effective service for mediation	38	2	0
How the logistic support can be improved to that end?	A separate mediation room should be instituted for mediation with sufficient economic utility	A mediation centre should be instituted to provide necessary logistics to the courts and monitor thereon.	
	30	10	

[552] See appendix C(i).
[553] See appendix C(i).

5.7.4 Developing competency of judges as mediators and building up central mediation organization

In the previous discussion, the judges answered that judges are not competent enough on techniques of mediation under CPC. In this connection, the question that was asked to them was 'How can judges' competency *to resolve cases through mediation be enhanced further?'*[554] As demonstrated in Figure 5.16 below, all 40 judges answered that proper training is essential for the judges to equip them with techniques of mediation. In addition to that, ten judges added another option of providing mediation allowance for conducting the mediation effectively. Another group of 15 judges added the option of including mediation in the curriculum of legal studies.

In answer to the question, '*what sorts of institutional reforms do you suggest for the effective practice of mediation?'*[555] Among 40 judges, 20 judges have recommended developing a central mediation organization in which the training for mediation techniques will be provided for the judges and lawyers. According to their other opinion, a separate group of professional mediators would be appointed in such an organization. As professional mediators, all the persons with a different educational background, including the retired judges will deliver their duties as mediators. The government shall form the specific rules and regulations for recruitment of those professional mediators, and those professions will receive a salary from the State.

They have suggested that, after reception of the case from the court, the case will have to undergo different steps which are shown below:

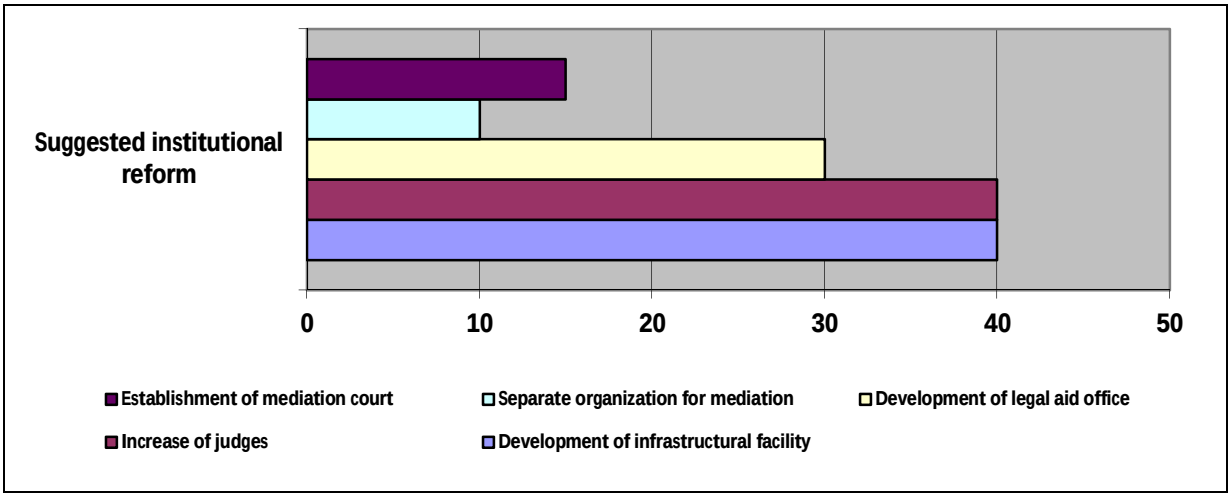
> "A date shall be fixed for the presence of both the parties… Fees shall be determined on the basis of nature of the suit…Date will be fixed for negotiation for settlement…date for exploration, ….date of agreement…otherwise."

Thus, it becomes evident that for the purpose of conducting effective mediation, logistic support inside the court should be provided. To that end, a separate room for mediation with adequate staff strength and other equipment is necessary. In addition to that, a separate mediation court presided by the mediation judge against each trial court is required to be established. The exclusive jurisdiction of the mediation judge would be to conduct mediation having all the authority of a trial judge. It is also apparent from the above conversation that an increase in the number of judges, development of a legal aid office, and establishment of a

[554] See appendix C(i).
[555] See appendix C(i).

separate mediation services organization is also essential in which after receipt of all the litigations from the different courts around the country, the professional mediators will arrange the mediation procedure according to rules and regulations formulated by the government.

Figure 5.16 Judges' Response to develop Institutional Capacity for Mediation



In the above-mentioned studies, the opinion of the judges is accumulated which conveys the prospect, barriers and possible way outs for developing effective mediation. The judge respondents have identified no motivation for lawyers, the low interest of the parties and low motivation for judges as the foremost reasons for less mediation efficiency. Suggestions were sought from the judges for improving the situation. The suggestions have already been discussed so far, are for the improvement of the legal framework and the institutional framework. As the detailed discussion has already been done in the previous segment, the observation is given only in Table 5.14 below:

Table 5.14: Judges' view on required legal and infrastructural development for mediation

Number of judges	Proposal for improvement of the legal framework	Number of judges	Proposal for improvement of the institutional framework
20	Rules have to be framed about the procedure of mediation	38	Training to both judges and lawyers are essential.
15	A list has to be maintained about the suits disposable through mediation	35	Awareness building mechanisms should be developed.
30	Fees have to be fixed for mediation by the judge himself, and there should be a rate in fixing the fees depending upon the nature of the suit.	20	Judges should be rewarded through honorarium and awarded with recognition for successful mediation

28	Fees should also be given to the pleaders	22	There should be a framework for categorizing the suitability of suits for mediation.
33	Mandatory character for mediation should be inserted. Thus, the parties must face consequence in case of not attending mediation sessions	25	A mediation services organization must be established in which training would be disseminated, and a group of professionals would conduct the mediation centrally under the given body of laws.
		27	Legal Aid office must be made more efficient through providing logistics and staff as well as officer strength
		14	A separate mediation court should be established against each court.

5.8 Lawyers' perception as to reformation of the institutional framework

The earlier discussion reveals that a prominent number of lawyers respondents have expressed the opinion that the reformation of institutional setup to ensure the implementation of existing laws is more important than the an amendment of the legal provision. It is also worth mentioning that 16 lawyers have proposed necessary actions to establish an institutional setup to make the mediation mechanism more efficient.

5.8.1 Establishing an effective Panel of mediators

Thus, the question that became very much necessary to ask was, '*what sorts of institutional reforms do you suggest for effective mediation practice?'* The options were improvement of the activities of District Legal Aid Office; increase the number of judges; develop infrastructural facilities of the court and others.[556]Among the 40 lawyer respondents, 17 have suggested promoting the performance of the mediation panel as established under sub-section 10 of section 89A.[557] In the earlier topic of 5.6.2, a number of 16 lawyer respondents who selected advocates as the most appropriate mediators suggested promoting the activities of panel mediators. While stating about the mediation panel, the respondents stated that currently, the mediation panel is not performing to the satisfactory level as the mediation mechanism is not financially beneficial to the pleaders and the mediators. Therefore, those

[556] Se appendix C(iii).
[557] Topic no 5.6.2: Activating mediators' panel with fit persons as registered mediators.

respondents have repeatedly emphasized upon the payment of handsome fees to the panel of mediators.

5.8.2 Development of District Legal Aid Offices

In reply to the question of institutional reforms, lawyers respondents stated that judges enjoy the confidence of people due to their impartial nature and proper authority to adjudicate on litigations. From that viewpoint, those respondent lawyers have expressed their opinion that the district legal aid officers being the judges enjoy the litigants' confidence and reliability to settle the suits through mediation. Moreover, according to their other opinion, the sitting judges are overburdened with the trial of the cases and lack enough logistic facilities to conduct the mediation procedure. The district legal aid officer, on the other hand, has the institutional setup as well as required legal authority to proceed towards resolving suits through mediation. Based upon these arguments and logic, those lawyer respondents have suggested an improvement of the activities of the District Legal Aid Office.[558]

5.8.3 Increase the number of judges

Regarding the increase of judges, as many as 38 lawyers have chosen that option stating that in post case mediation, the judges have to discharge the responsibilities specified under section89A of CPC irrespective of the fact of his acting as a mediator or not. While identifying the reason, the lawyer respondents have stated that it is the primary duty of the judges to mediate the suits by themselves or send it to the appropriate person for this purpose after complying with certain formalities like fixing the mediation fees, preparing the record etc. before sending it. These activities require time and attention and such allocation of time and attention is possible only when caseload upon individual judges can be minimized. Therefore, all the lawyer respondents have chosen to increase the number of judges as a vital step towards institutional reform.

5.8.4 Infrastructural development inside the court and development of a central mediation organization

While discussing the option of “develop infrastructural facilities in the court”, 26 lawyer respondents stated that a separate mediation room must be attached to each court.[559]They have also proposed establishing a separate mediation organization, the task of which will be

[558] The topic is detailed in topic no 5.7.2.
[559] Detailed in Topic no 5.7 3.

to conduct mediation of civil and disseminate the required training to the necessary stakeholders for conducting the settlement procedure through mediation. [560]

As a supplementary, another question was asked, and that is, *'How can the competency of the lawyers to resolve cases through mediation be enhanced further?'*[561] This query can be considered a supplementary question to the earlier ones as the increase of lawyers' expertise depends upon an appropriate institutional setup that helps to equip the lawyers with competence to resolve the mechanism of mediation. In answer to this question, 21 lawyers stated that proper dissemination of training is essential to build up competence and for that purpose, a mediation training organization is necessary. Another7 lawyers have answered that there should be a system of creating more earning opportunities for lawyers so that they would not have to depend only upon the trial of civil proceedings. If this opportunity can be raised in favour of the lawyers, they will grow a greater interest in settling the suits quickly through mediation and therefore, develop their competence in the field of mediation. A number of 31 lawyer respondents have mentioned that providing proper fees to the lawyers for mediation will necessarily increase lawyers' compatibility in this field.

Thus the expression of the respondent lawyers can be shown in Table 5.15 below:

Table 5.15: Lawyers' view on required infrastructural facilities for effective mediation

Number	Responses	Reasons
n=17 (42.5%)	Develop district legal aid office with more authority and infrastructure	DLAO enjoys the reliability of litigants and also have the establishment appropriate for mediation
n=38 (95%)	Increase the number of judges to allow more time for mediation	By minimizing caseload upon individual judges, they will be able to handle mediation more efficiently.
n=16 (40%)	Establish mediation room, mediation court and mediation organization	Courts do not have enough logistics and facilities for effective mediation.
n=40 (100%)	Increase the competence of lawyers in mediation	The lawyers as pleaders or panel mediators can effectively resolve the cases.

The above discussion reveals that along with an amendment of legal provisions, development of the institutional framework is essential to build up an efficient mediation mechanism. Besides, for the purpose of proper implementation of legal formation existing for mediation,

[560] Detailed in the topic no 5.7 4.
[561] See appendix C(iii).

the present institutional setup has proved to have been not enough for ensuring effective mediation. For that reason also, the intuitional structure has to be developed to achieve that end.

5.8.5 The need for a separate law and rules for mediation: Outline proposed under this research

As described in the chapter, both lawyers and judges identified several institutional and legal reforms necessary for the effectiveness of mediation in civil courts. Changes in law and infrastructure are always suggested to develop a justice delivery system that promotes quick resolution and melts down the pile of case backlog in civil courts. However, the thesis used the term 'reform' because the need for confidential mediation is sometimes different or even opposite to what is required for the promotion of justice delivery through trial in open courts. For instance, instead of developing the open courtroom at the foreground, mediation requires a more equipped office room and meeting room for judges to conduct mediation and caucus during the process.

Instead of dealing with two equally empowered lawyers, in case of mediation, judge-mediators have to understand the parties' differential needs and have to follow an empowering process to make both the parties participate in the process. Therefore, a different set of procedural rule and skill training is required for that. Though the objective of this research is to identify areas that need legal or institutional reforms, based on the relevant literature and records searched during the research, some specific provisions for reform including "mediation rule" and "fee structure for lawyers" are drafted and added as appendix E to this chapter. These draft outlines for reform could be a good starting point for policy-makers, to begin with the reform process in this regard.

5.9 Conclusion

In the present chapter, an attempt was made to collect the response from both judges and lawyers regarding prospect and existing challenges of the country's mediation system. The respondents have revealed their different opinions from their knowledge and experience. In the prevailing system of mediation, the involvement of district legal aid officers have given them the status of judge mediators, and therefore, their expressions have categorically been in the discussions of this chapter. The opinion of all of them has revealed that the law relating to the court-connected mediation has the potentiality to reduce case backlog in the courts and enough prospect for ensuring better justice in comparison to the trial procedure. However, the

judges and lawyers have unanimously put forward the opinion that the system though exists in law, is not adequately implemented in practice due to various reasons.

According to them, disinterest on the part of litigants, low motivation of lawyers, fewer judges' activities, and other factors prevailing outside the court in this respect are widely prevalent in this field. The institution of the mediation system is not properly functioning, as per their opinion due to several shortcomings in the legal and institutional framework. Both the stakeholders identified those deficiencies and limitations by answering different questions. Furthermore, from their individual viewpoints, they suggested appropriate solutions to develop an efficient institutional and legal framework of mediation of civil suits in Bangladesh. To ensure fair justice through mediation, they have recommended legislation of laws to standardize its practice and rejuvenation of institutional basis leading to skilled professionals to sensitize disputants at the grass-root level to achieve the success.

CHAPTER 6

AN EMPIRICAL ANALYSIS ON THE EFFECTIVENESS OF MEDIATION IN CIVIL CASES UNDER CPC: CLIENTS' PERSPECTIVE

6.1 Introduction

It has already been reiterated in the previous chapter that though provisions for trial and mediation of civil suits are available in the Code of Civil Procedure, those provisions are not maintained and complied with causing a barricade behind disposal of civil suits.[562] In the earlier chapter, the main highlights of the discussion were judges and lawyers' perspective regarding prospects, challenges, and the possible way outs to overcome the challenges of mediation mechanism. In their discussion, they have unanimously agreed that people get better justice through mediation than through the trial system. According to the opinion of those respondents, loopholes in the legal and institutional framework are causing a barrier to bringing the benefit of mediation to the poor and marginalized litigant public. On the other hand, those respondents have further expressed that the existing socio-economic premise of our society stands in such a position where the major part of the litigations originates to harass the other party. Their mentality can be described in the following way:

> "To create false litigation and to tell more lies in courts of law is a general tendency of most of the litigant public. Instead of admitting immediately and forthwith the liability which subsists in them, there is a tendency to postpone the eventual result by making false claims and false defenses. All sorts of dilatory tactics are deliberately adopted by several litigants to delay the decision."[563]

In the realm of such psychological trend of the litigant public, the cooperation on the part of litigants plays a significant role to make the mediation mechanism a success. The challenges against the smooth functioning of mediation and possible solutions cannot be appropriately determined without considering their responses in this regard. Consequently, this chapter has attempted to understand their awareness and thoughts in respect of the effectiveness of mediation mechanism articulated in section 89A of CPC.

6. 2 Methodology Revisited

The justice delivery system of a community is planned and planted for settling down the dispute between citizens and between state and citizen in a timely and cost-effective way. All

[562] The effectiveness of trial procedure and mediation in disposing civil suits and underlying reasons for ineffectiveness are laid down in chapter 3 and 4 of the present research.

[563] Md. Akhtaruzzaman, *Case Management and Court Administration in Bangladesh,* (Advocate Razia Khatun,2014) 225.

civilized countries in the world have a formal court system to provide justice among the members of society. As articulated in the Universal Declaration of Human Rights, "Everyone has the right to an effective remedy by the competent national tribunals for the acts violating the fundamental rights granted to him by the constitution or by law."[564] Similarly, the Constitution of the Peoples Republic of Bangladesh has recognized the equal protection before law as the fundamental right of every citizen.[565] According to article 31 of the constitution, No person shall be deprived of life, and personal liberty save in accordance with the law. So the citizens, in other words, the people at large are the beneficiary of the formal court system. However, the formal adjudication system is causing delay and excessive cost leading to the enormous backlog of cases.

6.2.1 Interview of litigants to share their perspectives on trial and mediation

In order to minimize the sufferings of the people on the formal trial process, mediation has been introduced as an alternative dispute resolution through the amendment of The Code of Civil procedure in 2003. Since the amendment, a considerable portion of time has elapsed, and at this point of time, the response of the litigants about the effectiveness of mediation in civil courts under CPC is significant to determine whether the mediation process has provided access to justice to the litigants. It is necessary to know for their part as to whether they think the mediation procedure is efficient enough to attain their own benefit. Therefore, perception of litigants about the efficacy of civil mediation constitutes the essence of analysis made in this chapter. Fifty litigants with cases pending in civil court for different tenures were chosen as respondent for this research.

Though data on delay in disposal has already been discussed in aggregate terms, it is further triangulated here through a response on delay gathered from litigants participated in this research. As discussed later in this chapter, such interviews provide an option to classify cases on average time to delay, they create in civil courts before disposal. Such differential data on delay in disposal would help policy makers classify cases that need to be dealt with first to reduce backlog and delay in civil courts.

[564] Universal Declaration of Human Rights, Article 8.

[565] The Constitution of People's Republic of Bangladesh, Article 27, 'All citizens are equal before law and are entitled to equal protection of law.'

6.2.2 Semi-structured questionnaire survey to explore subjective views of respondents

In the previous chapter, the judge and lawyer respondents pointed out less interest of the parties as one of the main reasons behind the ineffective practice of mediation.[566] The majority of lawyers opined that very few times the litigants, following the lawyers' suggestion, agree to settle the suits through mediation. Many psychological factors, including ego problem, ignorance about mediation, cause the parties disinterested in this situation. Thus, the chapter focuses on the verification of their level of awareness and interest and usefulness of the mechanism of mediation under CPC. Litigants were interviewed with a semi-structured questionnaire to collect responses and triangulate the validity of responses on similar questions asked earlier to a different set of respondents such as lawyers and judges in civil courts.

The questionnaire prepared for the respondents is structured, semi-structured and unstructured. Structured questions were put to the respondents for the purpose of representing the majority opinion in respect of a particular matter. Semi-structured and unstructured questionnaires are formulated for getting all the information which the interviewees are willing to provide.[567]The type of interview was focused as an extensive effort to obtain the experience, attitudes and opinion regarding different aspects of court-connected mediation of civil disputes from the persons known to have been involved in a particular concrete situation.[568]

The questions were put forward to a number of 50 respondents and those questions were aimed at eliciting information on the background of their experience as parties of civil litigation. The interview was focused on individuals who are fighting to get their rights enforced through civil litigations. Those interviewees were selected from courts of different jurisdictions such as Assistant Judge Court and Joint District Judge Court and Additional District Judge Court and diversified territory like courts of metropolitan area and beyond metropolitan area to cover parties of all types of civil suits. During the interview, through verbal and non-verbal communication, a consistent effort was made to know their "experience, attitude and emotional responses"[569] regarding their own civil proceeding,

[566] Topic under the head 'Judges perception about problems in practice of mediation' deals with the disinterest of parties as one of the main reasons.
[567]Martin P. Golding, *Legal Reasoning*, (Alfred A. Knoph, Inc, New York, 1984) 1.
[568] Brian Bix, *Jurisprudence: Theory and Context*, (2nd edn , Sweet and Maxwell 1999) 133.
[569] Robert. K. Merton and Patricia Kendall, 'The Focused Interview' (1895)American Journal of Sociology, Vol 51, No 6, 541-542.

particularly about the mediation mechanism. The questionnaire was designed to categorize the questions in four parts:

Firstly, certain types of questions were put forward to learn whether they are getting proper remedy in time through the procedure of trial. To get an idea of their experience through trial, questions relating to nature of the suits in terms of duration, the complexity of facts and type of remedy they wanted were asked. The purpose of such a questionnaire was to compare resolution through trial and mediation and assess the necessity of mediation.

The second category of questions was made to get an idea about their level of awareness of the mediation mechanism and find out the reason for their disinterest in resolving the suit through mediation. In this category, the questions asked were whether they had any idea about mediation, whether they know about the fixed date of mediation, the person who informed them about mediation etc.

The third category of the questionnaire was formulated to measure the support the lawyers and judges provide to the litigants to make the litigants involved in the process of mediation. The questions were asked about the role played by lawyers and judges in this respect, the person who acted as a mediator in case of a successful mediation, in case of unsuccessful mediation, for whom the success was not possible etc. This set of questionnaires aimed to measure the efficiency of the different stakeholders of the courts (including district legal aid office) in terms of success and failure of the resolution of suits.

The fourth and last set of questions put forward to them was to verify the suitability of their suits for mediation and if not suitable, the underlying reasons thereof.

The set questionnaires was formulated to collect, analyze and interpreting the data[570] as regards prospect, underlying problems and possible way out for improvement of mediation to provide better justice to the respondents.

6.3 Litigants' experience on delay in disposal under different types of civil disputes

In the preceding chapter, both the judge respondents and lawyer respondents put their opinion that parties get better justice in mediation than that of a trial. [571] To verify the above-

[570] Syed M.S Kabir, *Basic Guidelines for Research: An Introductory Approach for All Discipline* (Book Zone Publication, 2016) 201-210.

[571] In chapter 5, topic no 5.4.1 the expression of judges were elaborated and in topic number 5.5.1. the expression of the lawyers were elaborated.

mentioned opinion of the judge and lawyers, a set of questions were asked to litigants to understand their experience in the trial proceedings of the suits. By interviewing the respondents, an attempt was made to understand the necessity of taking resort to mediation process as an alternative for trial. The first question that was asked to them was, *'For how long has your case been pending before the court?'*[572] Around 20 of the respondents replied that their case was pending for more than 15 years. Twelve respondents answered that their case was under trial for more than ten years. The remaining 18 respondents out of 50 replied that their suit had been instituted on or after 2012 and were still pending before the concerned court. The next question asked to them was, *'What relief do you want in your suit?'* A related question asked to them was, *'How much time do you think the suit may take to be disposed of?' The options were declaration of title, permanent injunction, declaration of the deed to be void and not binding, compensation, reinstatement of service, preemption and partition.*[573] The responses are explained in the following points;

6.3.1. Delay in the suit for declaration of title

Among the 50 respondents, 28 answered that they have sought for declaration of title in the suit. Among those respondents, most of them said that they had filed the suit for declaration of latest record of the right to be incorrect and not binding upon them.[574]

According to their response, among 28 suits for declaration of title, 15 cases are pending for more than five years, and four cases are under trial for more than ten years. Among the rest of the nine cases, seven are more than three years old. Thus, from the above observation, it appears that out of 28 cases, 26 are lengthy pending proceedings and in all those contested cases, through the formal process of trial the suits irrespective of its nature being simple or complex, are taking a considerable amount of time to be disposed of.

[572] See annexure C(iv)
[573] See annexure C(iv)
[574] See annexure D(i) for details

Figure 6.1: Delay in the disposal of declaration suits

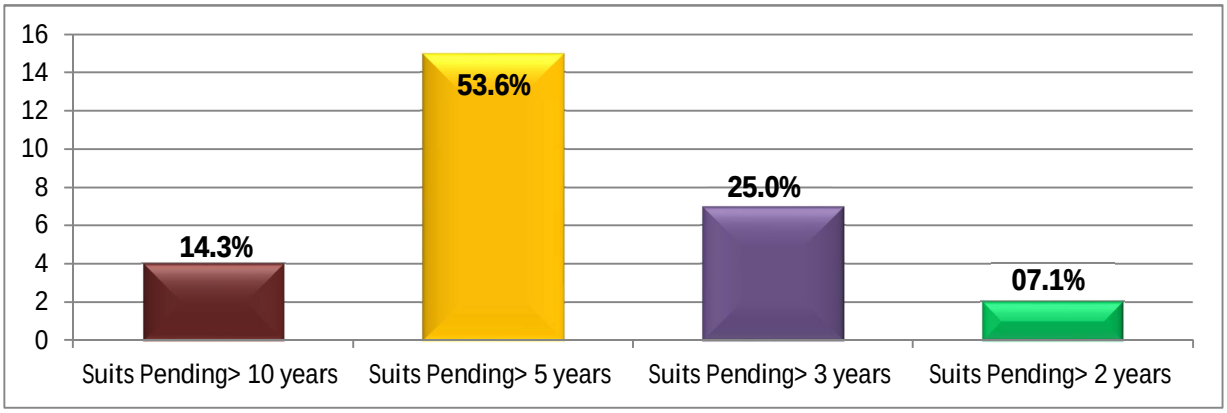


Figure 6.1 above shows that more than 50% of the declaration suits remain pending from five to 10 years and only less than 10% of declaration suits can be resolved before two years. Therefore, one corollary question was to know how much more delay they expect to resolve the trial of their cases. The question was, *'How much time do you think the suit may take to be disposed of?'*[575]

In reply to the question, out of 28 respondents, 16 respondents replied that the tentative date for disposal of the suit is not less than two years. Ten respondents have answered that they have no idea as regards the time of disposal of the suit. Only two respondents have responded positively. One of them stated that his case has already been disposed of and the other respondent said that High Court Division had ordered the trial court to dispose of the suit.

Table 6.1: Litigants' response on anticipated delay in disposal (*declaration suit*)[576]

Serial number of respondents	Number of suits	Brief description of the suit	The tentative time for disposal
1	622/2015 of 2nd Joint District Judge Court, Dhaka	It is for a declaration that the CT survey *khatian* has been wrongly recorded in respect of 6.50 decimals land in the names of the defendant.	Two years
2	560/13 of 2nd Senior Assistant Judge Court, Dhaka	Declaration for the decision of the governing body of the school in respect of his suspension from the service to be void and not binding upon him.	He does not know
3	378/2016 of 4th Joint District Judge Court Dhaka	It's for declaration of CT *khatian* wrongly recorded in respect of 22 decimals land in the names of the defendants.	One year

[575] See annexure C(iv)
[576] See annexure D(i) for details

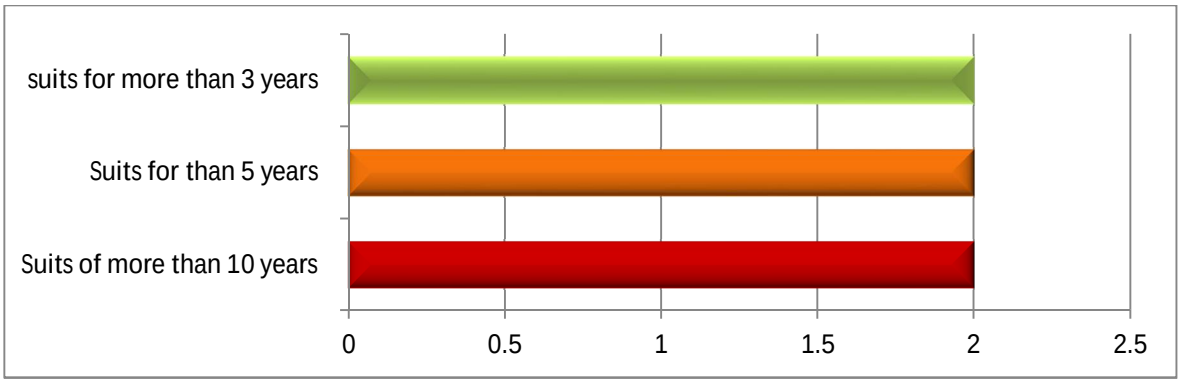
4	903/2014of 2nd Joint District Judge Court, Dhaka	Suit for declaration of title and recovery of *khas* possession in respect of 5 decimals land as the defendant no 1 is in possession as an owner through a void power of attorney.	Five years

The above mentioned response in Table 6.1 shows that the suits through formal adjudication will take a long time to reach its finality. Thus, the suits for declaration of title through the trial process do not render the benefit of the timely disposal of suits.

6.3.2. Delay in the suit for declaration of the deed to be void and not binding

Among the 50 respondents, six respondents have replied that they have filed the suit with a prayer for declaration of the deed to be void and not binding. The tenure of the suit they have filed can be adequately understood in the Figure below:[577]

Figure 6.2: Delay in the disposal of the declaration of the deed to be void and not binding



From the responses of litigants, it appears that 2 cases are more than five years old, 2 cases are more than ten years old and 2 cases are more than three years. In reply to the question of the tentative date of disposal, all of them stated that those litigations would take more than 2 to 3 years. Only in one case, the suit was decreed on compromise taking six years after formal litigations. In the other suit filed in the ear of 1962, it was disposed of after the lapse of 21 years going through trial.

[577] See full list on appendix D(i)

Table 6.2: Litigants response on anticipated delay in disposal *(declaration of the deed to be void and not binding)*[578]

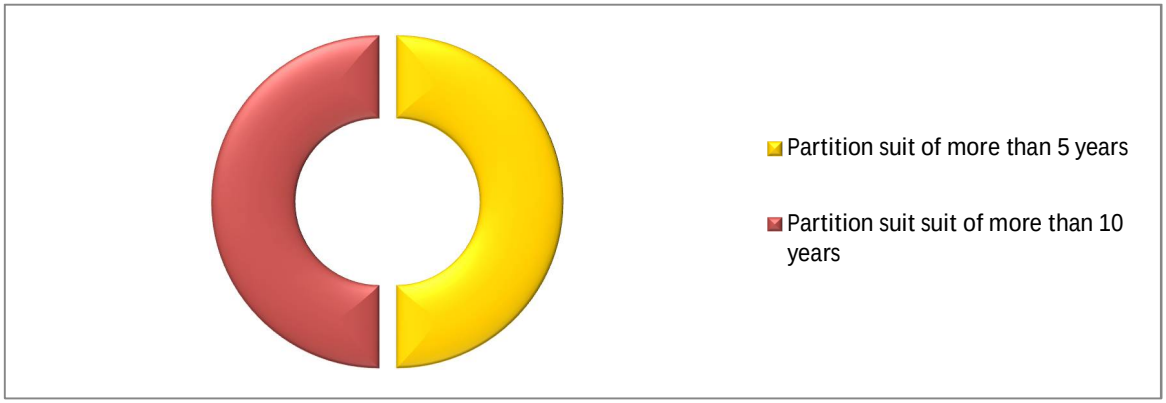
Serial number of respondents	Number of suits	Nature of the relief	The tentative time for disposal
29	104/1962 of 3rd Joint District Judge Court, Dhaka	It was a suit for declaration that the partition deed was void and not binding upon them. On the basis of the void partition deed, the defendants filed a suit for pre-emption which was ended in compromise.	It was disposed of in the year of 1985
30	23/2013 of 4th Joint District Judge Court, Dhaka	It was a suit for declaration of a deed of agreement and power of attorney to be void and not binding upon them. The defendant developer company violated the terms of the agreement by claiming excessive price, and therefore, they filed the suit.	They do not know.

In all those situations, it seems that by way of the adversarial process, the litigants are not getting the remedies due to formalities of adjudications. Moreover, from the view of respondents, it appears that delay in this type of suit is even more severe as respondents were unable to make any reasonable prediction about when their case might be disposed of.

6.3.3. Delay in the suit for partition

Another set of 6 respondents have stated that they have filed the suit for partition. The nature of the suits they have filed is shown in the Table and Figure below[579];

Figure 6.3: Delay in partition suits



[578] See annexure D(i) for details
[579] See full list in appendix D(i)

Unlike other types of suits discussed above, it seems that the time to disposal of partition suit remains more uncertain. Though the number of samples is only a tiny part of the total population available data collected under this research indicates a 50:50 chance that suit would be disposed in 5-7 years or continue for a long, uncertain period more than ten years. This uncertain nature can be better understood from the perception of clients about anticipated further delay in disposal of their cases.

Table 6.3: Litigants response on anticipated delay in disposal *(partition suit)*[580]

Serial number of respondents	The year of filing the suit	Nature of the relief they sought for	Tentative date for disposal of the suit
35	451/2015 in 5th Additional District Judge Court.	The plaintiff has filed the suit for partition against his brothers and sisters regarding 26 decimals land.	Two years
36	113/1995 of 4th Joint District Judge Court	The respondent is the defendant. The plaintiff has filed the suit for partition on the basis of a purchase deed from a minor through which he has purchased more than the share of a minor.	He does not know.

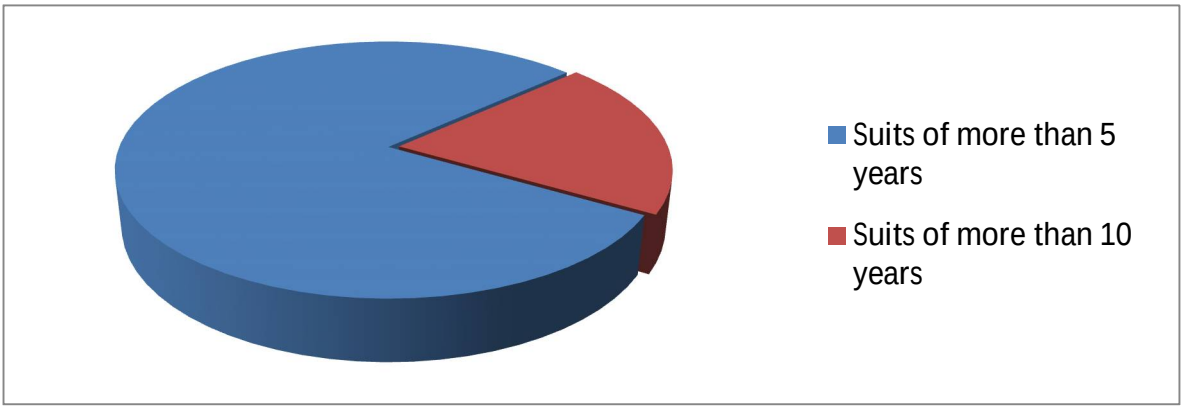
As shown in the Table above for a partition case filed in 2015, the client anticipated a further two year delay before disposal. However, in case of the partition suit filed in 1995, the client has absolutely no idea about when it may be resolved finally. The redistribution of inheritance on the death of any party may cause such uncertainty in distribution suits.

6.3.4 Delay in the suit of other nature

Among the 50 respondents, 10 of them filed the suit of several characters. The nature of those suits are shown in the Table and Figure below[581]:

[580] See annexure D(i) for details
[581] See full list in Appendix D

Figure 6.4: Delay in suits of other nature



From the responses, it seems that among suits of other nature, 3 of them are pending before the court for more than ten years and the rest of 7 are five years. Among those seven respondents, four respondents have stated that they do not even know when the suit would reach its finality. Thus, the suits of other nature through formal adjudication process are not functioning well for providing a remedy to the parties.

Table 6.4: Litigants view on anticipated further delay in disposal *(suits of different other nature)*[582]

Serial number of respondents	Year of institution	Nature of the suit	Tentative date of disposal
41	52/16 of 1st Joint District Judge Court, Dhaka	It is a money suit where the power development board did not pay the commission money of 3%, violating the agreement between them.	He does not know
42	154/14 of 1st Senior Assistant Judge Court, Dhaka.	Suit for recovery of possession where the defendants have dispossessed him from the suit property.	He does not know.

In the above-mentioned litigation of different nature like money suit, suit for compensation, recovery of possession, etc., all of those suits are of more than five years. It is also worthy of mention that among the 10 cases, 4 of them have stated that they do not even know when the suits would reach its finality. Except for one, the other five respondents have said that they think their suits would take 3 to 4 years to be disposed of.

[582] See appendix D1 for details

Thus, from the above observation, it becomes clear that despite the different level of jurisdictions of the court and geographical location, there seems to be no difference in the delay resulted due to formal adjudication process. In such a backdrop, it appears from the opinion of the respondents that there is an emerging necessity for alternative dispute resolution through which the civil proceedings can attain their finality providing better justice to the litigants.

6.4 Litigants' awareness on the presence and benefits of mediation under CPC

6.4.1. Lack of general awareness among litigants about the benefits of mediation

In the preceding discussion, there are observations that due to the lack of efficiency of the trial system for resolving the suits, the litigants are facing delayed and costly civil adjudication. As the present judicial system has virtually failed to address the needs of the litigants,[583] the option of ADR has been incorporated in different laws, including the *Code of Civil Procedure, 1908*. [584]However, the observation of chapters 3 and 4 reveals that the mediation mechanism is in a precarious condition and is yet to render an effective change that benefits the litigants. In the previous chapter, both the judges and lawyers have identified ignorance of litigants about mediation as one of the important reasons for unsatisfactory performance of mediation[585]. At this stage of discussion, an attempt was made to understand the level of awareness about mediation among the 50 litigants. It is very important to mention that for raising awareness and sensitization among the litigants, two stake holders of justice delivery system, I.e. lawyers and judges, have many responsibilities. Therefore, in view of understanding the level of support the litigants get from judges and lawyers for utilizing the mediation mechanism, a comprehensive field study of over 50 respondents was made.

To that end, the first question that was asked to them was**,** *'Have you any idea about the resolution of the suit through mediation under CPC?'*[586]In answer to the above question, 20

[583] Sheikh G Mahbub 'Alternative Dispute Resolution through Civil Courts In Bangladesh'. Shahria Printing Press P. 271

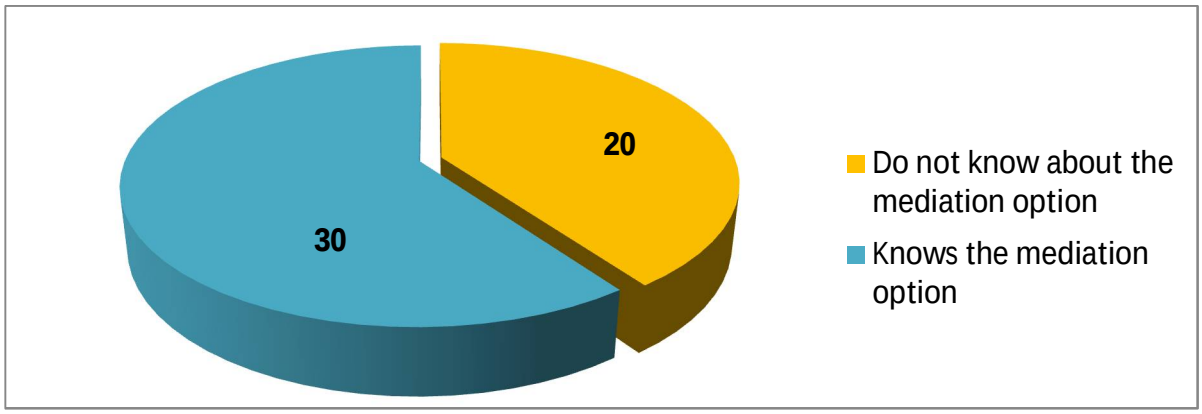
[584] In the 1st chapter of topic no 1.3.1.the matter in elaborately discussed.

[585] In topic,'5.4.2 Judges perception on the problems in practicing mediation under CPC' the judge respondents have stated lack of knowledge of the parties as the biggest reasons behind its inefficiency. Discussion in the topic of '5.5.2.2 Problems in practicing mediation originated from litigants' the lawyers have revealed that average number of litigants show reluctance to settle their suits through mediations due to different reasons like ego problem, lack of knowledge etc.

[586] See annexure C(iv)

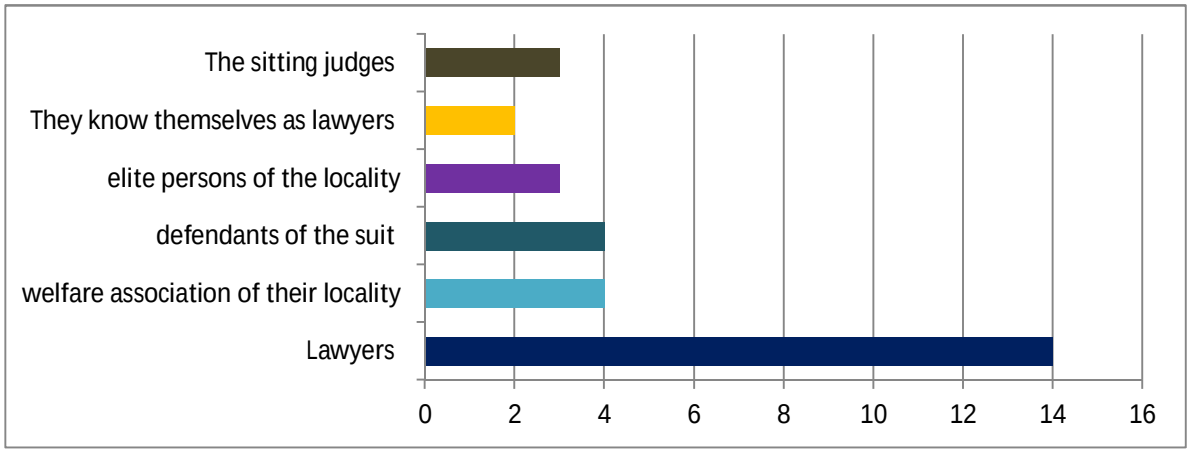
respondents have stated that they have no idea about the option of mediation through the court after filing the suit. The rest of the 30 respondents have indicated that they have an idea in this regard. Thus the level of awareness among the litigant public can be shown in the chart below.

Figure 6.5: Litigants knowledge on mediation as an option for resolution



After finding the number of litigants aware of the mechanism of mediation under CPC, the next question that was asked to them was, *'Who has informed you about mediation?'* Of the 30 litigants, 14 stated that their lawyer had informed them about this option for resolving the suits. On the other hand, among the rest of the 18 respondents, four said that welfare association of their respective locality informed then about this service. Four of them stated that the defendant to his suits made him aware of the mediation facility for resolving the suits. According to the response of another three persons, the elite persons of the locality made them aware about this matter. Two respondents have addressed them as lawyers, and therefore, they said that they are aware of this facility. Another set of three persons responded that the sitting judge informed them about the process of mediation. Thus, their opinion can be shown in the chart below:

Figure 6.6: Litigants primary source of information about the mediation option

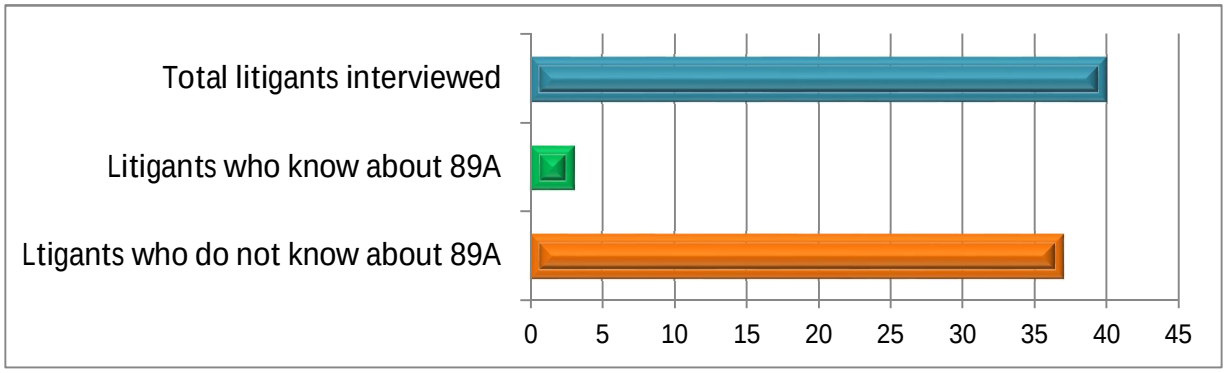


The level of awareness and how they get the information in this regard as reiterated above clearly shows that about half of the litigants have no idea about this component of resolving suit. Whereas, the persons knowing about this have stated that their lawyers have made them aware about this matter in half of the cases. Eight of the respondents out of 30 noted that the association and persons of the locality had raised awareness among them. But only three respondents out of 30 mentioned the name of a sitting judge as their informing entity. It is worthy of mention that none of them mentioned the name of a district legal aid officer. From the above-said observations, the matter that becomes most visible is that neither sitting judge nor the district legal aid officer disseminates any information regarding this court-connected mediation. The lawyers and the persons of the locality to some extent, render the duty to make people aware of this mechanism.

These statistics present the lack of awareness among the litigants as one of the main reasons for the infectiveness of mediation. Figure 6.6 also demonstrates that the roles played by the respective court and legal aid officers are not satisfactory in respect of their awareness-building activities. The above observation can be more substantiated if the answer to the next question is taken into consideration.

The next question asked to litigants was, *'Do you know a date was fixed for resolving your case through mediation?'* Among those 50 respondents, except for three, all the respondents replied in the negative. Thus, all the 47 respondents stated that they had no idea about the date which is fixed only for resolving suits through mediation. Among those three who told about their knowledge about mediation, two respondents represented them as lawyers, and due to their practice in civil courts, they are acquainted with the provision of mediation. So, the level of their awareness regarding 89A can be expressed in the following way.

Figure 6.7: Level of awareness of litigants about the date fixed for the mediation



Thus, according to the expression of the chart, the litigants are not aware of the mandatory provision of mediation in civil litigations, and that is why, they are failing to utilize the benefit of mediation in civil litigations. To those three respondents, the next question was, *'if you know what you did on that date?'* The lawyer litigant respondents answered that they did not do anything on the date fixed for mediation. Only one respondent answered that in their case, the CT khatian was wrongly recorded in the defendants and the defendants also admitted that the recording had been improperly done. Thus, at the date of peremptory hearing, the defendant to the suit offered them to settle the suit among themselves and through a couple of sittings; the suit has been resolved through mediation.[587]*So, it transpires from their experience that among the 50 respondents, no one had any knowledge about the opportunity of section 89A of CPC. Consequently, the fact becomes unfolded to this effect that the level of awareness regarding court-connected mediation has not reached any level at all.*

6.4.2 Lack of awareness of the litigants about District Legal Aid Office as the mediation service provider

Several questions regarding their knowledge and co-relation with mediation service available in the legal office in respect of mediation were asked to those respondents. It has already been revealed in a previous discussion that the trial judges are yet to send an adequate number of cases to the DLAO. Therefore, they are now dealing with a very few numbers of civil cases for mediation.[588]The question was, *'Do you have any idea about legal aid?'*Out of 50 respondents, 17 of them stated positively. The other 33 respondents said that they did not have any idea about legal aid. They further added that they did not have any idea about the

[587] Civil suit no 126/18 of Senior Assistant Judge 1st Court, Dhaka.

[588] The view of the District Legal Aid Officers in respect of the above mentioned topic was elaborately discussed in topic number 5.4.3

existence of the District Legal Aid Office. The next similar question asked of the 17 respondents was *"Do you know parties can resolve their cases through mediation in District Legal Aid Office?'* Only nine respondents amongst those 17 respondents stated that they had some sort of idea about the prevailing mediation service in District Legal Aid Office. However, as per their reply, only two of them stated that they went to the District Legal Aid Office for mediation purpose after filing the suit. One stated that though they tried their best to resolve the suit through mediation, his brother defendant was not convinced for settlement.[589] The other respondents answered stating that their suit is a suit for recovery of possession where the defendants are residing unlawfully did not come to the office despite service of notice to the defendants. As the defendant was not present in the reconciliation proceeding the DLAO was not successful.[590] The above-mentioned expression of the respondents can be revealed more clearly in Table 6.5 below:

From the responses of the litigant, it seems apparent that many litigants are still not l aware and sensitized enough to avail the service of mediation existing in DLAO. But according to a considerable number of respondents, the DLAO has a bright prospect to reach a stage where they could bring some positive changes in the dispute resolution mechanism in civil suits.

Table 6.5: Litigants' awareness, use and success in using DLAO mediation

Number of respondents	**50**	**Respondents were pinned down into four tiers; those who know DLAO; those who know DLAO mediation; those who avail DLAO mediation; those who resolved dispute through successful mediation.**			
Respondents awareness of DLAO mediation	**17**	Respondents aware of the mediation service in the DLAO	**9**	Respondents went to DLAO to avail mediation	**2**
Respondents not aware of the District Legal Aid Office	**33**	Respondents who went to the DLAO for availing the service of mediation.			
Successful mediation					**0**

An effort was made to acquaint all the 50 respondents about the existing law for providing mediation services by the District Legal Aid Office. When those respondents attained some sort of understating about such mechanism in DLAO, the question that was asked to them, *'What is in your opinion, the prospect of District Legal Aid Office for resolving the suit through mediation under CPC?'* Among those respondents, 22 abstained from making any

[589]Civil Suit no 298/2012 of 5th Joint District Judge Court, Dhaka.
[590] Civil Suit no 913/2015 of 1st Joint District Judge Court, Dhaka

answer to that question. Among the rest of 28 respondents, 20 replied positively stating that it has the prospect of mitigating the litigation through mediation. The DLAO is a judge himself upon whom the people have more confidence than that of a lawyer. However, 10 of them added a condition to ensure its prospect and such condition according to them is building up proper awareness among the litigants. The rest of 8 respondents have opined that the DLAO has fewer prospects to resolve the suits through mediation as the litigants depend upon the advice of lawyers and in the presence of the lawyers, the DLAO will not be able to motivate the parties to reach any settlement. The response of the litigants in this regard is shown in the Table below:

Table 6.6: Litigants' response about the need for developing DLAO mediation

Total number of respondents	**50**	**Reasons**
Respondents abstained from answering	22	They have little idea about this matter.
Respondents replied in the positive	20	If the initiative is taken properly, it has the prospect.
Respondents replied in the negative	8	The lawyers always insist the parties for trial, and therefore, DLAO does not have many prospects for mediation

From the above responses of the litigant public, it seems apparent that many litigants are not still aware and sensitized enough to avail the service of mediation existing in DLAO. But according to a considerable number of respondents, the DLAO has a bright prospect to reach a stage where they could bring some positive changes in the dispute resolution mechanism in civil suits. In the above discussion, it has become visible that the present infrastructural ability in the District legal Aid Office is not at all satisfactory to make the litigants utilize and get benefit from the provision of mediation.

6.4.3. Litigants' perception on the reason for their lack of attachment with court-connected mediation

(a) Lack of initiative in Lawyers for effective mediation under CPC

It has already been revealed in the preceding discussion that the litigants are not even aware of the prevailing opportunity of court-connected mediation and fixation of a date for this purpose. However, 14 respondents opined that their lawyers informed them about the mediation through which they could settle their dispute.[591] But, after getting a response of another question, it has become apparent that neither judges nor lawyers made them aware of

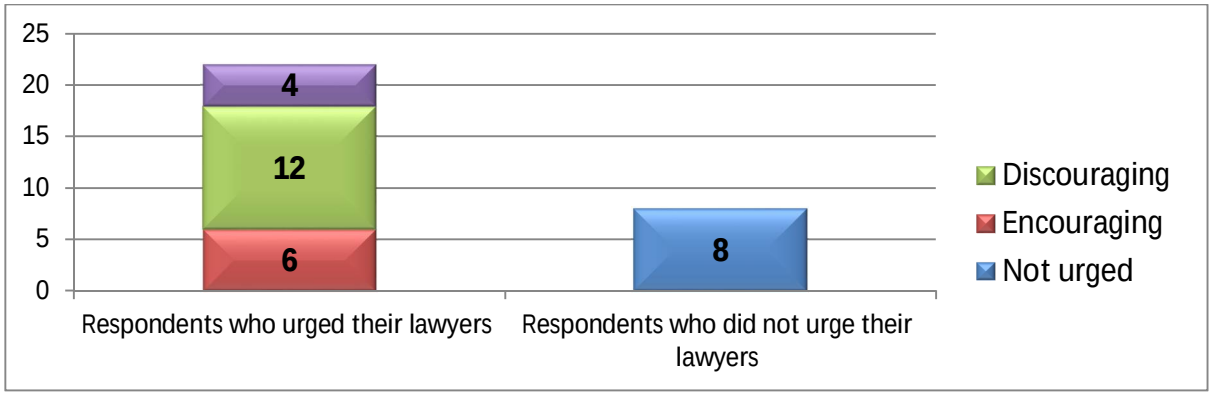
[591] Shown in Figure 6.6: Litigants primary source of information about the mediation option

such a facility under section 89Aof the CPC. Therefore, the existing environment of the court is not at all favorable to provide them with any opportunity of court-connected mediation under this law. Further, to become more specific about the role of lawyers and judges in this respect, several questions were asked to the 30 respondents who replied about mediation. The question that was asked to them was, *'Have you ever urged your lawyer to resolve your suit through mediation under CPC'*.

Except for two litigants respondents, all 28 respondents failed to understand the "*meaning of mediation under CPC*". However, 22 among the 30 respondents replied in an altered way, stating that they urged their lawyers to resolve the suits either before or after filing the suit. The other eight respondents answered that they had not urged the lawyers. Among the eight respondents, 5 of them said that their dispute is not suitable to be settled through mediation, and that is why they felt no interest to settle the suit in this way. The other three respondents said that if they approached mediation, the other party would think they had a weak case and therefore prevented themselves from urging the lawyers.

The next question that was asked to the 22 respondents was, '*What was the reaction of your lawyer?'* Among the 22 respondents, 6 stated that lawyers encouraged them to settle the suit through mediation. Another group of 4 respondents said that the lawyers' attitude was neutral and the rest of 12 respondents replied that the role of lawyers was discouraging. The expression in the data can be shown in Figure 6.8 below:

Figure 6.8: Attitude of lawyers towards the litigants regarding mediation



Thus, from the Table above, it appears that out of 30 respondents who knew about mediation, 22 of them urged their lawyers to resolve the suits through ADR and therefore, it can be said that most of them were willing to settle the suits through mediation. However, inspite of their willingness, 16 out of 22 lawyers, were not interested in sitting for any attempt of mediation. In such premises, it can be said that the part played by the lawyers do not broaden the scope

of mediation both before or after filing the suit. For understanding the lawyers' co-operation and non-cooperation from litigant's viewpoint, another question was asked relating to thir (lawyers)express in this regard**.** In order to make the question more clear to them,the followingthreesupplementary questions were simultaneously asked:

i) 'Was your case successfully resolved through mediation?'

ii) 'If your case was successfully resolved through mediation, who acted as amediator, and how was it done?'

iii) 'If the mediation was unsuccessful , why did the attempt fail?'

The experience of 22 who were willing to go through the process of mediationis given in the Table below[592];

Table 6.7: Litigants view about the effectiveness of mediation

Serial number	Number of cases[593]	Attitude of the lawyer	Result of the suit	Reason behind
1	104/1962 of 3rd Joint District Judge Court, Dhaka	Encouraging	Successfully compromised.	It was a long-pending case, and at one stage, the defendants became tired and then both the parties urged for mediation and the suit was successfully resolved.
2	378/2016 of 4th Joint District Judge Court Dhaka	Neutral	Unsuccessful	The lawyer did not have adequate time to sit with both the parties
3	903/2014of 2nd Joint District Judge Court, Dhaka	Encouraging	Unsuccessful	The defendant did not come to sit for mediation
4	186/2014 of Keraniganj Senior Assistant Judge Court, Dhaka	Discouraging	Unsuccessful	The lawyer asked them to go for trial instead of mediation, and accordingly, they did not proceed.

It has been found that among the 50 respondents, nobody was informed about the provision of section 89A. So there was no attempt by the parties to initiate a mediation proceeding in the court. According to the Table above, though plaintiffs personally urged the lawyers to attempt mediation, none of the cases ended successfully through compromise as in mostcases,

[592] See full list in appendix D (ii)

[593] In the topic of 6.4.1 the nature of the relief in individual suit is elaborated.

the lawyers were reluctant or disinterested to initiate mediation. In six cases where the lawyer of either side was encouraged to mediate, the lack of other parties' lawyer's interest caused the mediation procedure to fail. In the background of the finidngs mentioned above, it becomes apparent that within the existing setup of the court procedure, the role played by the lawyers is not supportive of making the mediation procedure a successful one.

(b) Lack of initiative in Judges for effective mediation under CPC:

The discussion of the preceding topic clearly reveals that the level of knowledge about court-connected mediation is very low due to poor dissemination of information. In this respect, the presiding judges of the court have a vital role to play to promote the litigants' involvement for mediation. To explore the judges' inititives in this regard, a set of questions was asked to the litigants. In the topic of 6.5.1, a question was asked as to**who informed them about mediation.** In answer, 20 respondents replied that nobody informed them about mediation. Among the 30 respondents, only three answered that the sitting judges informed them about mediation.

Thus, very few judges disseminate the knowledge to the litigant public about the mediation procedure. In the same topic, further discussion reveals that not a single respondent is aware of the provision of 89A to resolve the case through mediation. However, three respondents repliedwith some sort of positive experience about the role of judges after institution of the suit. The above findings reveal that judges are not in the practice of rendering time for conducting mediation.The experience of those three respondents is shown in Table 6.8 below:

Table 6.8: Litigants' view on respective judges' lack of initiative for mediation

Number of cases	Initiative by the judges	Result	Procedure
298/12 of 5th Joint District judge Court Dhaka	It was a suit among the three brothers, and admittedly they were the co-sharers of equal three portions of land. At the date of peremptory hearing, the sitting judge sent the case to district legal aid officer.	Unsuccessful	In the office, the parties failed to reach any agreement about which side they will choose for themselves.[594]Now the case is running in the trial court.

[594] Civil Suit no 298/2012 of 5th Joint District Judge Court, Dhaka the case study is detailed in chapter 4. .

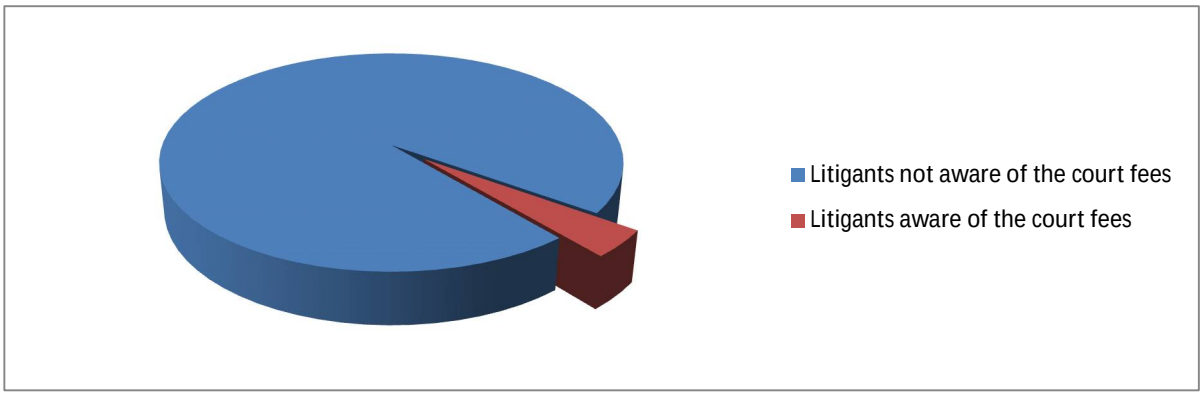
104 /2007 of Senior Assistant Judge 1st Court, Dhaka	It was a suit between the husband and wife. The husband filed a suit for declaration of *heba* deed to be void and not binding upon him. At the date of peremptory hearing, the judge sent the case to a lawyer to settle.	Successful	The settlement procedure came into success as the wife agreed to cancel the deed instead of payment of dower money by the plaintiff husband.
126/18 of 1st Senior Assistant Judge Court	The record was recorded in excess by the neighbor defendant. At the time of peremptory hearing, the judge found out that the defendants admitted the fact in the written statement. The judge referred it to the lawyers of the respective parties.	Successful.	The parties themselves agreed, and the defendant relinquished his interest towards the plaintiff and executed *solehnama*.

Thus, from the above observation, it appears that out of the three cases, in two cases, the initiative by the judge has made the mediation mechanism a success, Thus, in the survey, it is found that the litigants identified the judges' passive role as one of the main reasons for the inefficient performance of court-connected mediation.

In order to make a more specific observation, the next question that was asked to litigant was, *did your judge inform you about the reimbursement of court fees if the mediation is successful?*[595]Among the 50 respondents, except 2, all stated that they do not know about this provision of refund of court fees. From the reading of the provision of section 89A (7), it seems that the very provision is incorporated to encourage and inspire the litigants to initiate the mediation mechanism. However, the response from the litigants reveals that almost none of them are aware of it. Only two respondents replied in the positive as they represent themselves as lawyers. The response can be shown in the Figure below:

[595] The provision of repayment of court fee in case of successful mediation was incorporated in section 89A 7.

Figure 6.9: Litigants awareness about the redemption of court fees on successful mediation



Thus, from the discussion above, it becomes evident that there is lack of propagation of knowledge from the judges about the mediation mechanism in the court and the same can be identified as the important reason for non-application of mediation.

6.5 Litigants' perception on the suitability of their suits for mediation

Judge mediators expressed their opinion that irrespective of the remedy the litigants want in the civil suits, the suits in which the nature of the dispute is simple and mostly admitted are more suitable for mediation.[596]However, it has become visible in the previous discussion that as the litigant respondents have very little knowledge about the provision of section 89A, none of the cases has tested the practical implication of mediation.[597] Thus, in this segment of the discussion, an attempt would be made to verify the litigants' perception of the suitability of mediation in their pending cases. According to the words of Chowdhury: *"As ADR [mediation] processes do not strictly rely on legal principles and emphasize parties interests more than their legal rights, outcomes attained through ADR [mediation] are much more flexible".* [598] Along with the awareness level of litigants and pleasant and supportive arrangement of the courts, particular facts of each suit is an essential determining factor behind successful mediation. For such reason, the perception of the litigants and their thoughts about the applicability of mediation mechanism in specific cases has to be considered for attaining a better result in this field. In order to understand the perception of the litigants in this regards, the question that was asked to each of the respondents was that;

[596] In the 'Table 5.3: Judge-mediators response about suitability of suits for mediation'. the District Legal Aid Officers expressed this opinion

[597] In the topic 6.4.1, 'Lack of general awareness among litigants about benefits of mediation', the litigants expressed this opinion.

[598]Jamila A. Chowdhury, *ADR Theories and Practices; A Glimpse on Access to Justice and ADR in Bangladesh* (London College of Legal Studies (South) 2013) 46

'Do you think that your case is suitable for settlement through mediation under CPC?' In this perspective, out of 50 respondents, 16 of the respondents replied that their suit is suitable for mediation. Nineteen respondents have answered that they are not sure about the suitability of their cases through mediations. Fifteen respondents stated that their suits are not suitable for mediation. Their responses can be shown in Table 6.9 below:

Table 6.9: Litigants view about the suitability of their suits for mediation (declaration suit)[599]

Serial number of respondents	Number of suits	Response of the litigants	Probable terms of settlement/reasons for non-settlement
1	622/2015 of 2nd Joint District Judge Court, Dhaka	Yes	In return of money to the defendants, he wants the *khatian* to be recorded in his name.
2	560/13 of 2nd Senior Assistant Judge Court, Dhaka	Not sure	He wants the reinstatement to the service and all the arrears, but he will forego the cost of litigations incurred by him so far. He is not sure about the intention of the other party.
3	378/2016 of 4th Joint District Judge Court Dhaka	Not sure	He does not know the attitude of other parties whether they will sit for mediation and the lawyers' mentality.
4	903/2014of 2nd Joint District Judge Court, Dhaka	Yes	He wants to get back the possession, and he will not claim any rent from the defendant no one who stayed there illegally for years

Their responses reveal that in case of a suit for declaration of title, among 28 respondents, eight have stated optimistic about mediation. They have indicated that they are ready to renounce a portion of their legitimate claim for the sake of early settlement of the case. However, 13 respondents have said that they have no idea whether their suits are fit for mediation or not. They stated that they would talk with their lawyer and another party first and then tell the suitability of the case for mediation. Seven respondents out of 28 expressed that the other party will not settle the suit as they want to harass the plaintiff. Three respondents among the 7 added that they would not renounce their legitimate right, and fight to get their rights enforced.

[599] See annexure D(iii) for details

Table 6.10: Litigants' mixed-view about the suitability of their suits for mediation *(declaration suit for the deed to be void)*

Serial number of respondents	Date of institution	Response	Terms of mediation/reasons for failure
5	104/1962 of 3rd Joint District Judge Court, Dhaka	yes	The suit was resolved as the defendants could not proceed the suit any further and agreed to settle the suit through compromise.
6	23/2013 of 4th Joint District Judge Court, Dhaka	No	They have tried several times to settle the suit but failed.
7	104 /2007 of Senior Assistant Judge 1st Court, Dhaka	Yes	In the year of 2013, the suit was decreed on the basis of compromise.

In the suits of above-mentioned nature, among six respondents, three stated that instead of payment of money, renouncements of a portion of the claim according to the understanding of the parties, the settlement through mediation is possible. Two respondents have stated that the opposite party will never dispose of the suit as they do not have the mind-set to settle the suit through compromise. Only one respondent indicated that he does not have a clear idea about the terms upon which he will not agree to settle, and therefore, he is not sure about the suitability of the suit for mediation. The next group of respondents was the parties to the partition suits. The response of those litigants is presented in Table 6.11 below:

Table 6.11: Views from litigants about their willingness to settle their cases through mediation (partition suits)[600]

Serial number of respondents	The year of filing the suit	Response	Terms of mediation/ reasons for failure
8	451/2015 in 5th Additional District Judge Court.	No	They have approached for several times for mediation but failed. Now the suit is in the appeal stage.
9	113/1995 of 4th Joint District Judge Court	Yes	The plaintiff is ready to pay the market price to the purchaser

[600] See annexure D(iii) for details

			defendant about the excess area of land and settle the suit.
10	296/2008 of Senior Assistant Judge 1st Court, Dhaka	Not sure	The previous attempt to settle the dispute before filing the suit with her brother defendant failed, but she does not know whether the mediation will be successful if the court intervenes.

According to the expression of the respondents, in partition suits, a number of two respondents agree to settle the suits through adjusting the shares and payment of money thereon. Another two do not know the mentality and attitude of the other party and the rest of the two respondents stated that the opposite party would not come forward to settle the suit rather they would like to drag the suit for an indefinite period. The expression of the litigants of the other types of suits can be stated in Table 6.12 below[601]:

Table 6.12: Litigants view about willingness to settle through mediation (different types of suits)

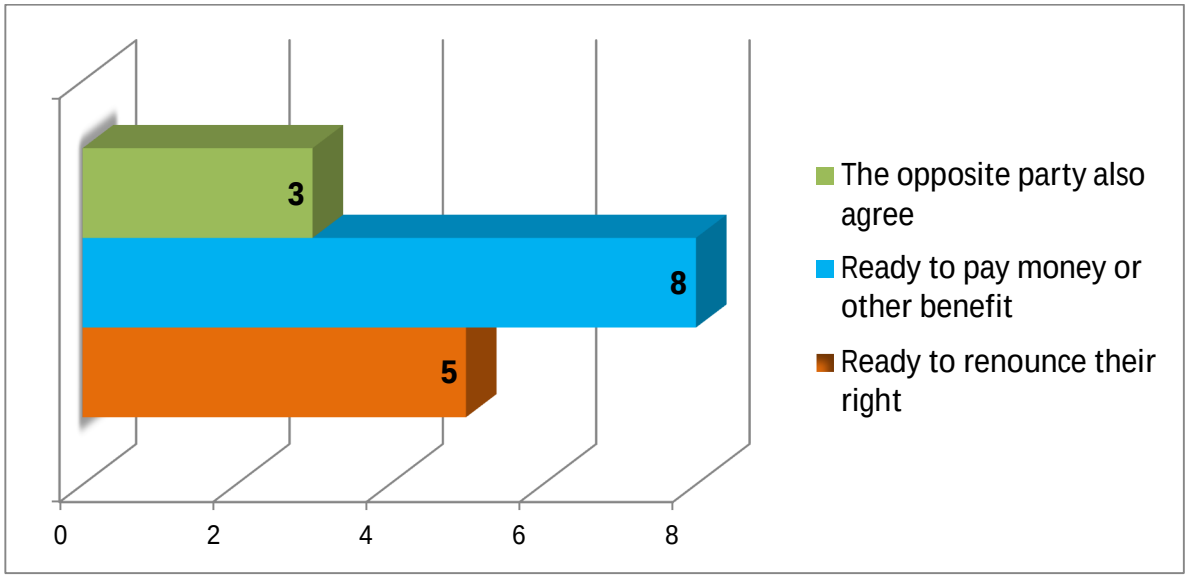
Serial number of respondents	Year of institution	Response	Terms of mediation/ reasons for failure
11	52/16 of 1st Joint District Judge Court, Dhaka	Not sure	Plaintiff is always ready to sit for mediation, but the defendants have no willingness in this regard.
12	154/14 of 1st Senior Assistant Judge Court, Dhaka.	no	The plaintiff has been forcibly disposed of the land, and the defendant will never discuss mediation.
13	913/2015 of 2nd Joint District Judge Court, Dhaka.	No	The plaintiff has tried for mediation, but the company did not come forward to sit for mediation.
14	93/04 of Arbitration Court, Dhaka	Yes	The plaintiff will stand for her claim of reinstatement, compensation and expenditure of the suit. But she will relinquish the matter of defamation.
15	903/14 of 1st Joint District Judge Court, Dhaka	Yes	The matter of possession cannot be relinquished, but the plaintiff is ready to give up the rent he is

[601] See full list in annexure D

			entitled during the pendency of the suit.
16	Miscellaneous case of 3rd Senior Assistant Judge Court, Dhaka	Yes	The petitioner is ready to pay the market value, and the opposite party also admits the petitioner as co-sharer.

Their responses reveal that a number of three respondents stated that they are willing to mediate on the basis of the terms stated above.[602] Another three respondents said that though the matter to be decided is very trifle. Still, without knowing the attitude of opposite party, it is not possible to talk about the suitability of suits through mediation. In other 4 cases, the respondents opined in the negative stating that he is not to relinquish any portion of his right. In two cases, it is not possible to sit for mediation with the government defendant. This expression of litigants can be shown in the Figure below:

Figure 6.10: Litigants' most cited reasons for taking strand for attending mediation

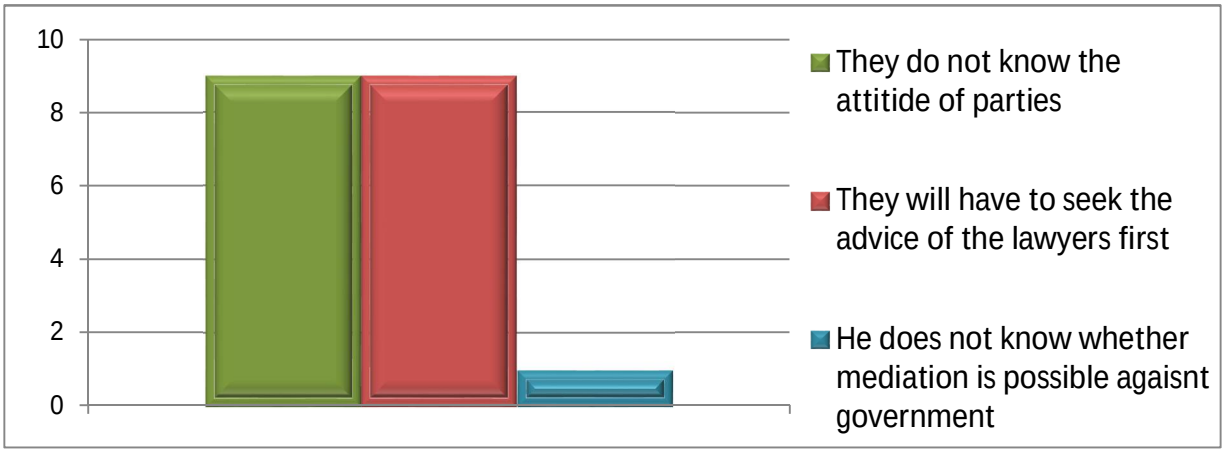


Thus, 16 respondents out of 50 maintain a positive attitude about resolving their suits through mediation. In these cases, the courts should preserve a category of suits so that the best effort can be given for mediation in those cases. [603] Further, during the opening joint session, mediators may try to attain party consensus on these three issues to increase the possibility of successful mediation.

[602] In the item number 14, 15 and 16, the proposed terms of compromise are laid down.

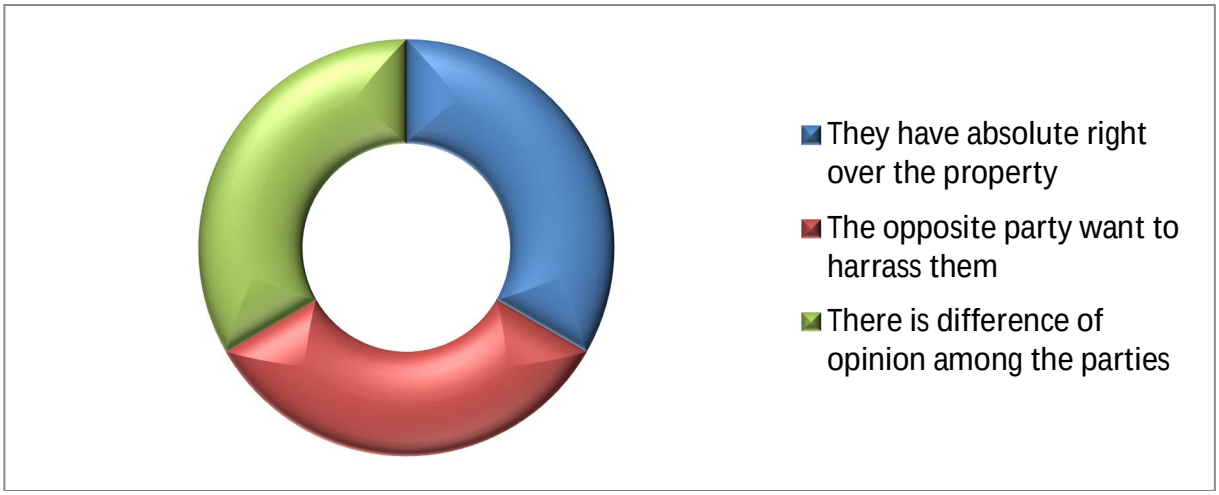
[603] In the topic, 'Encouraging lawyers through fixation of lump-sum fees for mediation' of chapter 5, there was a proposal for categorizing the sui Table suits for mediation.

Figure 6.11: Litigants view about the suitability of their suits for mediation



A number of 19 litigants out of 50 have stated that they are not sure whether their suits are suitable for mediation. Thus, their expression mentioned above strongly implies that their suits have not been put into the test of suitability for mediation. Neither judge nor the lawyer initiated anything for informing them about mediation. Hence, a robust attempt has to be made for compelling the parties to sit for mediation so that the parties may come to know about the possibility of settlement of the if suits for mediation. [604] The rest of 15 persons out of 50 respondents have opined that their suits are not suitable for mediations for various reasons mentioned above. Their expression can be shown in the chart below:

Figure 6.12: Litigants view about the suitability of suits for mediation



Those respondents have opined that they are not willing to go under any process of mediation. In such cases, in order to stimulate the parties for mediation, necessary initiatives

[604] In the topic 'Specific amendment to impose consequence for non-co-operation in mediation' specific proposals are recommended for compelling the parties to sit for mediation.

have to be taken such as most suitable mediators should be chosen, the early stage of the suit must be selected for this purpose, involving the lawyers in this procedure by giving them reasonable fees.[605]

6.6 Identifying the reasons for not taking the opportunity of mediation by the parties

It is already stated in the present chapter; the litigants expressed their experience about the trial procedure and thus implied the necessity of mediation for resolving the suits through mediation. In 6.4.1, the lack of awareness of parties was identified by the litigants as one of the foremost reasons for not sitting in the mediation procedure. In that study, out of 50 respondents, none except 2 persons are aware of mediation in the court. However, it was found that, 30 out of 50 persons know about the informal procedure of mediation among the parties either after or before the suit. Among them, 14 respondents replied that their lawyer informed them about this matter, and another two respondents pointed judges as their informers.[606]Therefore, it transpires from the responses that the court-connected components such as lawyers and judges are not performing their role of informing and sensitizing the litigants for sitting in the process of mediation.

In sub-section 6.5, it was mentioned that when the parties were asked whether their suits are suitable for mediation, 9 of them answered that they would have to seek the advice of their advocates before saying anything about the matter. It reveals that the litigants are highly dependent upon the advice of the lawyers and those lawyers in maximum case refrain from informing anything about court-connected mediation. It further transpires from the study mentioned above that 20 litigants have absolutely no idea about the mediation mechanism[607] and eight persons among those 30 persons who have some sort of idea about informal mediation, are unwilling. Consequently, it will be pertinent to say that 28 out of 50 (20 are not aware and eight never intended despite being aware) persons file and continue the suit for the following 2 reasons. Firstly, they continue the suit for a wrong perception that they will win the case and secondly, for harassing the other party in spite of knowing that they

[605] In the topic of, 'Need for legal reform: Judges' and lawyers' perception on way out to seal procedural loop holes for effective mediation under CPC' of chapter no 5 elaborately discussed about these mechanism to motive the unwilling litigants to enter into the procedure of mediation.

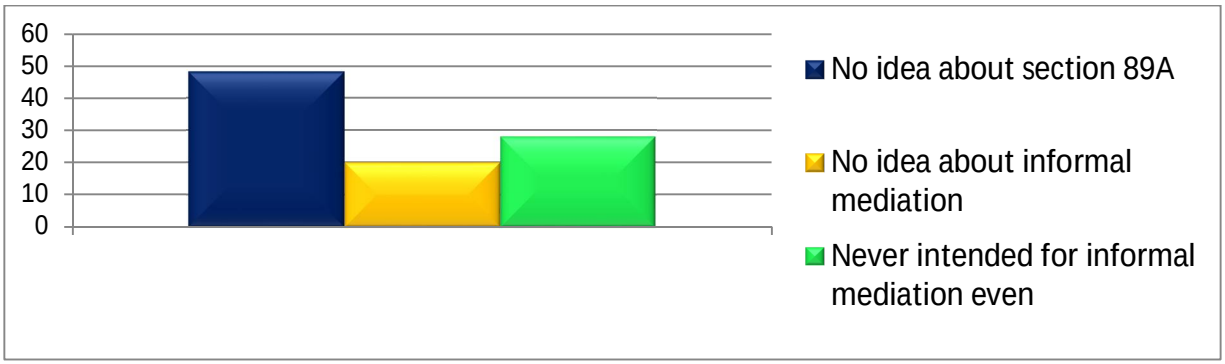
[606] In the topic '6.4.3: Litigant's perception on their lack of attachment with court connected mediation' the idea is widely discussed.

[607] This discussion was held in topic no 6.4.1

have no right at all. This type of conception by the litigants is also attributed by the discouragement of lawyers for mediation to the clients.[608]

Thus, the question was asked to the respondents: *'According to you, what are the main causes of not taking the opportunity of settling the land disputes through mediation in court?' The options were such as (a) Ignorance of the parties, (b) Not giving the idea about provision by the lawyers; (c) For the perception that you will win the case and therefore, mediation is useless, and (d) The tendency of the party to the suit to harass the other side are all equally responsible for precarious condition of the performance of mediation.*[609]The answer is known beforehand as the above-mentioned study has categorically revealed the reasons for failure of mediation mechanism. The situated can be shown through Figure 6.13 below:

Figure 6.13: Litigants view as regards underlying problems of mediation



The Table above shows that the wrong conception of winning the case and harassing the parties and ignorance among the litigants are prevalent among them, which appears to be hindering the progress of mediation of land-related disputes in the court. These mentalities among the litigants, as mentioned above, are resulted due to lack of initiative both by the lawyer and judges.

6.7 Conclusion

In the present chapter, an attempt was made to collect the response from litigants of various natures of civil suits to collect an exhaustive idea about the efficiency of mediation service existing in the courts. The respondents have revealed that they cannot utilize the opportunity of court connected mediation due to different reasons leading the access of justice unattainable by the litigants. The mediation is such a conflict resolution process where the

[608] In the topic, Lack of initiative in Lawyers for effective mediation under CPC
a considerable number of respondents identified lack of time and disinterest of the lawyers as one of the reasons.
[609] See annexure C(iv)

parties need to negotiate among themselves with the support of mediators enunciated in the section 89A of CPC and according to the procedure contained therein. The opinion of all of respondents has revealed that awareness about the law relating to the court-connected mediation is not prevalent among the litigants. However, the experience of the litigants as regards trial has unanimously put forward the justification of the emerging necessity of mediation for ensuring proper justice. According to many of them, settlement of the dispute through mediation is an appropriate option to minimize the hassle of continuing trial cases for years. To achieve that purpose, all of the related components of court-connected mediation, especially the bar and the bench should make the utmost effort to apply the relevant laws in practice. From the analysis made so far, it can be concluded that court-connected mediation if properly implemented will play a significant part in enhancing justice to the public at large.

CHAPTER 7

AN EMPIRICAL ANALYSIS ON THE EFFECTIVENESS OF MEDIATION IN CIVIL CASES UNDER CPC: PERSPECTIVES OF COURT SUPPORT STAFF, ASSISTANT COMMISSIONER (LAND) OFFICE AND SUB-REGISTRY OFFICE

7.1 Introduction

Preceding chapters, precisely, chapter 5 and 6 depicted that the disposal through mediation does not attain required success due to various reasons stated therein. In those chapters, judges, lawyers and litigants are shown to be a jointly responsible low rate of disposal through mediation. In this chapter, an effort has been made to find out the potentiality of mediation in reducing case backlogs, causes of low application for mediation and the possible way outs from the response of court support staffs. This group includes *sherestadars*, bench assistants, and office assistants and their interviews would be conducted to accumulate their viewpoint in order to verify the responses made by the other stakeholders. The courts' support staffs play an important part in time management of the cases in a particular court. They all the time meet different persons connected with the administration of civil justice in Subordinate Courts. Therefore, the questionnaire survey upon them would surly involve gathering data from a sample of the large, diverse, varied and scattered population[610]connected to the civil courts to make the qualitative data more authenticated and acquire full information of the research topic, i.e. mediation.

In the previous chapter 4, 5 and 6, in-depth case study through case review and questionnaire survey have revealed that most of the civil suits originated from a wrong recording of a record of rights, registration of concocted deeds, refusal to receive rent by the concerned authority[611]. Therefore, as shown in the previous chapter, the nature of the suits relates to the activities of Assistant Commissioner (land) office and office of registration. According to the enacted law of the State, the above mentioned two departments perform the duties of updating the land records and complete registration of documents. Since they appear to be related to reasons behind originating civil suits, the legal and institutional framework of those 2 departments is taken into account to gather in-depth understanding about the nature of those civil suits. Such knowledge can pave the way to formulate a more pragmatic and authoritative

[610] Abdullah A. Farouque, *Essentials of Legal Research*, (Khan Mahbub,2017) 110

[611] In chapter 6, it is seen that out of 50 respondents, 22 of them have filed suits for declaration of RoR to be wrong and baseless and 8 of them filed suit for cancellation and declaration of deeds to be void and non-binding.

recommendations for legal and institutional reforms to accelerate success to mediation activities.

Therefore, this chapter would a survey to collect knowledge, experience and thoughts from the court support staffs and members of AC (land) office and registration office.

7.2 Methodology Revisited

7.2.1 *Rationale for interviewing officers in AC (land) office and Sub-registry office in this research- A viewpoint from Social Institution Dysfunction Theory*

As reiterated in the previous chapters, civil courts being one of the social institutions are largely dysfunctional due to delayed and costly justice delivery system towards the litigants. In this connection, according to Scott (2010), social institutions need to be distinguished from more complex and more complete social entities such as societies or cultures. For example, a society is more complete than an institution of a society, whereas an institution is not. [612]The institution can be termed as organizations consisting embodied structure of differentiated roles. [613] Those organizations have differentiated roles, and there is a degree of interdependence among those roles. The organizations, through their differentiated roles, try to achieve the required result to achieve the collective goods.[614] According to the words of Cohen:[615]

> "….those roles are related to one another in part in virtue of their contribution to(respectively) the end(s) or function(s) of the institution, and the realization of these ends or functions normally involves interaction among the institutional actors in question and external non-institutional actors."

The above analysis by sociologists leaves an essential message for the necessity of understanding the interdependence among the organizations. Such as the civil court structure in Bangladesh undertake the responsibility of determining the right of litigants over the properties through formal adjudication and mediation.[616] The other organization, like the Office of Assistant Commissioner(land) assumes the duty of ensuring the title and possession of people over landed property.[617] On the other hand, the registration department provides

[612] Richard Scott, *Institutions and Organizations* (Sage Publications 2001) 136-140

[613]Seumas Miller, *The Moral foundations of Social Institutions: A philosophical Study*, (Cambridge University Press 2010) 25.

[614] Gerald A Cohen, 'Karl Marx Theory of History: A defense' *(1978)* History and Theory *Vol 19 No 2,* (Oxford, Clarendon Press) 186-204.

[615] Ibid.

[616] Code of Civil Procedure 1908, s 1 to 158.

[617]Rules of Land Administration Manual, 1990.

registration of all the deeds relating to the transfer of ownership and possession over the properties.[618]According to Herbert Spencer, social institutions are somewhat similar to the organs or limbs of the human body. According to his words:

> "Each organ or limb has a function, the realization of which contributes to the wellbeing of the body as a whole, and none can exist independently of the others."[619]

Such kind of interdependence among the roles of civil courts, AC(land) office and registration department is also prevalent in protecting the right to properties of the people at large. Nevertheless, such interdependence of actions of these social institutions can be termed as structuralist-functionalist, which stress the inter-relationship (structure) and their contribution to a larger group of societies.[620] Thus, the given institution, e.g. the law has empowered the courts to determine the rights to the parties to the suits through mediation and trial. The subsequent study has analyzed how the dispute arises from the aforesaid institution of land administration and registrations' formalities. It would also highlight whether those offices face any problem while implementing the order and decree of the civil courts. Thus, the present chapter has emphasized the coordinating functions of the institutions to explore the underlying problems behind increasing the land-related disputes to understand the nature of the dispute in civil suits and their suitability for application of mediation mechanism for resolving the dispute. To that end, the members of those institutions of AC (land) and the office of sub-registrar have been interviewed to elicit ideas, experience and information from them regarding the functions of their departments.

On the other hand, this chapter has attempted to highlight the opinions of the stake-holders who is neither the representative of justice providers, i.e. bar and bench nor the ultimate beneficiary of this social institution of civil courts, i.e. litigants. This particular segment of the stakeholders though has no co-relation or responsibility under the purview of legal provisions relating to civil litigations more precisely with mediation, and they are very closely associated with this process. Those are named as court support staffs who undertake the duty to assist the judge to conduct the civil litigations properly. Being closely acquainted with this court procedure for years together, they can be regarded as a reliable spectator of civil litigations disposal procedure. Thus, the civil courts as social institution dispense concerned proceedings with close involvement of those staffs. Therefore, their responses

[618]Registration Act, 1908 s 17 to 22A.
[619] Herbert Spencer (1971) *Structure, Function and Evolution,* (Joseph !971).
[620] Barry Barnes, *The elements of Social Theory*, (Princeton N.J: Princeton University Press 1995) 37.

have also been collected through the formal interview in respect of present research objectives.

7.2.2 Rationale of Interviewing Assistant Commissioner (land) and Sub-registrar An inter-disciplinary approach and socio-legal approach

As a part of research methodology, the present thesis has attempted to focus on exploring all the relevant information to understand the advantages and disadvantages of the origin of civil disputes and set proper road-map for accelerating its efficiency in case of disposal of cases, mainly through mediation. To achieve that end, both the inter-disciplinary approach and socio-legal approach are applied as the methodology in this chapter.

According to this inter-disciplinary approach, the findings of ineffective mediation as elaborated in the previous chapters and its reasons identified under the legal and institutional frameworks is not only confined inside the courts' premise but also extended and co-related with other authorities.[621]The concern for effective resolving of suits should be extended and integrated with other external but relevant authorities, such as the department of land administration, which can be more precisely called as Assistant Commissioner (land) office. Similarly, this interdisciplinary approach requires another separate but joined discipline of registration department intending to look the research from their perspectives. According to the words of Banakar and Travers:[622]

> "Interdisciplinary approach simply requires looking at various aspects of the subject and viewing it from more than one perspective. …The objective of interdisciplinary research is to combine knowledge, skills and forms of research experience from two or several disciplines … and create a basis for developing a new form of analysis."

The preceding chapter has already explored that the success of the mediation process largely depends upon the nature of dispute, e.g. simple or complex character.[623] It is also shown in those analyses that the parties in the simple suits generally think their suits suitable to be resolved through mediation.[624] In this backdrop, to arrive a settlement of the suit, a good mediator should keep in mind the interdisciplinary approach to conceive different factors behind arising the dispute. He also should have the capability to '*check the reality of the*

[621]Budaraju S, Murty, ' Socio Legal" Research- Hurdles and Pitfalls' in Shashi .K Verma and Afzal M Wani (ed) *Legal research and Methodologies (*Indian Law Institute, 2nd Edition 2001) 65.
[622]Reza Banakar and Max Travars, *Theory and Method in Socio-Legal Research* (Hart Publishing, Oxford, 2005) 5.
[623] Case study no 1, 2 ,3 and 4 of chapter 4 has revealed that in the cases where the issues of the suits were mostly admitted came to end through compromise.
[624]Elaborately discussed in topic no 6.6 of chapter 6.

settlement reached.'[625]Hence, to properly understand the surrounding factors of dispute and reach a practicable settlement through mediation, such an interdisciplinary approach towards the Assistant Commissioner land office and registration office is essential in the present context.

Similarly, the socio-legal approach towards the inter-relationship among the departments of judiciary, land administration and registration deserves a careful analysis. It has already been reiterated in this chapter that these three departments, though have different disciplines, they have inter-dependence for ensuring the right of the people over the properties. According to Roger Cotterrell,[626]

> "…both law and sociology are concerned with the whole range of significant forms of social relationships. And in practice, the criteria determining which relationships are significant are often similar, deriving from the same cultural assumptions or conceptions of policy relevance."

What is clear from the above saying is that to succeed in dispute settlement through mediation, the surrounding aspects of its economic, political and social organization has to be considered.[627]The origin and nature of the dispute cannot be separated from the social and cultural values, especially in non-western and technologically poor societies, where members of different social backgrounds and organizations are more dependent to each other. From this viewpoint, the court as mentioned above support staffs come from a diverse socio-economic background but remain closely connected with the judicial proceeding of settling civil disputes. On the other hand, the members of the department of land administration and registration view and define the origin of dispute and their settlement procedure from their knowledge and experience. Thus, in the context of the socio-legal approach, the questionnaire survey with those stakeholders appears to be very relevant to attain an output in the current research.

7.2.3 Semi-structured questionnaire to explore subjective views of respondents

As the AC (land) office and sub-registry office activities involved many tacit elements not widely discussed in academic literature, like court trial or mediation semi-structured questionnaire with many open-ended questions were used to gather required data in this

[625]Jamila A Chowdhury, *Mediation to Enhance Gender Justice in Bangladesh (*London College of Legal Studies south 2018) 33.
[626]Cotteral Roger, *The Sociology of Law: An Introduction* (Butterworths London 1984) 303
[627] William L.F Felstiner, *Influences of Social organizations on Dispute processing* (9 Law and Society Rev 1974) 63.

regards. A group of questions was formulated to dig out the reasons behind these two offices' poor performance and how it may affect the complexity in civil suits and make cased difficult for resolution through mediation. For the purpose of this research, twenty respondents from Sub registry Office, including the Inspector General of Registration, two Inspectors of Registration, one District Registrar, six Sub-registrars, and ten staffs from different Sub-registry Office. Another two respondents from Assistant Commissioner(land) office were collected from four Assistant Commissioner (land)from *Kotowalli, Dhamrai, Keraniganj, Dohar, Dhanmondi, Mirpur,* six*kanoongo*, four surveyors and four *tahshildars* of those AC(land) office.

7.3 Court support staffs' perception

7.3.1. Court Support staffs perception as to the present position and prospects of mediation

The court supports staffs such as *sherestadars*, bench assistants and office assistants are an integral part of court administration and case management according to the rules and circulars issued by the government and Supreme Court from time to time. They play an important role in the management of court activities, correspondence procedure,[628]preservation of records, maintaining records of the date and stages of suits in the records etc. Thus, being closely associated with the civil suit disposal procedure, they are supposed to have in-depth knowledge in mediation procedure and also know the mentality of the persons, like judges, lawyers and litigants in connection to the mediation procedure. The interviewees were from both Joint District Judge Courts and Senior Assistant Judge Courts. Two among them were from District Judge Court. According to the set questionnaire, a number of 20 staff respondents were asked questions.

According to aset questionnaire, the question asked to the staffs was that: *'How many cases are resolved through mediation under CPC in each month in the court you are working?'*[629] Among them, eleven respondents replied that 3/4suits are resolved through mediation, and the court passes judgment and decree on the basis of the terms and conditions of the agreement reached by the parties. Rest of nine respondents stated that on average, 1/2 cases are resolved in the above mentioned process. To clarify the contents of their answer, another question asked to them was that: *'Are those suits resolved through mediation under*

[628]M Akhtaruzzaman.*Case Management and Court Administration in Bangladesh* (Advocate raziaKhatun, 2014) 186.
[629] See annexure C(v).

section 89A or through submission of a solenama by arriving at a settlement by the parties themselves?'[630] All the 20 respondents stated that all these cases are settled by submitting a *solenama* prepared by the parties themselves. Thus, their responses can be shown in the Table below:

Table no 7.1: Court support staff's view on the benefit of mediation

Number of respondents	Types of response	
	suits settled through mediation under 89A	suits settled through compromise under section 23 Rule 1 and 2
20	None	2/3 per month

Therefore, when the next question was asked to the respondents as, *'Do you think that mechanism of mediation has decreased the number of civil suits in the court in which you are working?'* [631] All the staff respondents answered in the negative. In their opinion, the mediation mechanism performs far below the satisfaction to decrease the case backlog in civil suits.

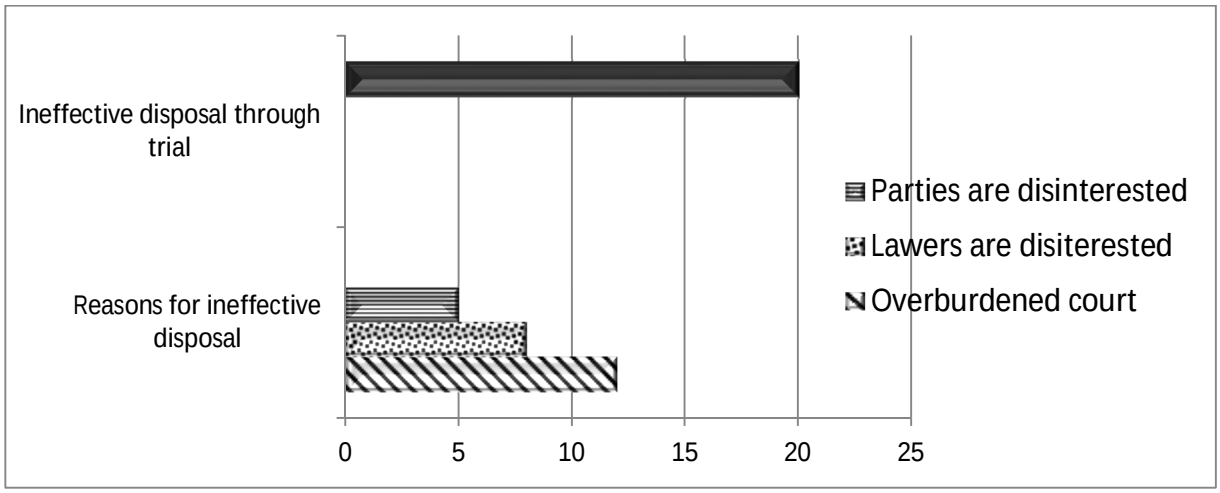
From the response above, it is shown that none of the suits is actually settled through mediation. Those suits which are settled through compromise is 3/4 in number per month, and they are decreed on the basis of *solenama* filed by the parties themselves under section 23 rule 1/2. Thus from the above observation of the responses, it can be said that the present position of mediation is not attaining desired success in quick disposal of the suits and decrease the backlog of cases thereby.

The next set of questions was asked to explore the prospect of mediation in resolving the cases. The first question in this group was, *'Do you think that trial mechanism is effective enough to decrease the case backlog?'* In response, all the 20 staffs have stated that the disposal of suits through trial is not giving the desired result of decreasing the case backlog in the respective courts. The next question that was asked to them was, '*What is the reason behind your answer in the negative?* While identifying the reasons, a number of 12 respondents answered that each of their courts is hugely overburdened with a large number of cases and a number of new cases are being filed every day. In such a situation, a single judge of the court following the trial procedure cannot dispose of the case so as to decrease the

[630] See annexure C(v).
[631] See annexure C(v).

number of cases proportionately. According to their different response, in a trial procedure, the suit is adjourned for various reasons whatsoever in each of the stages and therefore, through a trial it is not possible to lessen the number of suits. The rest of the eight respondents believe that the lawyers are disinterested for the disposal of the suits and that the suits are not possible to dispose of through trial. Among the twenty respondents, five have pointed out disinterest of parties as to the reason for a lower number of disposals of suits than expected. The responses mentioned above of the staffs are given in the diagram below;

Figure 7.1: Court support staffs' perception on reasons for less effective trial



From the diagram shown above, it is visible that according to the opinion of all court support staffs, the backlog of cases is not decreasing through the trial procedure for various reasons including the state of courts being overburdened with a huge number of cases.

The next question that was asked to them was that, *'Do you think that mediation is the appropriate alternative of trial for resolving the suits effectively?*[632] In response to that question, all twenty respondents have stated that mediation is an effective alternative of trial. Towards them, the next question was asked, and the question was, *'Why do you think mediation is a better option?' The options were: (a) It resolves litigations quickly; (b) It resolves the suits with less cost; (c) Through mediation, the parties get a fair decision from the court.*[633]In response, all of them chose the first two options, and they stated that if the suit is resolved through mediation, it will save time, thecost for the justice seekers. However, eight out of twenty respondents put some reservation to the option that the parties always get fair decision from the court through mediation. They presented a logic to this effect;

[632] See annexure C(v).

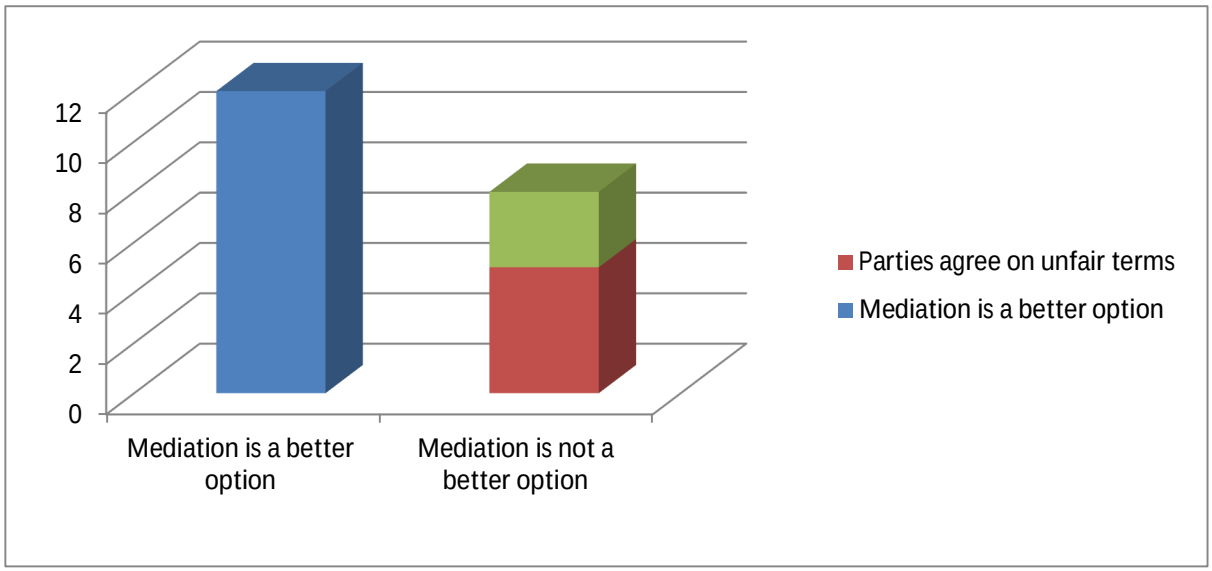
[633] See annexure C(v).

sometimes the weak parties become compelled to settle the suit by agreeing with the terms which are unfair and inconvenient for them. In such circumstances, though the suit is resolved earlier with less expenditure from both the parties, the weak party has to suffer a loss due to unfair terms of the settlement agreement. Among those eight respondents, three stated that some of the unscrupulous litigants fraudulently enter into *solenama* regarding the property in which they have no right, title and interest. They submit the agreement before the court only to defraud the third party who is the true owner of the property. In such circumstances, after scrutinizing the record, the court rejects the *solenama* petition on the ground of terms and conditions of the *solenama* to be not fair and legal.

In the backdrop of such response, the next question that was asked to them was that '*In those cases where the parties submit solenama petition before the court, who contributes the most in making such settlement successful?* In answer, 23 respondents answered that parties to the suit in consultation with their respective lawyers settle the disputes, and upon the agreement reached between them, they file the *solenama* petition. Rest of 17 respondents have answered that the parties solely decide the matter of their terms of the agreement, and through lawyers, they file the compromise petition. Thus, it is very clear from their responses that the judges of the respective courts have little contribution to the suits settled through submission of *solenama* under order 23 Rule 1/2.The concerned judge of the court only pronounces order and decree on the basis of such a compromise petition. Thus their responses show that the court-connected mediation which can be more precisely called mediation under section 89A of CPC has no application towards for disposal of the suit.

Now, if we link the last two questions with each other, it becomes clear that taking resort to non-interference of court procedure, the parties sometimes enter into unfair and illegal agreement causing the access of justice unfeasible. The response can be shown in the diagram below:

Figure 7.2: Staffs response about the benefit of mediation in comparison to compromise outside court



Thus, most of the respondents have chosen the option of mediation as less costly and less time-consuming process. However, as per the above mentioned eight respondents, the parties do not get fair decision always through entering into an agreement through *solenama* under section 23 Rule 1/2.From this observation, one thing becomes clear that when the parties furnish agreement among themselves without any intervention of the court under order 23, rule 1/2, there is a greater chance of unfair and fraudulent agreement among the parties. Therefore, to get the benefit of amicable settlement, the provision of mediation under section 89A is always a better option as in this case, amicable settlement procedure is performed either in the presence of the court or any mediator referred by that court. From the above-mentioned discussion, it becomes visible that though the mediation under section 89A of CPC has no application, it is, of course, a better option than trial even better than the settlement under section 23 rule 1/2 of CPC.

7.3.2. Court Support staffs perception as to the underlying problem of exercising mediation and possible ways for improvement

In the previous segment of the present study, all the court support staffs put their opinion for mediation as a better option for ensuring justice. But according to them, the mediation option is not taking place in practice due to various reasons. To enquire about the underlying problems, several questions were asked to the respondents. The question was asked to them was: *'What is the reason behind non-functioning mediation? The options were (a) Judges are overburdened, and therefore, he cannot give time for mediation; (b) Lawyer is not interested,*

(c) litigants are not interested; (d) there is not adequate rooms and other[634] *arrangements for conducting mediation.* In answer to this question, all the 20 respondents have stated that lawyers are not interested enough to settle the suit through mediation. Among them, seven respondents have stated that the lawyers do not inform the parties about the mediation procedure of civil suits. A number of eleven respondents have added that the parties always follow the lawyers' advice and be influenced by their advice; the parties drag the suit for years together. Four respondents replied that the parties are not willing to pay any remuneration towards the lawyers for conducting mediation, and for that reason, the lawyers feel less interested in disposing of the suits through mediation. Among them, a number of twelve respondents have answered that in addition to the disinterest of the lawyers, the parties are also reluctant to dispose of the suits in many cases. The parties have a fascination to obtain a decree after full decree by defeating the other party. But as many as eight respondents have expressed the opposite opinion by stating that the litigants are willing to reach at the end of the proceeding to enjoy the benefit of the result of the suit. A number of six respondents have added that judges are overburdened with the trial and therefore, it is not possible for them to spare any time for sitting with the parties and mitigate the dispute between the parties through negotiation and discussion. Two respondents stated that the judges think that the suits would be transferred to other court and therefore they feel reluctant to put any effort for mediation. Thus, the response of the court support staffs can be laid down in Table below:

Table 7.2: Reasons behind the non-functioning of mediation

Number of staffs	Response
20	Lawyers are not interested
12	Parties are reluctant to dispose of the case
6	Judges have too little time to sit for mediation

Thus, the discussion so far reveals that there are various reasons for non-performance of mediation in civil courts as mentioned above. If the court support staff's responses are co related with the response of judges, lawyers, and litigants, it will become visible that response of all of them is similar to that of the court support staffs.

[634] See annexure C(v).

It is seen in the last discussion that twelve court support staff respondents pointed out disinterest of the parties as one of the reasons for the ineffective exercise of mediation. The staffs have the chance to closely observe the attitude and behaviour of the litigants. For such reason, the question that was asked to them was that, *'What do you think is the reason behind less interest of the parties to resolve their disputes through mediation?' The options were, (a) The parties are not acquainted with the concept of mediation, (b)The party tries to harass the other side by lingering the suit, (c) The lawyers always pursue their clients not to be involved with the process of mediation; (d)The parties are not punished in case of non-compliance with the provision of mediation; (e) Ego problem; (f) Non-fixation of fees*[635]

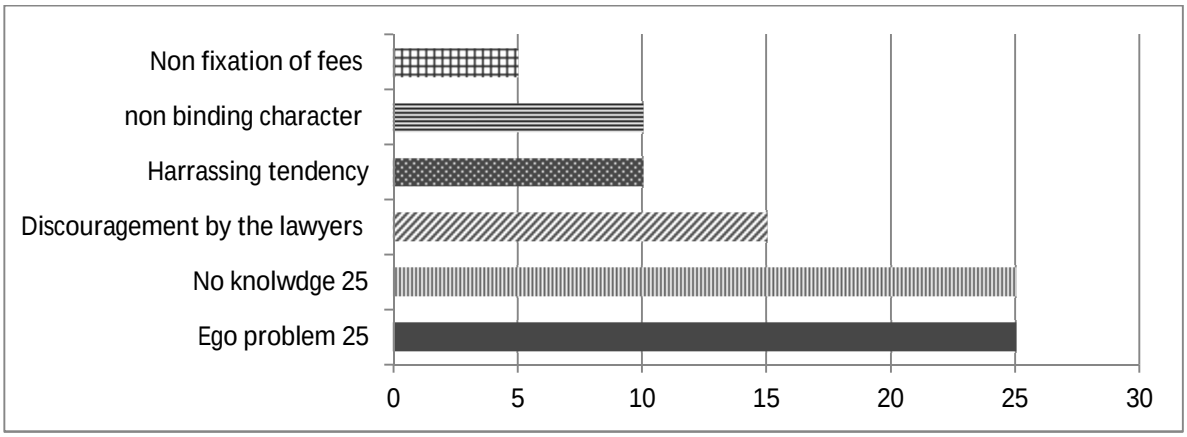
In response to the above question, the respondents pointed out all the above reasons are liable for the non-effective situation of mediation. However, nine respondents added ego problem as one of the important reasons for this position of mediation activities. According to them, the litigants to the suits are not acquainted with the spirit of mediation, and therefore, they are not willing to renounce an inch of their interest for the sake of arriving at a settlement and dispose of the suit accordingly. The nine respondents as mentioned earlier identified this egoistic problem as one of the foremost reasons for disappointing state of mediation. If we co-relate their response with that of the lawyer respondents, lawyers also pointed out ego problem as the 2nd important reason for the dismal condition of mediation.[636]

The court support staff respondents another reaction was that the litigants are not aware of mediation as nobody informs them about this stage of civil litigation. Three respondents who are the staff of the courts of outside Dhaka metropolitan area said that most of the persons are illiterate in that area and some of them don't even know about the number of their suits and they entirely depend upon the advice of their lawyers. It is very peculiar for such type of common people to know about the provision of mediation in the civil suit. Thus, their responses can be shown in the Diagram below:

[635] See annexure C(v).

[636] In the topic no 5.6.2.2 of chapter 5, elaborately discussed the response of the lawyers in this regard.

Figure 7.3: Staffs' response as regards reasons of disinterest of parties



From the Table mentioned above, it appears that ego problem and lack of knowledge are the most important reasons behind the disinterest of the parties. However, all the court support staffs identified non-fixation of fees, discouragement by the lawyers, non-binding character of mediation as essential reasons for this dismal condition.

While answering the questions, the staff respondents successfully identified reasons for the inefficient performance of mediation. Subsequently, to explore the way outs for minimizing the dismal condition from their viewpoint, the next question that was asked to them was that: *'Whom do you think as the most suitable person as a mediator?' the options were, (a) Judge (b) Lawyer, (c) Local elite persons; (d) others.*[637]

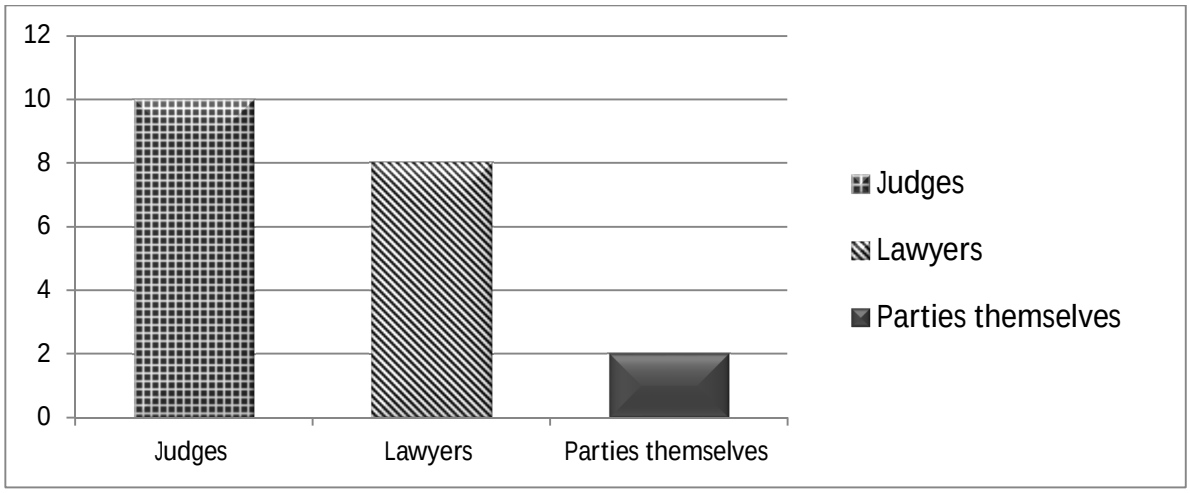
The answers that were collected from the staff respondents were diversified in nature as ten staffs selected judges as the most suitable mediators; on the other hand, 8 of them chose lawyers as the most suitable one. Rest of the two mediators identified parties themselves as the most suitable mediators.

The logic behind choosing judge as suitable mediator was that a judge is supposed to be a neutral person and litigants has the highest confidence upon a judge. Two of the staff respondents stated that the sitting judges remain too busy to spare time for mediation proceeding and such reason, retired judges may be appointed as the mediator as he has time as well as impartiality and people's confidence as a judge. On the other hand, eight persons identified lawyers as the fittest person for being a mediator as respective parties always follow their own lawyer's advice and rely upon their own lawyer as their guide. In addition, they stated that if the lawyers are willing, it is easier for them to motivate their own clients to

[637] See annexure C(v).

sit for mediation procedures utilizing their client's good faith. Only two respondents have chosen the parties themselves and local elite fit for amicable settlement in a dispute relating to the mediation. Their responses can be laid down in the diagram below:

Figure 7.4: Staffs' view as regards a suitable person as mediator



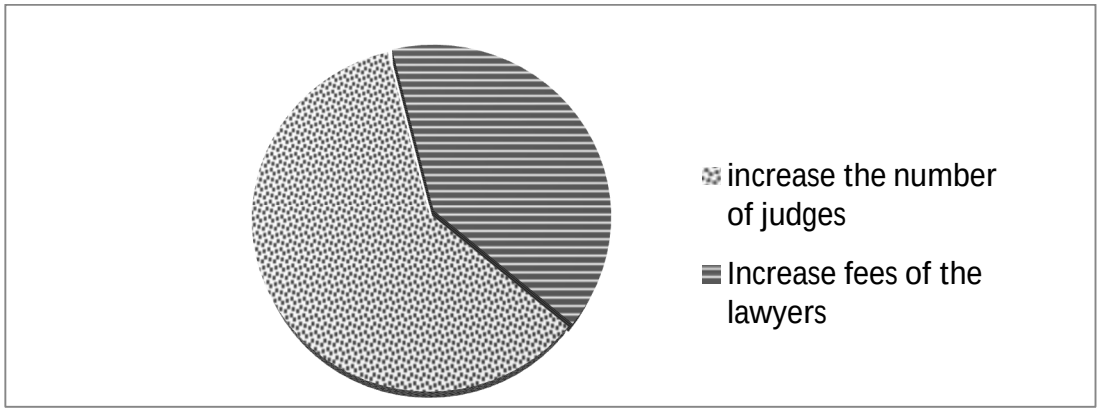
Thus, the Diagram above shows that unlike the judge respondents, the court support staffs have chosen judges and retired judges as the most suitable mediator.[638]On the other hand, a considerable portion of the staffs have identified lawyers as the fitting person in this regard. Their opinion appears to be similar to the view of the lawyer's respondents.[639] Thus, irrespective of the professional disparity and social differences, the staff's view has become identical with the judges' responses and lawyers. Therefore, it can be concluded with confirmation that both judges and lawyers can be a suitable mediator if necessary amendment of laws and the establishment of the institutional framework is made to accelerate the functions of mediation.

Another question that was asked to the respondents was that: *'What steps can be taken to develop the practice of mediation to decrease the number of suits in the civil courts?"*[640]The respondents, in their response, identified three options for developing the practice of mediation. Twelve respondents stated that there should be an increase of judges so that sitting judges may find adequate time to conduct the mediation procedure. To that end, separate mediation court may be established whose sole function will be to perform the mediation

[638] Topic no 5.6.2 of chapter 5, 27 judge respondents have chosen District legal Aid Officers, Retired Judges, and sitting judges as fitting persons for mediation.
[639]In topic no 5.6.2.of chapter 5, the lawyer respondents have chosen both the lawyers and judges as professional mediators.
[640] See annexure C(v).

activities. Eight respondents proposed increasing the fees for lawyers so that they become committed to settling the suit through mediation. Their response may be laid down in the following way;

Figure 7.5: Staffs' view as regards way to increase the practice of mediation



Unlike the judges and lawyer respondents,[641] the court support staff also identified the above-mentioned ways to eradicate the hurdles behind the smooth functioning of mediation practice. It is noteworthy that among the staff respondents, two court support staff, namely the administrative Officer to the District Judge and Appeal Assistant of the District Judge court, have stated that no panel of mediators is in existence under the District Judge. In their opinion, it can also be inferred that as a part of developing a separate professional mediator group, an active panel of mediators has to be maintained for proper implementation of mediation provision.

Given the above-mentioned finding and observation of the responses of the court support staffs, their opinion appears to be identical with the idea of the judges and lawyers despite their having separate social footage and the different professional positions.

7.4 Perception of the Sub-registrars

According to the observation contained in 7.2.and 7.3, there is a necessity to collect response from the sub-registry office to examine the inter-relationship from a practical viewpoint. The number of respondents was ten in total.

[641] Topic no. 5.7.1 of chapter 5, the judges respondents preferred the option for increase of judges and establishment of mediation court. Topic no 5.6.4.of chapter 5, the lawyers respondents have referred for increasing the fees for lawyers so that separate professional group may be established for this purpose.

7.4.1. Exploring Linkage between Sub-registry office and civil litigation

Registration department is governed by Registration Act, 1908 and Registration Rules 2014. According to this law, certain documents required to be registered under section 17 of this law. According to this provision, registration of those documents purport or operate to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest, whether vested or contingent, to or in the immovable property.[642] The Act makes registration compulsory on certain deeds such as, an instrument of the gift of immovable property, declaration *Heba* under Muslim law, an instrument of mortgage, lease of immovable property, any instrument transferring or assigning any decree or order of a court or award when such decree, order, or award purports or operates to create, declare, set limit or extinguish any right, title and interest to or any immovable property, an instrument of partition, an instrument of the sale in pursuance order of the court under section 96 of SAT Act, any composition deed, any certificate of sale etc.

The nature of civil suits is such that during adjudication, those deeds are frequently dealt with by the court to arrive at any decision for declaring any order and decree.[643]According to the law of evidence, the above-mentioned documents are presented before the civil courts to establish the point of title and possession, and on the basis of such documents, the concerned court arrives at a particular decision in respect of the alleged right, title and interest over the property. [644] It is mandatory provision of law that the court shall presume the genuineness of a particular document when it is duly registered according to section 79 of *Evidence Act, 1872*. A part of this section is as follows:

> "The Court shall presume every document ……to be genuine. Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf."

In addition to that, the courts as per the mandate of the law of evidence rely upon the document itself. They do not consider any oral evidence in contradiction to the contents of such documents.[645]

[642] The Registration Act, 1908, s. 49(a).
[643] Ibid. S. 17.
[644] The Evidence Act, 1872, s. 79 'The Court shall presume every document …which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the government to be genuine.'
[645] Ibid, s. 92 'When the terms of any such contract, grant, or other deposition of property or any other matter required by law to be reduced to the form of document have been proved according….no evidence of oral

Given the above-mentioned provisions of relevant laws of a civil proceeding, it emphasizes enormous importance upon registered documents for deciding civil dispute through both formal adjudications as well as mediation under section 89A of CPC. Thus, the above observation shows the paramount role of registration department as it provides a conclusive guarantee of the genuineness of document; prevent fraud, afford facility of ascertaining whether a property has already been dealt with; and to afford security of title deeds and security of proving titles in case the original deeds are lost or destroyed.[646]

However, according to the relevant sections of Evidence Act, the court will only presume the correctness of registered document. Still, it is not the absolute proof of particular fact as anyone who challenges the authenticity of the document can prove such contrary fact.[647] Because, registration is not by itself absolute proof of execution of a document and mere registration does not prove title nor prove transfer.[648] For this reason, any person can challenge the execution of such registered document and the alleged transfer of title in any court of law.

Because of the above observation about the linkage between the two departments as mentioned earlier, the inter-disciplinary approach comes into play. In this backdrop, to arrive a settlement of the suit, a good mediator should keep in mind the interdisciplinary approach to conceive different factors behind arising the dispute. Therefore, for the sake of proper understanding the surrounding factors of dispute and reach a possible settlement through mediation, such inter- disciplinary approach towards registration office is essential in the present context. To gain more profound understanding of this field, the procedure of functioning of registration office and the underlying problems behind it requires prime consideration.

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agreement or statement shall be admitted …..for the purpose of contradicting, varying, adding to or subtracting from, its terms..'

[646] Tripathi Sanjana (2018) Directorate of Registration and Stamp Revenue, Finance Revenue Department, Government of West Bengal available at blog.impleaders.ingeneral.

[647] The Evidence Act, s. 4, ' Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.'.

[648] Sanjana Tripathi, 'Directorate of Registration and Stamp Revenue' (Finance Revenue Department, Government of West Bengal, 2018) <advocatanmoy.com>2020/7/26>stamp-vending-license> accessed 20 January 2020.

7.4.2. Duties and responsibilities of Sub-registry office in connection to the registration of documents.

The Sub-registrar has a prescribed responsibility to administer several tasks as per different laws such as Registration Act 1908 and Registration Rules 2014. From the interviews of 10 sub-registrars, they have identified several problems which cause hindrances in the proper functioning of the sub-registry office. For collecting their responses, several questions were asked to them. The questions and answers are shown in Table below:

Table 7.3: Sub-registrar's task of registration and the barriers to discharge duties [649]

Question	Answer
In what percentage of cases, the registration of a document is admitted?	In most of the cases, the documents for registration are admitted
When the documents are admitted for registration	If the executants of the documents are not insane or lunatic,[650] if the executants do not deny the execution of the document[651] and if all the required documents are presented before the sub-registrar,[652] the deed is admitted for registration.
In what percentage of cases, the registrations of the documents are refused?	In very rare cases, the registration is refused.
Why the registration of documents is rejected?	When the executants are lunatic or minor in several cases, the executants refuse the execution, adequate documents are not presented, the market price is not appropriately presented[653]; if the registering officer is not satisfied that the persons present before him are the executants of the documents.[654]
What are the ways of verifying persons before you?	The person who claims himself as the executants has to present the national identity card, TIN certificate and the sub-registrar verifies that document. The officer sometimes verifies the authenticity of the NID in his own initiative; In addition, he can require the appearance of an identifier of the executants.[655]
What are the ways for verifying the documents presented before you as required under section 52A of Registration Act?	Five respondents answered that they accept the documents as they are if the documents are duly signed and sealed by the concerned authority. Rest of Five respondents stated that they maintain a

[649] See annexure C(vi)

[650] The Registration Act, s. 35(3) 'if any such person appears to the registering officer to be a minor, and idiot or a lunatic'.

[651] Ibid, 'if any person by whom the document purports to be executed denied its execution.

[652] Ibid, 52A '… certain documents such as the last khatian prepared in the name of seller.

[653] Ibid, s.52A(d).

[654] Ibid, . S. 35(3).

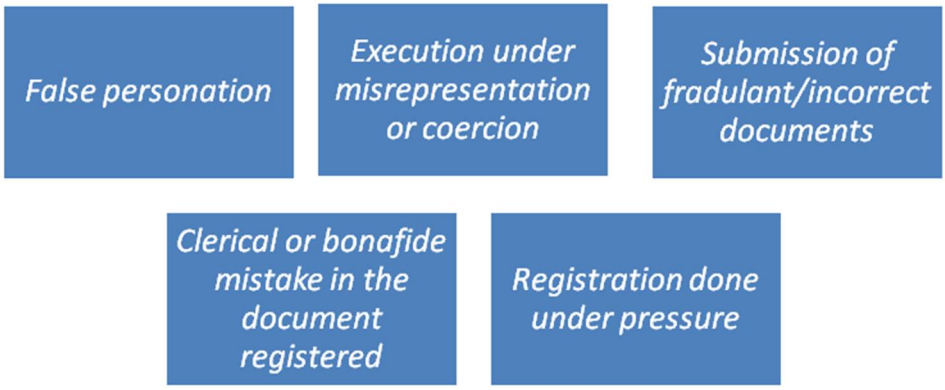
[655] Ibid, s. 36 'If any person ….desires the appearance of any person whose presence or testimony is necessary for registration can issue summon towards him'.

	relationship with AC (land) and other concerned authority to seek required confirmations for deciding authenticity in particular cases.
In which percentage of cases, the court through order cancels the registration of the documents?	Sometimes the court sends orders for cancellation.
In those cases, why the registration is wrongly done?	There may be false personation in respect of the executants, the documents upon which the execution and registration were done are decided by the court to be false and fabricated, or the executants may have been found to have signed the documents under false representation or coercion.
How the volumes of registered documents are preserved in your office? Do you have enough space and accommodation for this purpose?	The volumes are preserved in the record room in the books which are manually written down.[656] A considerable number of volumes are kept in a single record room.
Can you regularly send the volumes when they are required by the courts?	The documents are not copied within the stipulated time in the volumes due to delayed supply of the books from the government. Sometimes, the existing volumes are misplaced, and therefore, it takes time to find them out.

Chapter 6 shows that out of 50 respondent litigants, 6 have stated that they have filed the suits for declaration of registered deed to be void, illegal, and non-binding. The response of the litigants in that chapter clearly show that a considerable portion of the litigants files suits challenging the legality of registered partition deed, registered power of attorney, cancellation of *Heba* deed, deed of purchase[657] and they are pending before the concerned court for years together. The reason for registration of such fabricated documents in the sub-registry office can be shown in the Figure below:

[656] Ibid, s. 52(c) '…every document admitted to registration shall without unnecessary delay be copied in the book appropriated there for according to the order of its admission.'
[657] The details of those cases are shown in the point no 6.3.2. of chapter 6.

Figure 7.6: Sub-registrars' view about barriers to discharge their duties



The sub-registrar response revealed why the execution of some registered documents is challenged in the civil courts. Along with those reasons, the respondents have identified the following problems which hinder smooth functions of the sub-registry office.

7.4.3. The hindrances behind proper functioning of the registration department and its relation to the dysfunctional state of civil adjudication system. [658]

The respondents in connection to the above-mentioned situation have identified the following problems:

- While the sub-registrar satisfies himself about the person executing the documents, it becomes difficult to decide the authenticity of the person. The NID card and other documents are also fabricated, and the sub-registrar has no digitalized mechanism before him to arrive at a correct decision. Therefore, the respondents have recommended for digitalization of this sector for the sake of proper verification in these cases.
- Similarly, it is difficult for a sub-registrar to satisfy himself regarding the title, interest and right of the executants as the papers presented before him may not be authentic. There is no mechanism available for the sub-registrar to verify the authenticity of the document. The respondents have proposed that there should be proper official co-ordination between AC (land) office and other appropriate organizations.
- The execution of a concerned deed is not performed before the sub-registrar, and therefore, it is not always possible for him to determine whether the executants have signed the documents as per his free will or not. For example, in a suit, the plaintiff

[658] See annexure C(vii).

father filed a suit against his son, stating that his son managed to get the signature of the deed of power of attorney.[659]

- If the deed seems to contain a simple clerical mistake after registration, this cannot be rectified in the sub-registry office. Such rectification must be obtained by filing a civil suit. The respondents have suggested that there should be a limited authority of the sub-registrars to rectify the mistakes which are merely clerical.
- There are unavoidable circumstances where the registration has to be done under some compelling situations in some circumstances. As per these stakeholders' opinion, the sub-registry office should be given a proper domain to work independently without any fear and favor.
- The volumes of the registered deeds are kept manually in the record room, and therefore, it is not appropriately maintained sometimes. The books, are not always supplied by the governments in due times. For such reasons, it takes time to send the volumes when required by the courts.

At the beginning of this chapter, it was said that as an essential sector of ensuring the right of the people over property, sub-registry office assumes to contribute in the proper exercise of aright, title and interest over the property. In the preceding discussion, the research study in the present chapter explored interlink between these two departments of the registration department and civil courts. In-depth discussion about the functions and existing problems of that office was held to develop some recommendations for making the registration department more efficient in the domain of their activities. Both quantitative and qualitative data collected from this office show that lack of proper functioning of this office increase the number of civil suits and make settlement of those suits difficult. Thus study reveals that from the viewpoint of social institution dysfunctional theory, the problems existing in the registration office make the civil justice system dysfunctional to a great extent. Through interviewing the stakeholders mentioned above, some recommendations are adopted to accelerate the civil justice system functional both in formal litigation and mediation.

7.5 Perception of the Assistant Commissioner (land) and his staffs

Given the context as discussed above, there is a necessity to collect response from the members of AC(land) office to examine the role of adjudication as well as mediation from their viewpoints. The number of respondents was fifteen in total.

[659] Suit no 104/07 of Joint District Judge 5th Court Dhaka.

7.5.1 Duties and responsibilities of the AC (land) office in connection to the determination of land-related rights of the raiyats

The AC(land) has a prescribed responsibility to administer several tasks as per different laws such as State Acquisition and Tenancy Act, 1950, State Acquisition and Tenancy Rules 1950, Land Development Tax Rules, 1976, Record Manual 1943 and Land Administration Manual 1990. According to those laws, the AC(land) has several duties and responsibilities, such as follows:

Determination of land development tax, preparation and review of mutation *khatian*, management of government agricultural and non-agricultural land, management of vested property, updating the records of all government properties, preparation of a statement of fact in the civil litigation and contest the suit accordingly, dispossessing all the illegal possessor of government property, maintaining all the registers properly relating to land administration etc. [660]

To attain knowledge about their working procedure, a set of questions were asked to them. The above-mentioned roles and responsibilities mainly focus on updating the records of ownership and possession over the landed property. From scrutiny of the above-mentioned Table, it appears that in few cases, the AC(land) in private party cases, updates the records without verifying the documents and ascertaining the actual land area. In such cases, there may be some mistake in revising the records, giving rise to civil disputes subsequently.

In the preceding chapters 4, 5 and 6 of this research, the individual case review and interview with the respondents revealed that in most cases, the civil disputes arise from the documents of ownership and possession. Among those documents, a portion of documents relates to record of rights and mutation *khatians*. It is generally said that every entry in the record of rights shall be presumed to be correct until proven by other evidence, e.g. recital of kabala, registered instrument, rent receipts, etc. incorrect.[661] Thus, as per relevant law,[662]every entry in the record of rights shall be conclusive evidence of the matter referred to such entry and shall be presumed to be correct until proved to be wrong.

[660]Government Estate Manual, 1958.
[661] Mohammad T Islam, *Lectures on land Law*(Northern University Bangladesh , 2013) P 64.
[662]The Sate Acquisition and Tenancy Act, 1950, s 144A; The State Acquisition Tenancy Rules, 1935, r.35.

In many civil litigations, [663] the litigant file the suit denying the correctness of the contents of RoR prepared by the AC(land), non-receipt of rent and other related matters.[664] Thus, in the inter-disciplinary approach, a mediator while trying to motivate the parties to reach at a settlement should keep in mind the role of the AC (land) office. A mediator having a profound understanding of the functions of that department will contribute to the understanding the nature of the suits and suitability of these suits for mediation.[665]Moreover, this interdisciplinary approach towards this separate but connected discipline of land administration will help understand this research topic more profoundly.[666]

7.5.2 Problem lying in the procedures of AC (land) office and its co-relation with delay in civil suits

To materialize the purpose mentioned in 7.5.1 of this chapter, a set of questions were asked to the AC (land) of Dhanmondi, Mirpur, Kotowali and Dhamraithana and several staff[667] working in his office. The question that was asked to the respondents was that **'***Have you ever faced any problem while making a change in the record of rights and preparing mutation khatian?'*All the fifteen respondents answered in the affirmative. To explore the problems, the next question that was asked to them was that, *'Which are the problems that cause the highest hindrance while performing above mentioned functions properly?'*The respondents pointed out the following problems:

- In case of preparing a revised record of rights and mutation *khatian*,[668] if the applicant submits incorrect latest RoR, the AC(land) office generally has no authority to declare the documents as wrong. If anyone challenges the authenticity of that document, he will have to file the civil suit before the competent court.
- Only in cases where the deeds appear to relate any government property, the office takes the attempt to verify the authenticity of the transfer deeds through the sub-registry office. But, while preparing revised RoR or mutation *khatian* of private persons, the office does not generally take any attempt to verify the

[663] As shown in chapter 4, 5 and 6.
[664] The Specific Relief Act, 1877, s. 42.
[665] The reason of this study is more vividly described in point no 7.2 of this chapter.
[666] The reason of this study is more vividly described in point no 7.3 of this chapter.
[667] The staffs mainly include kanungo, surveyor, land deputy assistant officer(Tahshildar) and mutation assistant.
[668] Under section 144 of SAT Act, the revised RoR is prepared. Mutation khatian is prepared under section 143 of SAT Act. 1950.

authenticity of the transfer deeds. The remedy which lies before the persons who challenges the same is to file the civil suit.

- If all the deeds in including RoR are recorded in the names of private properties but the last CT *khatian* is recorded in government names without any basis, the AC(land) office denies to receive rent from the concerned tenant. The then true owner has to file the suit before the competent civil court.
- When a private person files a suit against the government regarding the wrong recording of CT or RS *khatian*, the Land office and AC(land) office, faces enormous trouble to prepare the defense as the required documents are not available in the office. Then the suit takes a long time to be disposed of.
- In case of difference of shares regarding the owners, the office has to depend upon the documents presented before it. If the applicant or the other party denies the correctness of documents, the office does not have any option to declare any of such partition deeds to be wrong and false. So, there is no use of sending a surveyor to corroborate the correctness of the deeds and calculate a new share. The only of the parties are to file partition suit in the civil court.
- Sometimes, in the order and decree passed by the court, there is a lack of consistency in the CS, SR, RS and SA plots. In some other cases, the share provided by the court becomes excess to the actual area of the plot. In some cases, the court does not clearly mention the share of each of the parties. In those cases, the AC (land) office cannot implement the order of the court while correcting the RoR or mutation *khatian*.

Thus, from the responses of the officials and staffs of particular AC (land) office, it seems that a considerable number of civil suits are filed from the dispute originated from that office. As per their opinion, when the authenticity of a document is challenged, the proper forum of getting remedy is to file a suit in the civil court. Consequently, the field study reveals the fact that the cause of action in the suits like a declaration of title and the connected RoR to be wrong and baseless, the rectification of deeds like partition deed, any other transfer deeds, cancellation of deeds in appropriate cases, suit for partition mainly originates in AC (land) office. Subsequently, after disposal of the suits, the AC (land) office again implements the order passed by the courts by correcting the khatians and preparing the mutation khatians accordingly. Apart from this, the AC (land) office being the representative of the government contests the suits where the government interest is present. Consequently, from the

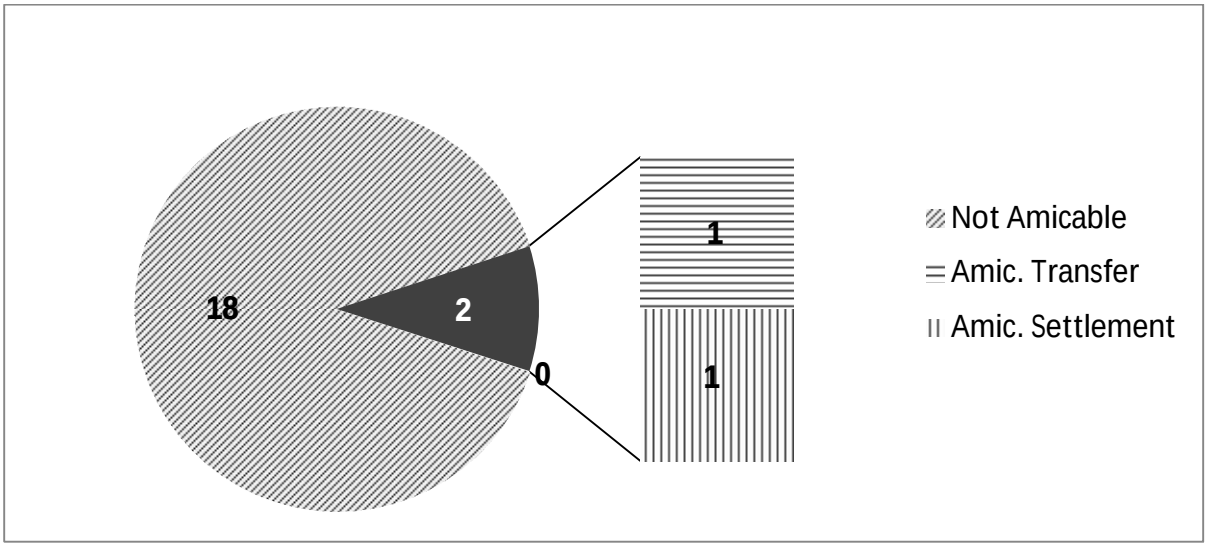
perspective of inter-disciplinary approach, there remains a co-relation with these two sectors in case of discharging their roles. It is clear from the above-mentioned study that for the administration for justice in case of land-related disputes, both the AC (land) office and the civil court has co-related responsibility towards the tenants as well as litigants.

7.5.3. Investigating the role of AC (land) office in promoting mediation in land-related disputes

These two departments being co-related with each other in determining the land-related rights of the people, surely have the responsibility in solving the disputes in this respect in their own laws, rules and regulation. Regarding the research area of the present study, the query was made to this office about their role in ADR mechanism. For this purpose, the question asked to them was, *'Do you have any law or practice for settling the disputes amicably among the parties while preparing a revised record of rights or mutation khatian?'*Eighteen respondents have replied this question in the negative. They have stated that even in the case of an apparent mistake in the RoR or other deeds, the office cannot settle the issue with the consultation of the parties amicably. In case of any inconsistency among the documents, they refer the parties to solve the dispute in the civil courts. They have further answered that when the government itself is a party to the suit, there is no practice on the part of the government to resort to the provision of mediation as enshrined in section 89A of CPC. Thus, according to the viewpoint of social institution dysfunction theory, the AC (land) office is not functional in promoting ADR activities in their department. This state plays a role in increasing the institution of civil suits and makes the mediation mechanism dysfunctional.

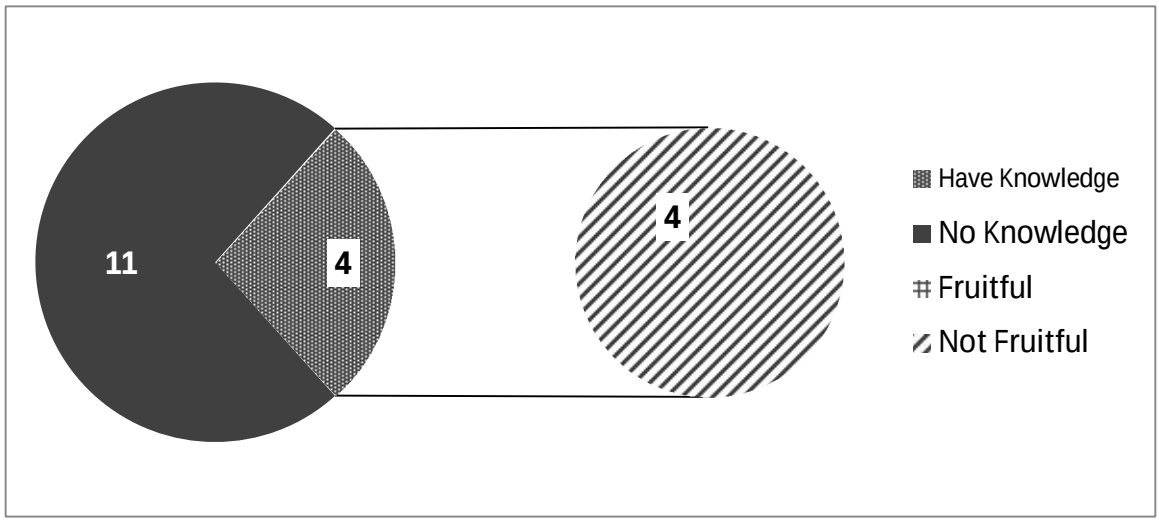
However, two respondents have stated that in exceptional and limited cases, there is scope to settle the dispute through amicable settlement, such as where all the heirs have come forward to divide their shares, and upon hearing of all the parties, the AC(land) can prepare the mutation upon amicable settlement. In case of transfer also when admittedly the deed of transfer is executed, but the possession is not conveyed, then the matter can be settled before AC(land) and mutation *khatian* may be prepared accordingly. Thus, their response can be shown in Figure 7.7 below:

Figure 7.7: Scope of limited practice of amicable settlement in Assistant Commissioner (land) office



From the Diagram above, it is visible that there is almost no law and practice of amicable settlement among the parties appeared before the AC (land). The next question that was asked to them was, *'In your opinion which of the land-related suits are instituted in civil courts?' The options were, (a) For a declaration of title; (b) For permanent injunction; (c) For partition; (d) Declaration of deeds to be void and non-binding'*. In reply to this question, almost fifteen respondents have stated that the suits are mainly instituted for declaration of title and for declaration of RoR to be wrong and baseless, for partition and declaration of the deeds to be void and non-binding. From their response, it appears that the interviewees have adequate idea and experience in respect of the civil proceedings. The next question that was asked to them was, *'Do you think that those suits can be effectively resolved through mediation? Express your opinion in a few words.* 'A number of four respondents among fifteen replied that they know about the provision of mediation in resolving the suits through civil disputes, but according to their opinion such mechanism is not fruitful in theprevalence of the uncompromising mentality of the people in this country. Other 11 interviewees responded that they have no idea as regards the mediation mechanism of the civil courts. Their response can be shown in the Table below;

Figure 7.8: AC (land) response about the benefit of mediation in Civil Courts



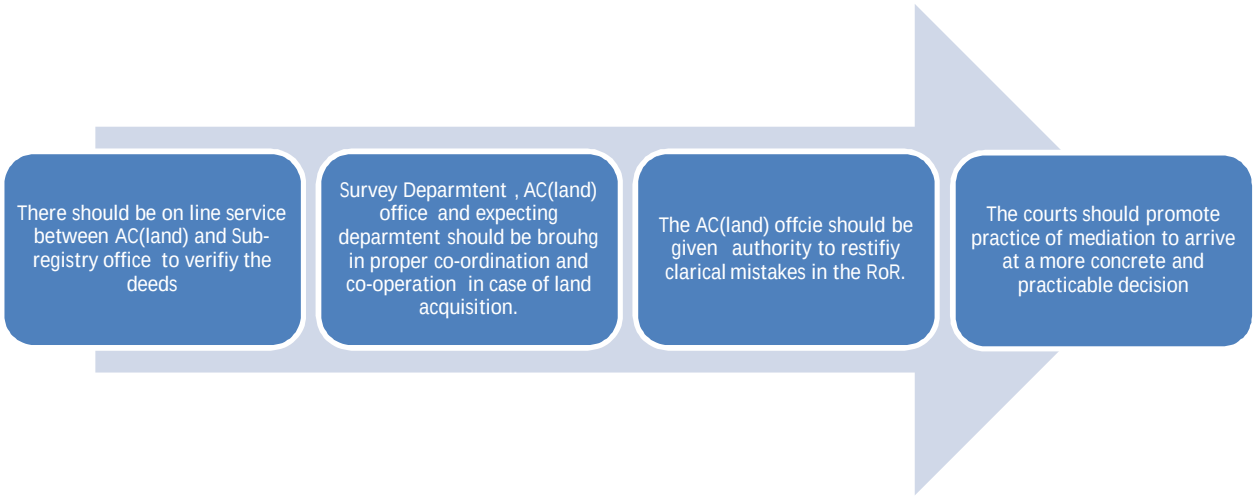
The response from the stakeholders makes it clear that the officials and staffs of the AC (land) do not have any legal provision for exercising amicable settlement to resolve the land disputes. Moreover, they have little knowledge about the effectiveness of mediation mechanism prevailing in the civil court. Another question that was asked to them was, *'Do you suggest any reforms either legal or logistic to lessen the number of the institution of civil suits as well as accelerate the mediation process in the civil courts?'*

While answering the question, the respondents answered the question in the following ways:

- While preparing the documents of title and possession and receiving the rents, the AC (land) office has to check the deeds of a chain of title. For such reason, there should be proper co-ordination and connection with the Sub registry office so that the AC (land) office can verify the deeds of the sub-registry office through on-line service. If this facility is provided to the AC (land) office, it will minimize the number of wrong recordings of documents leading to lessening the institution of civil suits.
- In case of land acquisition, the survey department, sub-registry office, AC (land) office and expecting department for whom the land is acquired, should work together to keep the consistency of all of the documents and properly maintain the chain of ownership before the acquisition. In such a case, it will lessen the future litigations in case of acquisition land.
- Sometimes, there are clerical errors in the names, plots in the RoR; they should be given authority to rectify those clerical mistakes. If they can rectify those clerical mistakes, the people would not have to file the suits in civil courts.

- In the suits, if the courts can initiate mediation procedure successfully, the court would reach the more concrete, precise and right decision in the civil suits. In such cases, it would be easier for the AC (land) office to implement such orders. Their responses can be shown in the Figure below:

Figure 7.9: AC (land)s response about way-outs to decrease case backlogs



At the beginning of this chapter, it was said that as an essential sector of the land administration department, the office of Assistant Commissioner(land) assume the duty of ensuring the title and possession of people over landed property. In the preceding discussion, the research study in the present chapter explored interlink between the activities of these two departments of land administration and civil courts.

7.6 Conclusion

In-depth discussion about the functions and existing problems of the AC (land) office was incorporated in this thesis so that some recommendations can be suggested on the ground that a lack of proper functioning of AC (land) offices raise the number of civil suits and make settlement of those suits difficult. This study reveals that from the viewpoint of social institution dysfunctional theory, the problems existing in AC(land) in particular cases cause barriers in the smooth functioning of civil courts. Through interviewing the stakeholders mentioned above, some recommendations are adopted to accelerate civil justice system functional both in formal litigation and in mediation, particularly for promoting court-connected mediation.

Therefore, the study in the present chapter reveals that along with reformation in the legal and structural framework within the court premise, development of particular functions of the connecting department is also necessary to attain the desired level of success for providing justice in the civil court.

CHAPTER 8

CONCLUSION: SUMMARY OF UNDERLYING PROBLEMS AND RECOMMENDATIONS FOR LEGAL AND INSTITUTIONAL REFORMS

8.1 Introduction

In the previous chapters, it has been reiterated that civil courts of Bangladesh as a legal institution suffer severe setbacks in providing access to justice to the litigant public. As per Parsons AGIL theory, social institutions function through goal attainment, integration, adaptation, and latent maintenance.[669] According to the words of Miller, social institutions are defined in terms of their collective ends. Such collective ends are also for collective goods.[670]For instance, the purpose of our civil justice system is to ensure the access of justice among the members of our society when a dispute arises out of civil matters, and the actual access to justice for *'all'* is an inevitable criterion for the proper function of the court system as an institution.[671]

In civil courts of Bangladesh, a low number of disposal of civil litigations leads to unjustifiable delay in resolving of disputes causing unavailability of justice towards the litigant public. In the backdrop of this unavailability of access to justice, unlike different countries worldwide, the provisions of ADR were incorporated in various legislations in our country as a novel initiative to remove the barriers minimizing the cost and delay of the suits. The scope of this research was, however, limited to the resolution of suits of civil nature through mediation (as enshrined in section 89A of the Code of Civil Procedure) especially land disputes that are dealt under the Code of Civil Procedure (Amendment)Act, 2003 and the Code of Civil Procedure (Amendment) Act, 2006.

The present study has tried to investigate thoroughly the efficiency of mediation mechanism in resolving the civil suits within the framework of social institution dysfunction theory. The present study tried to explore whether the existing mediation provisions are being adapted and appropriately integrated within the justice delivery system of Bangladesh. For that purpose, data were collected from court registry and a number of cases were analyzed from individual files, in short, both the qualitative and quantitative sources were relied upon. Once the performance of the mediation mechanism was shown to have been dysfunctional, judges, lawyers and parties to the suit were contacted and interviewed. Through this interview, an

[669] This is detailed in 'Functions of AGIL System' in chapter 2.
[670] This is detailed in 'Nature and Features of Social Institutions' in chapter 2.
[671] This is detailed in the topic 'Finding causes of Legal Institutional Dysfunction' in chapter 2.

attempt was made to acquire their knowledge and understanding regarding prospects, challenges and way outs for developing mediation mechanisms. The responses of different stakeholders from both inside and outside the courts are collected and analyzed to find out factors responsible for making the institution of mediation procedure dysfunctional. This thesis also examined the interview with the court support staff, staff of Assistant Commissioner (land) office and that of the sub-registry office to understand the cause and nature of dispute from their viewpoint. While doing the tasks mentioned above, the current study has brought some way-outs to make the mediation mechanism properly functional in the form of recommendations. Those recommendations were entirely based on theoretical analysis and empirical study of court registry data, individual case study, and opinion of above-mentioned stakeholders.

The entire research was elaborated into all preceding chapters to derive the finding categorically from different sources. In the present chapter, those findings have been summarily expressed under the theory of four functional states of social institutions as identified by Talcott Parsons under the GAIL theory of Social Institution Dysfunction in chapter 2 of this thesis.

8.2 Dysfunctional mediation mechanism in the civil courts of Bangladesh

One of the main objectives of this research is to examine the effectiveness of mediation in resolving civil disputes under CPC. In Bangladesh also, the benefit of ADR has been widely acclaimed as it addresses court backlogs by providing cheap, accessible methods of dispute resolution for poor people. Therefore, it accelerates the civil justice delivery system as properly functional. It is a process where the disputes are resolved by an impartial third party usually chosen by the parties themselves where neutral and impartial third party is generally familiar with the disputes of that nature, and the proceedings are informal without procedural technicalities and are conducted in a manner agreed by the parties.[672]In such a backdrop, the measurement of the functionality and success of mediation in resolving civil disputes obviously bears great value in dispensing justice towards the litigant public.

8.2.1 Dismal condition of mediation- Respondents perspective: Considering the huge backlog in civil courts, judges of civil courts were asked about the current state of application of mediation in their respective courts. During this study, the question was: *'Do you think the*

[672] This is detailed in 'Mediation in Bangladesh: A Novel Initiative and Aftermath' in chapter 1.

mediation under 89A as dispute resolution mechanism has brought any benefit in reducing the case backlogs in your court?' Among the judge respondents, 75% mentioned that a very negligible amount of cases are solved through mediation, and therefore, this mechanism has not brought any benefit in reducing the case backlog in their courts.

A similar query was made to District Legal Aid Office, the function of which includes promotion of mediation. Regarding mediation, the first question that was asked to the District Legal Aid Officer was: *'How many civil cases did your office receive from trial court during your tenure as a legal aid officer?'*They replied that they receive a very nominal amount of civil suits from the courts for disposal. The lawyers were asked for triangulation, *'Have you ever attempted to mediate under section 89A of CPC?'*In response, they mentioned that none of them has the experience to sit for mediation in the civil suits under section 89 A.[673] Similarly, when the question was asked to the litigants: *'Do you know a date was fixed for resolving your case through mediation?'*, they answered that they have no idea about the date fixed only for resolving the suits through mediation. The question that was asked to the litigants was: *'What relief do you want in your suit?'* A related question asked to them was: *'How much time do you think the suit may take to be disposed of?'*In response, the litigants answered that despite the different nature of courts having different hierarchy and geographical location, the suits for declaration of title, declaration of the deeds to be void and not binding upon the parties, partition suits, suit for compensation, recovery of possession, suit for injunction suffer delay due to formal adjudication process. The respondents do not even know when the suits are going to be disposed of. Among the fifty litigant-respondents, none of them had any knowledge about the opportunity of section 89A of CPC.[674]

8.2.2 Dismal condition of mediation: Analysis of court registry data

According to January 2019, about 70,000 civil cases are pending to be disposed of in the entire District Judge Courts[675].The disposal of civil cases through court-connected mediation in some particular districts in Bangladesh from 1st July 2018 to 30th September 2018 show that the rate of successful mediation in Bangladesh in average is not more than50%.**[676]** Thus, in Bangladesh, the performance of the mediation mechanism does not seem to be satisfactory

[673] This is detailed in 'Lawyers' perception on problems in practicing mediation under CPC' in chapter 5.
[674] This topic is detailed in 'Lack of general awareness about benefits of mediation among litigants' in chapter 6.
[675] This topic is detailed in 'Rationale of the research: Current backlog in Civil Courts in Disposing Civil disputes' in chapter 1.
[676]Table 1.13 of chapter 1.

for the disposal of the litigations. All these empirical findings were inconformity with the court registry data analyzed in Chapter 3 to show an insignificant practice of mediation to resolve civil cases all over Bangladesh.

To explore further on the reason for this non-effective mediation in Bangladesh, in contrast with its worldwide success in resolving disputes and reducing backlog, the thesis progressed also with content analysis of case files and identified some common loopholes that cause usual grounds for delay in courts. Following the GAIL theory of Social Institution Dysfunction, the empirical research was conducted to gather the perception of stakeholders in all four segments of GAIL that may directly or indirectly affect the functioning of mediation in civil courts.

8.2.3 Procedural loopholes hindering mediation under CPC: A content analysis through individual case files

On perusal of record in 15 selective civil suits which have been shown to be compromised under section 89A of CPC, some flaws and non-compliance of the provision have become apparent. Those are as follows;

(a) Little or no application of mediation provision[677]

In all the suits, the Court has fixed a date for mediation under section 89A of CPC. But in none of the suits, the Court had any scope to mediate the dispute or refer the dispute for mediation. Though all the parties are in attendance in the Court, the parties do not submit any application that they are willing to settle the dispute under section 89A. It is also notable that the parties do not seek any efforts from the court either under the relevant section.

From the analysis of those case files, it seems that courts are not using the amended provision "the court shall", rather wait for parties to submit the application to show their intention for mediation as was done earlier under the provision "the court may".

[677] Suit for declaration of title no 31/16 of Senior Assistant Judge, 1st Court, Dhaka; suit for cancellation of power of attorney and deed of agreement no 467/13 of Senior Assistant Judge, 1st Court, Dhaka; Suit for declaration of title no 230/16 of Joint District Judge, 3rd Court, Dhaka.

(b) The compromise completed outside the court is shown as 'mediation under section 89A', and such is shown in the later stage of the suit [678]

In some cases which are shown to have been resolved under 89A of CPC are actually resolved through the application of Order 23 Rule 1/2 of CPC. The parties also take such step at a later stage of the suit. There is no implementation of the procedure either by way of mediation by the court or referral for mediation to the proper forum.

Thus, according to the extensive field study, the functionality of mediation does not seem satisfactory, which can be stated in other words to be can termed *'dysfunctional'*. From the analysis of court registry data, individual case files, and opinion of the respondents reveal that the mediation process is not functioning well to achieve the goal of disposal at the satisfactory level. This situation has raised the necessity to find reasons of the dysfunctional state of mediation mechanism.

8.3. Reasons for dysfunctional state of mediation: Understanding the perception of stakeholders in light of Social Institution Dysfunction theory

It is a difficult task to identify and conceptualize the underlying causes of institutional dysfunctionality. Parsons and Elinor have identified design failure, adaptation failure, institutional mismatch, rational choice to dysfunction and non-fulfillment of role expectations as significant reasons for institutional dysfunctionality.[679]Each institution in the society has its own rules and regulations through which it ensures compliance by the mechanisms of reward and punishment for the purpose of shaping behaviors of individuals. Those rules and regulations may fall short for proper functioning, which may be recognized design failure causing dysfunction of a particular institution.[680] Moreover, it is not unlikely that one or more groups of the society may not value the newly developed social institution if only normative rules are upheld without any consideration of these competing views.[681]When that pattern is not flexible enough to cope address new circumstances, this results in adaptation failure.[682] In

[678] Money suit no 1089/12 of Joint District Judge 1st Court, Dhaka; Suit for declaration of title and recovery of possession no 903/14 of Joint District Judge, 1st Court, Dhaka.
[679]Detailed in 'Talcott Parson's Theory of Social Institution' of Chapter 2.
[680] Detailed in the topic, 'Examining the underlying causes of social institutional dysfunction: Design Failure and Adaptation failure' of chapter 2.
[681]Ostrom Elinor (1999) 'Design Principles and Threat: To Sustainable Organizations that Manage Commons' Indiana University Press P. 1-18.
[682] Detailed in the topic, 'Examining the underlying causes of social institutional dysfunction: Design Failure and Adaptation failure' of chapter 2.

the reasons of the dysfunctional state of the following discussion, an attempt has been made to unearth the reasons of the dysfunctional state of mediation in Bangladesh.

8.3.1 Existing legal and institutional setup for accelerating mediation and its prospect: Examining the scenario in light of goal attainment

The justice delivery system in Bangladesh is adversarial in nature. In both higher and lower judiciary, associated delay in disposal of cases is sometimes so huge that cases may remain pending and litigants fail to celebrate the disposal of their cases during their lifetime causing the justice inaccessible towards the litigants. In such a backdrop, the benefit of ADR has been widely acclaimed as it addresses court backlogs by providing cheap, accessible methods of dispute resolution for poor people. Therefore, it accelerates the civil justice delivery system as properly functional. To attain the goal of cheap and accessible justice delivery system, the system of ADR has already been included in various laws of Bangladesh relating to civil, family, *Artharin* matters etc. Keeping consistency with the notion of promoting ADR in Bangladesh, the mediation system has been incorporated in 89(A)-89(E) of the Code of Civil Procedure, 1908. Pertinently, section 89(A) provides for pre-trial mandatory ADR, on the other hand, by an amendment in 2006, section 89(C) the procedure of compulsory post-trial mediation has been laid down. In order to carry out this procedure, the Court, the pleaders from respective sides, the lawyers from panels prepared by the District Judge as third party mediators are duly authorized to conduct the whole process of mediation. Apart from this, (i.e. during pre-trial) the parties at any time and at any stage of the trial can resort to mediation. The same law has widened the scope of mediation even in the stage of appeal in a particular suit. In the year of 2012, the provision of ADR has been made compulsory in every suit.[683]In the year of 2017, through an amendment, the District Legal Aid Offices are also imposed with the duty of acting as mediator.

Thus, in respect of the theory of goal attainment, the Parliament of Bangladesh has enacted laws relating to mediation. The government has established courts and other infrastructural facilities, including manpower, to achieve the highest quality performance of resolving cases through mediation. However, the discussion in the previous point has depicted that the dysfunctional state of mediation machinery tantamount to non-fulfillment of goal attainment in this sector.

[683] Detailed in 'Major laws incorporating civil ADR in Bangladesh' of Chapter 1.

8.3.2 The response of stakeholders both from inside and outside the court as regards to goal attainment

In the previous discussion, it is revealed that the system prioritized the goal of access to justice through mediation and mobilized its resources to achieve that goal by enacting different laws and other infrastructural facilities But, the dysfunctional state of mediation mechanism demonstrates that it has not attained the desired level of functionality. The judges, mediators, and lawyers' responses express the fact that the proper application of mediation has the potentiality to reduce case backlog in the civil court and ensure better justice towards the litigant public.[684]Thirty-five out of 50 litigant public have stated that their litigation to which they are party suitable for mediation.[685]All the 20 court support staff respondents have indicated that mediation is an effective alternative of trial.[686]Thus, the responses from the above stakeholders clearly express the necessity of attaining the goal of a more functional and effective state of mediation in civil suits.

8.3.3 Exploring problems behind exercising mediation: Examining the scenario through the theory of adaptation

In the previous discussion, it is depicted that proper laws regarding mediation and its application are necessary for achieving actual access to justice by providing a low cost, quick resolution disputes towards the people and such goal have not been attained despite existing relevant laws in this regard. According to Parsons AGIL theory, the purpose of adaptation is to distribute resources and raw materials throughout a system so that other parts can perform their actions appropriately. [687] Similarly, laws have to be made, keeping in view the socio-cultural context of a given society. While framing the rules and regulations of mediation, "what aspects are to be regulated and how"[688] must be considered, otherwise adaptation procedure may fail to achieve success.

From the theoretical analysis of the adaptation theory, it can be said that the relevant laws of mediation for resolving civil disputes are to be applied in such a way that all the stakeholders associated with mediation can get adapted with the benefit of legal provisions of law. An

[684] Detailed in the topic, 'Judges perception of the prospects of mediation' and 'Lawyers perception on the prospects of mediation' in chapter 5.
[685]Detailed in the topic, 'Litigants perception- suitability of their suits for mediation' of chapter 6.
[686] Detailed in topic no, 'Court Support staffs perception as to the present position and prospects of mediation' in chapter 6.
[687] Detailed in, 'Talcot Parson's Theory on Social Institutions: Adaptation' of Chapter 2.
[688] Ibid.

attempt was made to visualize whether judges have been able to get adjusted with the available laws of mediation. The performance of the judges can be analyzed in the following manner;

- The judges are overburdened with a huge number of cases, and therefore, they fail to allocate time to adapt to the practice of initiating mediation procedure.[689]
- The judges do not have any incentive either in the disposal or in monetary point, and they are also devoid of any formal training in this respect.[690]
- Very few judges disseminate knowledge to the litigant public about mediation procedure. The litigants identified the judges 'passive role as one of the main reasons for the inefficient performance of court-connected mediation.[691]

Thus, the existing laws and other infrastructural setup do not seem to be flexible enough to address the judges' capacity and atmosphere to perform the required duties for affecting mediation causing design failure on the part of law and adaptation failure on the part of judges.[692]In this case, the patterned expectation is regarded as appropriate for the judges to perform required duties and the prevailed law assigns great emphasis upon them.[693]But, due to the reasons mentioned above, there is a significant discrepancy between the expectation of duties and actual fulfillment of them by the judges. Similarly, in respect of the performance of judge mediators who are the District Legal Aid, the following problem they face while discharging their duties:[694]

- They receive very few cases for mediation in the District Legal Aid Office;
- They have a lack of authority for making the parties to the suit present in the mediation proceeding;
- They have a lack of authority to conduct any interlocutory matters to reach at a settlement;
- The District Legal Aid Office does not have enough logistics and staff strength to handle the court-connected mediation of the civil cases.

[689]Detailed in 'Court Support staffs perception as to the underlying problem of exercising mediation and possible ways for improvement' of chapter 7.
[690] Detailed in 'Judges perception as to the problems in practicing mediation' of chapter 5.
[691]Detailed in 'Litigants perception – judges initiative for mediation' of chapter no 6.
[692] This is detailed in the topic 'Finding causes of Legal Institutional Dysfunction' in chapter 2.
[693] Ibid.
[694]Detailed in, 'Judge mediators perception as to the effectiveness of mediation under 89A of CPC' of chapter 2.

In the case of the lawyers, the lawyers' motivation is less as well as court clerks as the most prominent reasons for the mediation's inefficient performance. [695 & 696] the lawyers as respondents have admitted the fact of their less involvement in the mediation settings, and many of them stated that they very few times suggest the parties for mediation. [697]In their opinion, it further appears that by invoking the provision of mediation the lawyers cannot benefit financially and they do not have enough competence to resolve the suits through mediation due to lack of training facility. Thus, it appears that the prevailing legal structure relating to mediation does render proper authority to the judge mediators and enough financial reward to the lawyers in this respect. As a consequence, adaptation failure and non-fulfillment of role expectation occur from their part as well.

The justice delivery system of a community is planned and planted for settling down the dispute between citizens and between state and citizen in a timely and cost-effective way. According to the expressions of respondents, the litigants are not aware of the mandatory provision of mediation in civil litigations, and that is why, they are failing to utilize the benefit of mediation in civil litigations.[698] This situation reveals that they are not aware of the mediation provision as the information is not disseminated by the concerned stakeholders. Therefore, adaptation failure is resulted on the part of a litigant to the utilization of mediation mechanism.

Framing the laws and distributing resources throughout a system should be made in such a way that the other parts can perform their duties properly.[699]The thesis demonstrated that the key stakeholders to the justice delivery system such as judges, lawyers and litigants cannot adapt with the current legislation and prevailing resources of mediation mechanism. Accordingly, previous chapters outlined the stakeholders' failure to fulfill the role expected from them and therefore getting least benefit from court connected mediation.

[695] Detailed in 'Judges perception as to the problems in practicing mediation' of chapter 5.

[696] Detailed in the topic, 'Court Support staffs perception as to the underlying problem of exercising mediation and possible ways for improvement' of chapter 7.

[697] Detailed in, 'Lawyers perception as to the problems in practicing mediation: Problems in practice of mediation from lawyers'.

[698] Detailed in the topic, 'Efficiency of mediation mechanism under CPC by litigants: Awareness among the litigants' of chapter 6.

[699] Detailed in 'Talcot Parson's Theory of Social Institutions: Adaptation' of chapter 2.

8.3.4 Exploring problems behind exercising mediation in light of a lack of integration

Parsons has described integration as the process of harmonizing the entire society through which values and norms of society become solid and formal.[700] Parsons has identified such process as the integration from collective orientation to a set of norms. Any change in codified laws alone may not be sufficient to bring changes in these institutions. Along with the codified laws, the integration process is facilitated through customary social practices, common values, and social norms.[701] The responses from those stakeholders and individual case studies reveal that the professionals, including lawyers and judges and litigants, have not achieved the required behavioral changes to integrate themselves with codified laws regulating the mediation process in the civil suits. Their responses further reveal that there is neither the existence of formal framework such as organizational setup to motivate the lawyers and judges to provide required service in this regard. The behavior that creates impediments to the effective functioning of mediation:

- Low motivation and discouragement of the lawyers are identified by the judges, lawyers themselves, court support staffs and litigants as the most prominent reason for non-application of mediation provision. In the earlier discussion, it is revealed that the lawyers are not interested in proceeding with mediation due to less financial reward.[702]
- The judges have themselves stated that they are reluctant to take attempt to any mediation due to low motivation of lawyers and disinterest of the parties and the heavy burden of trial cases. The individual case study depicts that compromise completed outside the court is shown as *'mediation under section 89A'* and such is shown at a later stage of the trial.[703]
- The litigants are also not interested in mediation, which is considered one of the main reasons for non-functioning mediation provision. [704] The reasons behind such disinterest are recognized as ego problem prevailing among them, the no-consequence for the failure of mediation in the legal provision, easy approval of time in the trial, non-fixation of fees, lack of knowledge.[705&706]The litigants also responded that they

[700] Ibid.
[701] Detailed in 'Talcot Parson's Theory of Social Institutions: Integration' of chapter 2.
[702] Detailed in Judges perception as to the problems in practicing mediation' of chapter 5; 'Lawyers perception as to the problems in practicing mediation.
[703] Detailed in 'Mediation stage: Empirical findings on procedural loopholes: case study 4 and 5' of chapter 4.
[704] Detailed in, 'Judges perception as to the problems in practicing mediation' of chapter 5.
[705] Detailed in, 'Judges perception as to the problems in practicing mediation' of chapter no 5.

> have no or very little knowledge about the mediation date after the suit has been instituted.[707] As the consumers have no information, there seems no practice of developing skills among the mediators. The individual case study reveals that the tendency to file false and vexatious suit discourage the litigant from mediating the disputes and drag the suit for an indefinite time by taking easy approval of time.[708]

The reasons mentioned above reveal the fact that none of the stakeholders has incorporated themselves with the mandatory provision of mediation, and no practice has developed from their part to go through the necessary procedure of mediation mechanism. Situations as mentioned earlier further show that the lawyers for their self-orientation to achieve more financial gain avoid co-operating in the mediation provision. Similarly, on the part of judges, they sometimes show the outside court compromise as *'mediation'* to increase their disposal rate. This practice on the part of judges and lawyers can be said to have occurred due to institutional mismatch, lack of integration between legal professionals and prevailing codified laws.[709]

On the other hand, this situation causes the litigants to remain indifferent towards the mediation mechanism as no-consequence for the failure of mediation provision, non-fixation of fees and easy approval of time in a trial give them the chance to take such advantage. Thus, the lawyers and litigants to the suit make "rational choice of dysfunction" of taking dilatory tactics hindering early disposal of suits. While making laws for successful mediation in Bangladesh, the cultural impact to explain the dispute resolution approaches is very important. The high power distance culture and low power distance culture require different sets of laws relating to mediation for effective resolving disputes, specifically to the role of a third party involved in the dispute resolution process. For instance, in high power distance culture like Bangladesh, law and regulations relating to mediation should be made by keeping in mind the county's cultural impact.[710]

While defining the concept of an institutional mismatch as a reason for dysfunction, according to the regulatory theory of Alexanader, the norms and laws need to be tailored

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[706] Detailed in, 'Lawyers perception as to the problems in practicing mediation: Problems in practicing mediation from litigants' of chapter 5.

[707] Detailed in, 'Efficiency of mediation mechanism under CPC by litigants: Awareness among litigants' of chapter 6.

[708] Detailed in 'Mediation stage: Empirical findings on procedural loopholes: case study 6, 7and 8' of chapter 4.

[709] Detailed in 'Examining the underlying causes of institutional dysfunction: Institutional mismatch and rational choice of dysfunction' of chapter 2.

[710] Detailed Examining the underlying causes of institutional dysfunction: Design Failure and adaptation failure' of chapter 2.

according to the context of the emergence of new actors. In the present situation, the laws appear to have no compulsion (reward and punishment)upon the parties to sit for mediation. The law also does not appear to have any financial incentive to the lawyers to encourage them to do the needful mediation. Further, the disproportionate number of judges compared to the number of cases and inadequate monitoring by the authority (infrastructural facilities of the court) discourage the judges to deal with the mediation process. These infrastructural facilities are termed by Alexander as *"formal framework"*.[711] All the situations can be conceptualized as a gap in the process of integration towards the mediation provision, which is still only available in the provision law but has no existence in the actual practice.

8.3.5 Exploring problems behind exercising mediation in light of latent pattern maintenance hindering the acceptability and practice of mediation

He actions stated above like adaptation and integration are considered the actions explicitly intended by the actors as distinguished from the latent pattern maintenance, which refers to the unintended and unrecognized consequence of the above mentioned manifest actions.[712] In the subcontinent including Bangladesh, the dispute settlement procedure is adversarial in nature, in the adversarial dispute settlement process; the court adjudicates the matter of the dispute upon evidence place by both the parties and pronounces decision in favor of one party. The reasons of the dysfunctional state of mediation, as discussed above reveals that though the new law relating to mediation is introduced, among the stakeholders associated with this system, the notion and practice of trial persists. More precisely, their behavior in contradiction to the formalized norms becomes the matter of *"emotional disapproval"*[713] which can be termed as latent pattern maintenance leading to the non-functioning mediation mechanism. For instance, when a malicious litigant files suit in a civil court and construct protracted delay through unnecessary time petitions or so, to enjoy the disputed property until final decree, taking advantage of the traditional trial system reflects the consequence of latent pattern maintenance hindering the practice of mediation mechanism. One more instance of this theory can be, there is a tendency among the parties to an amicable settlement without any intervention of the court under Order 23, Rule 1/2.In such a case ,there is a greater chance of unfair and fraudulent agreement among the parties.[714]In those cases, that weak

[711]Detailed in 'Finding co-relation between AGIL theory and Art of regulating mediation' of chapter 2.
[712] Detailed in 'Talcot Parson's theory on social Institution: Latent Pattern Maintenance' of chapter 2.
[713] Ibid.
[714] Detailed in 'Mediation stage: Empirical findings on procedural loopholes: case study 7' of chapter 4. chapter 4.

party sometimes becomes bound to compromise on any terms unfavorable to them and sometimes, the evidence is not appreciated in this case.

Thus, practicing fraud upon the court is still prevalent among the parties, one of the demerits of the adversarial adjudication system that is still subsisting among the litigants as latent pattern maintenance.

8.4 Recommendations for proper adaptation and integration of mediation mechanism with latent patterns in our legal culture

From the beginning of the present study, an effort was made to identify the grey areas of hindrances in the existing laws and infrastructure, causing the ADR mechanism ineffective. Those empirical study and investigation of this research were vowed to expound different means and ways, opportunities, the success of mediation in our civil justice administration system under CPC. The following way outs for development of legal and infrastructural facilities are recommended so that the judges, lawyers and litigants can get adapted with the procedure of mediation to achieve the goal of effective functioning of mediation in resolving the civil litigations.

Firstly, the solutions mentioned below are recommended to increase the adaptability of the lawyers, judges and litigants to these mechanisms,

- If the suits are appropriately categorized according to their suitability for mediation, the court-connected mediation can attain success. At the date fixed for step under section 89A, the judge shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party and are not expressly or by necessary implication admitted or denied by the party against whom they are made. The mediator shall record such admissions and denials to categorize the suits as fit for mediation or less fit for mediation and write it down in the record. The judge shall fix a fee in proportion to the value of the suit as well as nature (simple or complex) of the suit and both the parties shall submit the fee at the subsequent date. In India, The Mediation Rules 2006 provides for verifying the suitability of mediation in particular suits.[715] In the USA, also, the court refers for mediation if the suit value does not exceed

[715] Detailed in ADR in Resolving Civil disputes: perspectives from developed and developing countries Performance of mediation in civil courts in developing countries in Asia of chapter 1.

U$50,000/-. [716]In the arbitration proceedings conducted in BIAC, SIAC, WIPO, there are also similar rules for determining the fees to be paid by the parties.

- Necessary amendments should be made in mediation provisions such as the inclusion of consequence if any parties' failure to co-operate in mediation. If the party, either plaintiff or defendant, does not come to a session of mediation initiated under this section, or according to the opinion of the mediator, any of the parties shows an unwillingness to comply with the required formalities of the mediation procedure, the mediator shall prepare a report in this regard, and submit it to the sitting judge and such report will be a part of the evidence in the proceedings. If any party does not co-operate at the time of mediation and the result of such mediation goes against that party, the presiding judge shall impose upon them a fine at the time of disposal of the case towards that party on the basis of the report prepared by the mediator.' In the UK, there is a similar practice of mandatory mediation of mediation and refusal to sit for mediation; there is a system of sanction in the form of costs.[717]In Japan, there is a system of payment of penalties by the defaulting party[718],and in Sri-Lanka, the paper of non-settlement is used as evidence against the non-co-operating parties.[719] In India, if the court finds that a party is absenting himself before mediator without sufficient reason, the court may take action against the said party by the imposition of cost.[720]
- While referring a dispute or disputes in the suit for mediation under sub-section (1) to the pleaders or panel of mediators, the court shall fix a fee according to the nature of suit (whether fit or less fit for mediation) and valuation thereof and the parties will have to deposit the fees on the date fixed for mediation. In case of failure by the plaintiff to submit the fees, the suit shall be dismissed, and in case of failure on the part of the defendant, the suit shall proceed *exparte*. In Stockholm, Sweden the parties willing for mediation, must pay money as mediator fees as determined by the Mediation Board[721]and extensive literature prevails to this connection. In Sri-Lanka, the chairman and members of the mediation are paid allowance according to rates

[716] Ibid.
[717] Detailed in 'ADR in Resolving Civil disputes: perspectives from developed and developing countries Performance of mediation in civil courts in developed countries in Asia' of chapter 1.
[718] Ibid.
[719] Ibid.
[720] Ibid.
[721] Ibid.

fixed depending upon the specific context.[722] In India also the mediators are paid fees determined by the courts.[723] In Bangladesh, within the ambit of arbitration law, the arbitration committee fixes the fees to be paid by the parties bearing in mind the value of the dispute. [724] In high power distance country like Bangladesh, there is ample necessity to insert the mandatory laws of paying a lump sum amount of money determined by the superior authority, i.e. court.[725]

- To the same tune of high power distance culture in Bangladesh, the District Legal Aid Officers should be allocated with cases suitable for mediation, and they should be given some authorities to deal with interlocutory matters such as sending advocate commissioner, call for any record, etc.

Thus, mediation mechanism should be regulated by specific legislation to make necessary changes in the legal provision to organize the suits according to their suitability, imposing consequence upon the parties and providing reasonable fees to the lawyers will increase the adaptability of the stakeholders to the mediation mechanism. Secondly, as has been discussed by the previous chapters, there are some aspects in mediation filed which cannot be controlled through any formal legislature, especially there is hardly any mechanism to monitor mediator's conduct and make them disciplined in their professional activities.[726]For this reason, specific kind of formal framework, e.g. organizational setup is required so that the legal professionals and litigants can proceed with integration with mediation practice;

- Judges, lawyers, District Legal Aid Officer, retired judges and professional mediators have the highest capability to conduct mediation. So, those persons should be trained for conducting effective mediation procedure. In Australia, in civil matters, the employed mediator is required to have a legal education and received accreditation under the National Mediator Accreditation System.[727] In Sri-Lanka, the Mediation Boards consist of 3 members who are the retired judges of the Supreme Court. In

[722] Ibid.
[723]Ibid.
[724] Detailed in, 'Major laws incorporating Civil mediation in Bangladesh: Laws of Formal Mediation in Bangladesh' of chapter 1.
[725] Detailed in, 'Need for legal reform: Judges' and lawyers' perception on way out to seal procedural loop holes for effective mediation under CPC: Encouraging lawyers through fixation of lump-sum fees for mediation' in chapter 5.
[726]Detailed in 'Finding co-relation between AGIL theory and Art of regulating mediation' chapter 2.
[727] Detailed in 'ADR in Resolving Civil disputes: perspectives from developed and developing countries Performance of mediation in civil courts in developed countries in Asia' of chapter 1.

India also a retired judge is the chairman of *Lok Adalat* who resolves the dispute through compromise.[728]

- Mediation at the pre-trial stage under section 89A as distinct from 89C should be selected for effective means of conducting mediation;
- The respondents also proposed that a separate set of rules is essential for regulating the proper procedure of mediation. The detailed procedure of imposition of fees and other matters would be laid down.
- The respondents also proposed some institutional reforms for effective application of mediation. A separate mediation room should be instituted for mediation with sufficient economic utility and mediation centre should be built to provide necessary logistics to the courts and enhance the judges' competence and monitor the procedure thereon. In the UK, Center for Dispute Resolution (CEDR) consisting of members of different professional field is established to monitor the mediation activities.[729] Similarly, Australian National Mediator Practice Standards (2008) regulates competency of mediators, their relationship with participants and what is to be expected from the mediation process.[730]In Sri Lanka, the Mediation Board has left a positive impact of creating successful mediation practice, and in such mediation, there are three mediators having required training in this regard.[731] In India, in mid-eighties *Lok Adalat* was established to make settlement of different disputes including land disputes, and it has been given authority to give any compromise decree.[732]
- The High Court Division's Circular as regards the benefit of double disposal for successful mediation and single mediation in respect of failed mediation should be implemented appropriately and there should be proper evaluation and monitoring from the authority in this regard.
- As regards the mediation mechanism, the respondents from AC(land) office and sub-registry office also expressed their positive opinion stating that due to different reasons the incorrect and false documents are created from their office which gives

[728] Ibid
[729]Ibid.
[730]Ibid.
[730]Ibid.
[731]Ibid.
[732]Ibid.

> rise to civil litigations. To resolve those disputes, mediation is considered by them as the most appropriate machinery as an effective means of saving time, money and energy. In their opinion, the proper co-ordination of those offices with civil courts would accelerate stakeholder's participation with the mediation mechanism. [733]

At the inception, in Chapter 1, it was argued that laws to apply mediation are in place in most countries. However, there is no gatekeeper to assess and discipline the effective use of mediation and activities of mediators. As demonstrated throughout this thesis, Bangladesh is not an exception to this. At present, the provision of mediation is widely available in our legal texts. It would be hard to find any contemporary law where the legislators do not suggest mediation or any of its close variations. However, in our dispute resolution culture, litigants still have a serious lack of information regarding the availability and benefits of mediation services *vis-a-vis* trial in formal courts. Practitioners, especially judges and lawyers, also have a lack of motivation to promote mediation. Thus, the above-mentioned recommendations on institutional setup promote people's knowledge about mediation and develop the ability of the service providers in this regard. Those necessary changes, including infrastructure development, would create an atmosphere of successful integration among all stakeholders to reach the target level of efficient mediation for resolving civil suits under CPC. Similar lessons could be applied in resolving case backlog from other civil courts of Bangladesh.

8.5 Concluding remarks

Throughout this research, an extensive effort was made to verify the goal of mediation as an effective alternative to rendering resolution to litigations expeditiously and adequately. The dismal conditions of disposal of suits are shown in the statistics of this research on the basis of both objective and subjective criteria. The underlying reasons for such delay are also conveyed by scrutiny of individual case files. Those findings have unequivocally justified the necessity of activating the medication mechanism to ensure fully functional civil justice delivery system. Both quantitative data from court registries and qualitative data from case fact reviews and responses from stakeholders both from inside and outside the judiciary were collected for this research. The analysis has successfully unearthed the reasons behind low functioning of mediation such as adaptation failure and lack of integration and presence of

[733] Detailed in 'Investigating the role of AC (land) office and sub-registry office in promoting mediation in land related disputes' in chapter 7.

latent pattern maintenance on the part of judges, lawyers and litigants. Thus, for the betterment of existing situation, the recommendations such as imposing compulsion upon the litigants to initiate mediation, providing incentive and training to the judges as well as to the lawyers, classifying the suits according to their suitability through mediation, raising awareness among the litigants were adopted in the preceding chapters. If these recommendations are initiated for proper execution, it will play a significant role in removing the case backlog in the civil courts of Bangladesh and eradicating the dysfunctional state of prevailing legal institutions to provide fair justice to its citizens.

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I

Appendix A1

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়
আইন ও বিচার বিভাগ
বিচার শাখা-১.

নং-১০.০০.০০০০.১২৫.১৮/২.০০৪.১৩- ৫১৮ তারিখঃ ১৩/০৮/২০১৫ খ্রিঃ।

বিষয়ঃ- পি.এইচ.ডি গবেষণা কোর্স সম্পন্ন করার অনুমতি প্রদান প্রসঙ্গে।

সূত্রক নং- ১০.০৬.০০০০.০০১.৪৮.০৪৮.১৫-৬৭৮২, তারিখ-২১/০৭/২০১৫খ্রিঃ, বিচার প্রশাসন প্রশিক্ষণ ইনস্টিটিউট।

উপর্যুক্ত বিষয় ও সূত্রের প্রেক্ষিতে নির্দেশিত হয়ে জানানো যাচ্ছে যে, সরকারী কাজের বিঘ্ন ঘটবে না শর্তে সরকার বিচার প্রশাসন প্রশিক্ষণ ইনস্টিটিউটের সহকারী পরিচালক (প্রশাসন) জনাব ইফাত মুবিনা ইউসুফ-কে ঢাকা বিশ্ববিদ্যালয়ের আইন অনুষদের অধীনে আইন বিষয়ে ২০১৫-২০১৬ শিক্ষাবর্ষে (জুলাই-ডিসেম্বর) খন্ডকালীন পিএইচ.ডি কোর্স সম্পন্ন করার অনুমতি প্রদান করেছে।

১৩/৮/১৫
(উৎপল চৌধুরী)
সিনিয়র সহকারী সচিব
ফোনঃ ৯৫৪৫৪৩১।

মহা-পরিচালক
বিচার প্রশাসন প্রশিক্ষণ ইনস্টিটিউট
১৫, কলেজ রোড, ঢাকা-১০০০।
[দৃঃ আঃ জনাব আলমগীর এস. রহমান, উপ-পরিচালক (প্রশাসন)]

জ্ঞাতার্থে (জেষ্ঠ্যতার ক্রমানুসারে নয়)ঃ

১। রেজিস্ট্রার জেনারেল, বাংলাদেশ সুপ্রীম কোর্ট, ঢাকা।
২। জনাব ইফাত মুবিনা ইউসুফ, সহকারী পরিচালক (প্রশাসন), বিচার প্রশাসন প্রশিক্ষণ ইনস্টিটিউট ১৫, কলেজ রোড, ঢাকা-১০০০।
৩। সচিব মহোদয়ের একান্ত সচিব, আইন ও বিচার বিভাগ
৪। প্রোগ্রামার, আইন ও বিচার বিভাগ (ওয়েবসাইডে প্রকাশের অনুরোধসহ)।

Appendix A2

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আইন বিভাগ
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ঢাকা-১০০০, বাংলাদেশ
ফোন : ৯৬৬১৯০০-৭৩/৬৮১০
ফ্যাক্স : ৮৮০২-৮৬১৫৫৮৩
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নং DO-70/2017-12

তারিখ 26/09/2017

TO WHOM IT MAY CONCERN

This is to certify that IFAT MUBINA EUSUF, daughter of Dr. M Eusuf and Professor Tasnim Ferdousee, is a Ph.D student at the Department of Law, University of Dhaka. She was admitted on 01-09-2016 in the academic session 2015-2016. If possible, she would like to use the resources of District & Sessions Judge Court, Dhaka, Record Room of Dhaka District Judge Courts, Ministry of Law, Justice and Parliamentary Affairs and Supreme Court of Bangladesh etc. to pursue her studies.

I wish her every success in life.

DEPARTMENT OF LAW * UNIVERSITY OF DHAKA *

26/9/17

(Dr. Borhan Uddin Khan)
Professor & Chairman
Department of Law
University of Dhaka.

Appendix A3

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
জেলা ও দায়রা জজ আদালত, ঢাকা

স্মারক ঃ ৯৫৩

তারিখঃ- ২৪/১০/১৭ইং

বিষয়:- পিএইচ.ডি.-এর গবেষণা কাজ পরিচালনার উদ্দেশ্যে জেলা জজ আদালত, ঢাকা হতে প্রয়োজনীয় তথ্য সংগ্রহ-এর অনুমতি প্রদান প্রসঙ্গে।

উপর্যুক্ত সূত্র ও বিষয়ের প্রেক্ষিতে জনাব ইফাত মুবিনা ইউসুফ, উপ-পরিচালক (যুগ্ম জেলা ও দায়রা জজ), বিচার প্রশাসন প্রশিক্ষণ ইনস্টিটিউট-কে ঢাকা বিশ্ববিদ্যালয়ের আইন অনুষদের অধীনে 'Examining the Role of ADR in Resolving Civil Disputes: Legal and Institutional Reforms to Accelerate Success' শীর্ষক পিএইচ.ডি. সংক্রান্তে গবেষণা কর্ম পরিচালনার স্বার্থে অত্র আদালত হতে দেওয়ানী মামলা দায়ের ও নিষ্পত্তি এবং এডিআর এর মাধ্যমে মামলা নিষ্পত্তি সংক্রান্তে বিস্তারিত তথ্য সংগ্রহ করার অনুমতি প্রদান করা হলো।

২৪/১০/১৭

(এস. এম. কুদ্দুস জামান)
জেলা ও দায়রা জজ
ঢাকা।
জেলা ও দায়রা জজ
ঢাকা।

Appendix A4

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
জেলা রেজিস্ট্রার এর কার্যালয়,
৪৪৬ তেজগাও রেজিস্ট্রেশন কমপ্লেক্স, ঢাকা।

স্মারক নং- ২০৮২৮ তারিখ: ৩১/১২/২০১৭.

বিষয়ঃ পিএইচ.ডি এর গবেষণার কাজ পরিচালনার উদ্দেশ্যে জেলা রেজিস্ট্রার, ঢাকা এর কার্যালয়ের আওতাধীন সাব রেজিস্ট্রি অফিসসমূহ হতে প্রয়োজনীয় তথ্য সংগ্রহের অনুমতি প্রদান প্রসংগে।

সূত্রঃ ঢাকা বিশ্ববিদ্যালয়ের আইন বিভাগের স্মারক নং-৭০/২০১৭-১৮; তারিখঃ ২৬/০৯/২০১৭

উপর্যুক্ত বিষয় ও সূত্রস্থ পত্রের প্রেক্ষিতে জনাব ইফাত মুবিনা ইউসুফ, বিচারক (যুগ্ম জেলা ও দায়রা জজ), অর্থ ঋণ আদালত নং-৪, ঢাকা-কে ঢাকা বিশ্ববিদ্যালয়ের আইন অনুষদের অধীনে 'Examining the Role of Mediation in Resolving Civil Disputes under Code of Civil Procedure,1908: Legal and Institutional Reforms' শীর্ষক পিএইচ.ডি সংক্রান্ত গবেষণাকর্ম পরিচালনার স্বার্থে ঢাকা জেলা রেজিস্ট্রার এর কার্যালয়ের আওতাধীন সাব রেজিস্ট্রি অফিসসমূহ হতে প্রয়োজনীয় তথ্য সংগ্রহের অনুমতি প্রদান করা হলো।

৩১/১২/২০১৭
(সাবিকুন নাহার)
জেলা রেজিস্ট্রার, ঢাকা

অনুলিপি সদয় অবগতি ও প্রয়োজনীয় কার্যার্থে প্রেরণ করা হলো (জেষ্ঠ্যতার ক্রমানুসারে নয়):

১। ইফাত মুবিনা ইউসুফ, বিচারক (যুগ্ম জেলা ও দায়রা জজ), অর্থ ঋণ আদালত নং-৪, ঢাকা ও পিএইচ.ডি গবেষক।

২। সাব-রেজিস্ট্রার .....(সকল), ঢাকা।

৩। অফিস কপি।

Appendix A5

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
জেলা প্রশাসকের কার্যালয়, ঢাকা
(রাজস্ব শাখা)
www.dhaka.gov.bd

স্মারক নং-০৫.৪১.২৬০০.০১২.০০৬.০০২.১৯.২৮৫; তারিখ: ১৯/০৫/২০১৯

বিষয়ঃ পিএইচ.ডি এর গবেষণার কাজ পরিচালনার উদ্দেশ্যে ঢাকা জেলা প্রশাসকের কার্যালয়ের আওতাধীন সহকারী কমিশনার (ভূমি) অফিসসমূহ হতে প্রয়োজনীয় তথ্য সংগ্রহের অনুমতি প্রদান প্রসংগে।

সূত্রঃ ঢাকা বিশ্ববিদ্যালয়ের আইন বিভাগের স্মারক নং-৭০/২০১৭-১৮; তারিখঃ ২৬/০৯/২০১৭

উপর্যুক্ত বিষয় ও সূত্রস্থ পত্রের প্রেক্ষিতে জনাব ইফাত মুবিনা ইউসুফ, বিচারক (যুগ্ম জেলা ও দায়রা জজ), অর্থ ঋণ আদালত নং-৪, ঢাকা-কে ঢাকা বিশ্ববিদ্যালয়ের আইন অনুষদের অধীনে 'Examining the Role of Mediation in Resolving Civil Disputes under Code of Civil Procedure,1908: Legal and Institutional Reforms' শীর্ষক পিএইচ.ডি সংক্রান্ত গবেষণাকর্ম পরিচালনার স্বার্থে ঢাকা জেলা প্রশাসকের কার্যালয়ের আওতাধীন সহকারী কমিশনার (ভূমি) অফিসসমূহ হতে প্রয়োজনীয় তথ্য সংগ্রহের অনুমতি প্রদান করা হলো।

(আবু সালেহ মোহাম্মদ ফেরদৌস খান)
জেলা প্রশাসক, ঢাকা।
ফোনঃ ৯৫৫৬৬২৮
e-mail:dcdhaka@mopa.gov.bd

অনুলিপি সদয় অবগতি ও প্রয়োজনীয় কার্যার্থে প্রেরণ করা হলো (জেষ্ঠ্যতার ক্রমানুসারে নয়):

১। অতিরিক্ত জেলা প্রশাসক (রাজস্ব), জেলা প্রশাসকের কার্যালয়, ঢাকা।

২। ইফাত মুবিনা ইউসুফ, বিচারক (যুগ্ম জেলা ও দায়রা জজ), অর্থ ঋণ আদালত নং-৪, ঢাকা ও পিএইচ.ডি গবেষক।

৩। সহকারী কমিশনার (ভূমি) ....., ঢাকা।

৪। অফিস কপি।

Appendix B

Examples cited; details kept on file

ঢাকা জেলা জজশীপের জানুয়ারী/২০১৮ইং হইতে ডিসেম্বর/২০১৮ইং পর্যন্ত দেওয়ানী মোকদ্দমার কার্য বিবরণীঃ

আদালতের নাম	পূর্বের জের	দায়ের	প্রাপ্তি	মোট মামলার সংখ্যা	অন্য আদালতে বদলী	বিচারাধীন	নিষ্পত্তি				মোট নিষ্পত্তি	সাক্ষী		মাস শেষে বিচারাধীন
							দোতরফা	একতরফা	অন্যভাবে	ADR		একতরফা	দোতরফা	
জেলা জজ আদালত, ঢাকা	১৫৩৮	২১৬৪	--	৩৭০২	৮৭৪	২৮২৮	৩৮১	৩৭০	৫১২	--	১২৬৩	--	--	১৫৬৫
অতিঃ জেলা জজ, ১ম আদালত, ঢাকা	২২৫	--	১৫৪	৩৭৯	২	৩৭৭	৫৯	৫৬	৬১	--	১৭৬	--	--	২০১
অতিঃ জেলা জজ, ২য় আদালত, ঢাকা	১৫৪	--	১২৯	২৮৩	৯	২৭৪	২৭	৪৬	৭০	--	১৪৩	--	--	১৩১
অতিঃ জেলা জজ, ৩য় আদালত, ঢাকা	৩৭	--	৮	৪৫	২	৪৩	২	--	১৬	--	১৮	--	--	২৫
অতিঃ জেলা জজ, ৪র্থ আদালত, ঢাকা	৩২	--	৯	৪১	--	৪১	৩	--	৯	--	১২	--	--	২৯
অতিঃ জেলা জজ, ৫ম আদালত, ঢাকা	১৯৫	--	১৩৮	৩৩৩	৭	৩২৬	২৬	২৪	১৫	--	৬৫	--	--	২৬১
অতিঃ জেলা জজ, ৬ষ্ট আদালত, ঢাকা	১৩৭	--	১৪১	২৭৮	৩	২৭৫	১০৯	৪৪	৭	--	১৬০	--	--	১১৫
অতিঃ জেলা জজ, ৭ম আদালত, ঢাকা	২৫৮	--	২২৪	৪৮২	২	৪৮০	১১৮	১২	৫	--	১৩৫	--	--	৩৪৫
অতিঃ জেলা জজ, ৮ম আদালত, ঢাকা	৫৩	--	৮২	১৩৫	--	১৩৫	১৩	৮	১৫	--	৩৬	--	--	৯৯
অতিঃ জেলা জজ, ৯ম আদালত, ঢাকা	৯	--	২০	২৯	১	২৮	--	--	--	--	--	--	--	২৮
অতিঃ জেলা জজ দেউলিয়া আদালত, ঢাকা	১৬১	--	১৫০	৩১১	৪	৩০৭	১৪	৩০	৫	--	৪৯	--	--	২৫৮
যুগ্ম-জেলা জজ, ১ম আদালত, ঢাকা	৬০৭৮	১৪৮৯	--	৭৫৬৭	৩৯	৭৫২৮	১৯৪	৭৯৯	--	৩০	১০২৩	--	--	৬৫০৫
যুগ্ম-জেলা জজ, ২য় আদালত, ঢাকা	৪৫১৬	১১৩১	--	৫৬৪৭	২৩৫	৫৪১২	৯২	৬১৫	২০২	৩৫	৯৪৪	--	--	৪৪৬৮
যুগ্ম-জেলা জজ, ৩য় আদালত, ঢাকা	২৯৭২	২৬৫৩	২৫৩	৫৮৭৮	৭	৫৮৭১	৮৮	১৯০৩	৪	৩১	২০২৬	--	--	৩৮৪৫
যুগ্ম-জেলা জজ, ৪র্থ আদালত, ঢাকা	৫০৩৮	৭৭৫	১৫	৫৮২৮	১৮	৫৮১০	৫৮	২৭২	২১	১০	৩৬১	--	--	৫৪৪৯
যুগ্ম-জেলা জজ, ৫ম আদালত, ঢাকা	৪২২৩	৮৯৯	৭	৫১২৯	২৮০	৪৮৪৯	১১৭	৬৯১	--	--	৮০৮	--	--	৪০৪১
যুগ্ম-জেলা জজ, অতিঃ আদালত, ঢাকা	৩৫৪৯	৩৭৫	--	৩৯২৪	--	৩৯২৪	৩২	১৮২	৩২	--	২৪৬	--	--	৩৬৭৮
যুগ্ম-জেলা জজ, আবরিট্রেশন আদালত, ঢাকা	৪৪২০	২৩৯	২১০	৪৮৬৯	৫	৪৮৬৪	৪১	৩৪১	২	১	৩৮৫	--	--	৪৪৭৯
যুগ্ম-জেলা জজ, ল্যান্ডসার্ভে ট্রাইঃ	৬১৮৫	৪৩	--	৬২২৮	--	৬২২৮	৫৬	৪৮৪	--	৪	৫৪৪	--	--	৫৬৮৪
জজ, অর্থঋন আদালত নং-১, ঢাকা	৪৪০৬	৮৯১	--	৫২৯৭	--	৫২৯৭	৪২	৫৪৪	৫২৪	--	১১১০	--	--	৪১৮৭
জজ, অর্থঋন আদালত নং-২, ঢাকা	৭৪১২	৩১৬১	--	১০৫৭৩	৯	১০৫৬৪	৬৪	২৫৭৯	২৭১	--	২৯১৪	--	--	৭৬৫০
জজ, অর্থঋন আদালত নং-৩, ঢাকা	৭৯৪২	২৪৯৬	--	১০৪৩৮	--	১০৪৩৮	৬৭	২২৮২	২৩৪	--	২৫৮৩	--	--	৭৮৫৫
জজ, অর্থঋন আদালত নং-৪, ঢাকা	৯১৭৯	৭৬৭	--	৯৯৪৬	২	৯৯৪৪	৪৪	২২৮০	৫৮০	--	২৯০৪	--	--	৭০৪০
সিনিঃ সহঃ জজ, ১ম আদালত, ঢাকা	২৩৭৯	১২২৯	১	৩৬০৯	৭৪০	২৮৬৯	৬২	৩১৯	৯১	৮	৪৮০	--	--	২৩৮৯
সিনিঃ সহঃ জজ, ২য় আদালত, ঢাকা	২৬৪১	১০৬১	--	৩৭০২	৫০৩	৩১৯৯	৮১	৩৩০	৮১	১৮	৫১০	--	--	২৬৮৯
সিনিঃ সহঃ জজ, ৩য় আদালত, ঢাকা	১৮৮৪	৫৫৮	৫	২৪৪৭	১৩৯	২৩০৮	৫২	২৯৬	৯৩	৯	৪৫০	--	--	১৮৫৮
সিনিঃ সহঃ জজ, ৪র্থ আদালত, ঢাকা	২২৮৩	৭৯৫	৬	৩০৮৪	৪০৯	২৬৭৫	৭৭	২৫৩	৯৫	১০	৪৩৫	--	--	২২৪০
সিনিঃ সহঃ জজ, ৬ষ্ট আদালত, ঢাকা	২২১৮	৮২৩	১২	৩০৫৩	৪৭৭	২৫৭৬	৬৬	২৩৯	--	৫	৩১০	--	--	২২৬৬
সিনিঃ সহঃ জজ, সাভার আদালত, ঢাকা	১৪৩১	৫২৪	১৭	২৫৭৯	২০০	২৩৭৯	৫৯	২৫৪	১১৪	১	৪২৮	--	--	১৯৫১
সিনিঃ সহঃ জজ, ফেনীগঞ্জ আদালত, ঢাকা	২০৩৮	২২১	--	২০০৫	৭৪	১৯৩১	৫২	১৩৭	--	১৮	২০৭	--	--	১৭২৪
সিনিঃ সহঃ জজ,নবাবগঞ্জ আদালত, ঢাকা	১৭৮৪	১৩৮	--	১৬২২	৩৫	১৫৮৭	৪৭	৮১	১৮৪	২	৩১৪	--	--	১২৭৩
সিনিঃ সহঃ জজ, দোহার আদালত, ঢাকা	১৪৮৪	৬৬৫	--	২০৯৬	২৭০	১৮২৬	৮১	২৯৮	৩৫	২৮	৪৪২	--	--	১৩৮৪
সিনিঃ সহঃ জজ, ধামরাই আদালত, ঢাকা	১৫৬৮	২২৮	৩৬	১৮৩২	৭৬	১৭৫৬	৫৭	২২২	৪৩	৩	৩২৫	--	--	১৪৩১
সিনিঃ সহঃ জজ, ১ম অতিঃ আদালত, ঢাকা	১১৮৫	১৩	১০	১২০৮	১৬	১১৯২	৫৭	১১৯	--	--	১৭৬	--	--	১০১৬
সিনিঃ সহঃ জজ, ২য় অতিঃ ও পারিবারিক আদালত, ঢাকা	১৯৭৬	৭০৭	৭০৯	৩৩৯২	৭	৩৩৮৫	১০৩	৮৯৪	১৮৯	৫৭	১২৪৩	--	--	২১৪২
সিনিঃ সহঃ জজ, ৩য় অতিঃ ও পারিবারিক আদালত, ঢাকা	২৪৮২	৫৯৫	৬৪০	৩৭১৭	৫	৩৭১২	৪২	৬৩৪	--	৭৭	৭৫৩	--	--	২৯৫৯
সিনিঃ সহঃ জজ, ৪র্থ অতিঃ আদালত, ঢাকা	১৩৪০	৩	৩২	১৩৭৫	২৪	১৩৫১	৬৪	৩৭৫	--	--	৪৩৯	--	--	৯১২
সিনিঃ সহঃ জজ, ৫ম অতিঃ ও পারিবারিক আদালত, ঢাকা	২০৩৪	৫৭৫	৬২৬	৩২৩৫	২১৷	৩২১৪	৩৬	৩৪৬	১৭৩	২৮	৫৮৩	--	--	২৬৩১
মোট	৯৭৪৪৬	২৫২১৭	৩৬৩৫	১২৬২৯৮	৪৪৯৫	১২১৮০৩	২৫৮৩	১৮৩৫৯	৩৬৮৩	৩৭৫	২৫০০০	--	--	৯৬৮০৩

২০/১২/২০১৮ইং

(মোঃ আজিজুর রহমান)
আপীল সহকারী
জেলা জজ আদালত, ঢাকা।

Institution and disposal of civil suits of Joint District Judge, 1st Court, Dhaka

Year	Opening balance	Instituted and received	Total	Total disposal	Disposal through ADR	Disposal through trial				
						Contested	Exparte	Disposal through otherwise	Disposal of execution case	Total disposal
2017	১৭৮৫	৫৭১	২৬৫৪	৭	৭	৬৭	১২	৪২১	৬	৪৮০

Duration of cases	Number of cases pending for disposal
0-2 years	১০৮৪
2-5 years	৭৬১
5-7 years	৬৬
7-10 years	২০
10+ years	০৫
Total	১৮৮৪

সিনিয়র সহকারী জজ
ধামরাই আদালত, ঢাকা।

Institution and disposal of civil suits in Senior Assistant Judge Court , Dhamrai, Dhaka

Year	Opening balance	Instituted and received	Total	Total disposal	Disposal through ADR	Disposal through trial				
						Contested	Exparte	Disposal through otherwise	Disposal of execution case	Total disposal
2017	১৫২৬	৬২৪	২৪২	২৭৪	০২	২৫	৫৪	১৯০	০৬	২৭২

Duration of cases	Number of cases pending for disposal
0-2 years	৪২৪
2-5 years	৫২০
5-7 years	৬৬৭
7-10 years	১৮২
10+ years	১৬
Total	১৪৮৯

VIII
Appendix B
Examples cited; details kept on file

1.4.18
সিনিয়র সহকারী জজ
ধামরাই, ঢাকা

৫ম অতিরিক্ত সহকারী জজ
ও পারিবারিক আদালত, ঢাকা।

Institution and disposal of civil suits in 5th Additional Assistant Judge and family Court , Dhaka

Year	Opening balance	Instituted and received	Total	Total disposal	Disposal through ADR	Disposal through trial				
						Contested	Exparte	Disposal through otherwise	Disposal of execution case	Total disposal
2017	1699	1253	2952	918	190	61	269	338	60	728

Duration of cases	Number of cases pending for disposal
0-2 years	1575
2-5 years	268
5-7 years	179
7-10 years	12
10+ years	-
Total	2034.

Sabuzgaard
01.04.2018
ভারপ্রাপ্ত বিচারক
৫ম অতিঃ সহকারী জজ ও
পারিবারিক আদালত, ঢাকা।

Statement of civil suits disposed of by District Legal Aid Officer through ADR (2012-2016)

Year	Number of cases sent by Court or Tribunal	Number of cases taken up for ADR	Number of cases resolved by ADR	Number of beneficiary of ADR	Amount of money recovered through ADR
2017	1	1	0	0	0

X
Appendix B
Examples cited; details kept on file

Appendix C1
Questionnaire for the Judges

Place of Interview **Date**

Information of the Respondent

Name

Designation

Working place

1) Do you think section 89A of CPC or mediation has the potential to reduce case backlog in civil courts?

- ☐ Yes
- ☐ No

2) Have you ever attempted to mediate under section 89A of CPC?

- ☐ Yes
- ☐ No

3) According to your opinion which of the following group may have the highest reservation on the success of mediation in civil courts?

- ☐ Judges
- ☐ Lawyers
- ☐ Legal Aid officers
- ☐ Lawyers' assistant
- ☐ Court Clarks
- ☐ Others (please specify) _____

4) Which of the following are causing major hindrances in the effective application of mediation in Civil Courts?

PLEASE CHOOSE MAXIMUM 3 REASONS FROM THE FOLLOWING AND ORDER THEM AS 1,2,3 FROM HIGH TO LOW.

- ☐ No motivation for lawyers
- ☐ Less interest in the parties
- ☐ Low motivation for judges
- ☐ Inadequate training of mediators
- ☐ Easy approval of time petitions that may encourage delay
- ☐ Others (please specify) _____

5) Do you have any suggestion to improve this situation?

a._____

b._____

c._____

6) According to you, who is the most suitable person to be a mediator?

- ☐ Judge of the dispute
- ☐ parties themselves
- ☐ Retired judge
- ☐ Advocate
- ☐ District Legal Aid Officer
- ☐ Others (please specify) _____

7) What is your reason for choosing this group as your first choice?

_____

_____

8) Do you think further amendment is required in CPC in respect of mediation in order to promote its application?

- ☐ Yes
- ☐ No

9) If you have any specific proposal for amendment, please specify.

_____

_____

10) Under the existing system, do you think judges have sufficient incentive to resolve cases through mediation instead of trial?

- ☐ Yes
- ☐ No

11) How this incentive or motivation can be enhanced further?

_____

_____

12) What do you think is the reason behind less interest of the parties to resolve their disputes through mediation?

- ☐ Ego problem
- ☐ No consequence of the failure of mediation
- ☐ Lack of knowledge about mediation
- ☐ Discouragement by lawyers
- ☐ Nonfixation of fees for mediators
- ☐ Others (please specify) _____

13) Do you think, by way of resolving cases through mediation, parties may get better justice than that of a trial?

- ☐ Yes
- ☐ No
- ☐ Not sure

14) Do you think the delay in other procedural stages in trial encourage parties to go for trial and discourage them to seek quick resolution through mediation?

- ☐ Yes
- ☐ No

15) Do you think the mediaton under s. 89A as dispute resolution mechanism has brought any benefit in reducing the case backlogs in your court?

- ☐ Yes
- ☐ No
- ☐ please justify _____

16) Which stage is easier for the parties to resolve the case through mediation under CPC?

- ☐ Pre-trial mediation
- ☐ Post-trial mediation

17) Do you think that judges are enough competent on techniques of mediation to resolve the suits through mediation?

- ☐ Yes
- ☐ No

18) How the competency of judges to resolve cases through mediation can be enhanced further?

_____

_____

19) Do you agree that courts do not have enough logistic strength to provide effective service on mediation?

- ☐ Strongly agree
- ☐ Agree
- ☐ Disagree

20) If your answer is 'a/b', how the logistic support can be improved to this end?

Please specify

_____

_____

21) Do you think any institutional reform is required for effective practice of mediation in mitigating case backlogs in the courts?

- ☐ Yes
- ☐ No
- ☐ please justify _____

22) What sorts of institutional reforms do you suggest for effective practice of mediation?

- ☐ Improvement of the activities of the District Legal Aid Office
- ☐ Increase the number of judges
- ☐ Develop infrastructural facilities in the court
- ☐ Others (please specify) _____

Appendix C2
Questionnaire for the Lawyers

Place of Interview **Date**

Information of the Respondent

Name

Working place

(1) Do you think section 89A of CPC or mediation has the potential to reduce case backlog in civil courts?

- ☐ Yes
- ☐ No

(2) Have you ever attempted to mediate under section 89A of CPC?

- ☐ Yes
- ☐ No

(3) Do parties to civil suits usually show their interest to settle their case through mediator under 89A of the CPC.

- ☐ Yes
- ☐ No

(4) How often you suggest your clients settling the dispute amicably before filing the suit?

- ☐ Always
- ☐ Most of the time
- ☐ Very few times
- ☐ Never

(5) Following your suggestion, how often your clients agree to settle the dispute amicably before filing the suit?

- ☐ Always
- ☐ Most of the time
- ☐ Very few times
- ☐ Never

(6) According to your opinion, what is the reason for the disinterest of the parties for resolving the suit through mediation?

- ☐ Ego problem
- ☐ Non-fixation of fees for lawyers
- ☐ Lack of knowledge about mediation
- ☐ Discouragement by lawyers
- ☐ Others (please specify) _____

(7) Do you think, by way of resolving cases through mediation, parties mayget better justice than that of a trial?

- ☐ Yes
- ☐ No
- ☐ Not sure

(8) Generally which type of resolution is financially more beneficial for you?

- ☐ Resolution through trial
- ☐ Resolution through mediation
- ☐ Not sure

(9) If you think mediation is financially less rewarding, what is the reason behind it?

- ☐ It takes too much time for settling the dispute
- ☐ Lack of logistic support to conduct mediation
- ☐ It is too difficult to convince the parties for amicable settlement
- ☐ Parties are not willing to pay much for settlement through mediation

☐ Others (please specify) _____

(10) Do you think determination of mediation fees by the court would encourage lawyers to sit for mediation?

☐ Yes

☐ No

☐ Other (please specify)…….

(11)If your answer is yes, what should be the mode for fixing the fees?

☐ On the basis of consultation between pleaders, their respective clients and mediator.

☐ By the court, on the basis of value and complexity of the particular suit

(12)According to your understanding, who is the most suitable person to be a mediator?

☐ Judge of the dispute

☐ parties themselves

☐ Retired judge

☐ Advocate

☐ District Legal Aid Officer

☐ Others (please specify) _____

(13)What is your reason for choosing this group as your first choice?

_____

_____

(14)Do you think that further amendment is required in CPC in respect of mediation in order to promote its application?

☐ Yes

☐ No

(15)If you have any specific proposal for amendment, please specify.

_____

_____

(16)Do you think delay in other procedural stages in trial encourage parties to go for trial and discourage them to seek quick resolution through mediation?

- ☐ Yes
- ☐ No

(17)**W**hich stage is easier for the parties to resolve their cases through mediation under CPC?

- ☐ Pre-trial stage
- ☐ Post-trial stage

(18)Do you think that lawyers are competent enough to resolve the suits through mediation?

- ☐ Yes
- ☐ No

(19)How the competency of lawyers to resolve cases through mediation can be enhanced further?

_____

_____

(20)What sorts of institutional reforms do you suggest for effective practice of mediation?

- ☐ Improvement of the activities of the District Legal Aid Office
- ☐ Increase the number of judges
- ☐ Develop infrastructural facilities in the court
- ☐ Others (please specify) _____

Appendix C3
Questionnaire for Mediators

Place of Interview **Date**

Information of the Respondent

Name

Designation

Working place

1) Approximately, how many mediations have you conducted so far?

_____

2) What kind of problem did you face while settling the case as a mediator?
(a) Non-cooperation of the lawyers.
(b) Less interest of the parties
(c) Lack of time to settle the suit through mediation
(d) Experience of the failure of mediation
(e) Inadequate training
(f) Other

_____
_____

3) In which type of cases, mediation as adispute resolution mechanism may be more effective?
(a) Declaratory suits
(b) Suit for Injunction
(c) Suit for partition
(d) Suit for pre-emption
(e) Suit relating to service matters

4) How have you developed your skills as a mediator?
a) I had formal training over mediationas a dispute resolution mechanism
b) Working as a judge/lawyer, I developed in built capacity as mediator
c) Previously, I worked as a mediator in family Court, civil court
d) I witnessed formal mediation sessions and acquired the skill

e) Other

_____

_____

5) To whom you send the case while exercising your part as a mediator in most of the cases? *(when the mediator is a judge)?*

a) To the District Legal Aid Officer
b) To the pleader not engaged by the parties in the suit
c) To the retired judge
d) To the mediator from the panel prepared by the District Judge
e) To any other person whom you think suitable to act as a mediator

6) Did you address the issue of mediation of civil suits in District Legal Aid Committee? *(When the mediator is District Legal Aid Officer)*

☐ Yes

☐ No

7) Did you submit any report regarding the efficiency of mediation in the civil suits? If yes, would you please share the substance of the report*? (When the mediator is District Legal Aid Officer)*

Please specify ----------
---

8) Does the Upozilla Parishad Chairman act as a mediator in Upozilla Legal Aid Committee for disposing of the land-related dispute after filing the suit in the court? *(When the mediator is District Legal Aid Officer)*

☐ Yes

☐ No

9) If your answer is yes, how is their performance?

☐ Good

☐ Not so good

☐ There is no such legal provision

10) If your answer is 'c', do you think their part should be integrated into the court-connected mediation under 89A of the CPC?

☐ Yes

☐ No

☐ please justify _____

11) Do you think that Panel of mediators should also incorporate non-government organization's(NGO) personnel's in this field?

☐ Good

☐ Not so good

☐ please justify _____

12) Whom do you think the most suitable person as a mediator? Please justify your answer.

a) Presiding judges
b) District Legal Aid Officers
c) Pleader appointed by the parties
d) Pleaders not appointed by the parties
e) Retired judges
f) One from the Panel prepared by the District Judges
g) Any local authoratative person
h) Any other person (please specify) _____

13) If your answer is nobody, what is the reason for your opinion?

a) None of them is interested to deal with this matter because of lack of fund
b) It is difficult to find time to deal with this process
c) They do not have enough skill to conduct the mediation proceeding
d) The litigants and local persons do not feel necessity and benefit to settle the disputes through mediation
e) There is non-co-operation from the pleaders of the suit.

14) Do you think new laws or rules are required to improve the effectiveness of mediation underCPC

☐ Yes

☐ No

☐ please mention your suggestion _____

-

_____

_____

15) What is the reason behind less interest of the parties to settle through mediation?

(a) Ego problem
(b) Non fixation of fees for lawyers
(c) Lack of knowledge about mediation
(d) Informal character of mediation that sometimes lower down the status of a judge
(e) Other _____

16) Do you think the mediation as a dispute resolution mechanism has brought any benefit in reducing the case backlogs in the courts?

☐ Yes

☐ No

☐ please justify _____

17) If your answer is 'yes', specify the mechanism which will enhance the effectiveness of mediation under s. 89A of the CPC, in particular?

a) Amendment in law
b) Increase the number of judges including District Legal Aid Officers
c) Training to the mediators on different techniques of effectivemediation
d) Building awareness among the litigants about the benefits of mediation
e) Increase the monetary benefit of the pleaders
f) Build up institutional set up of mediation e.g. mediation Organization.
g) Other _____

18) Do you think any amendment in CPC is required to enhance the effectiveness of mediation under CPC, in general?

☐ Yes

☐ No

☐ please specify _____

19) What do you understand by the term 'institutional reform' of mediation under s. 89A of the CPC?

(a) Improvement of the District Legal Aid Office
(b) Increase the number of judges
(c) Develop infrastructural facilities in the court
(d) others (please specify)

_____

20) Have you ever worked as a Panel mediator? *(When the mediator is a panel judge)*

☐ Yes

☐ No

21) Please specify the advantages and disadvantages of being a panel mediator.

(a) Advantages_____
_____

(b) Disadvantages

_____
_____

22) Which stage is easier for the parties to resolve the case through mediation under CPC?

☐ Pre-trial mediation

☐ Post-trial mediation

Please specify the reason_____

_____

_____

Appendix C4
Questionnaire for Litigants

Place of Interview **Date**

Information of the Respondent

Name

Male/Female

Age

1) For how long your case is pending in the court?

_____

2) What relief do you want in your suit?

- ☐ Declaration of title
- ☐ Permanent injunction
- ☐ Declaration of a deed to be void and non-binding
- ☐ Compensation
- ☐ Reinstatement to service
- ☐ Preemption
- ☐ Partition

3) How much time do you think the suit may take to be disposed of?

_____

4) Do you have any idea about resolution of suit through mediation under CPC?

- ☐ Yes
- ☐ No

5) Who has informed you about mediation?

- [ ] My lawyer
- [ ] Assistant to the lawyer
- [ ] The judge
- [ ] Legal Aid officer
- [ ] Local person
- [ ] Others (please specify) _____

6) Have you ever showed the urge to your lawyer for resolving your suit through mediationunder CPC?

- [ ] Yes
- [ ] No

6a) What was the reaction of your lawyer?

- [ ] Encouraging
- [ ] Discouraging
- [ ] Neutral

6b) Please express your experience in few words

_____

_____

7) Do you know, a date was fixed for resolving your case through mediation?

- [ ] Yes
- [ ] No

8) If you know, what did you do on that date?

☐ Did nothing and the suit proceeded for trial

☐ The judge made an attempt to mediate the suit

☐ Others (please specify) _____

[[[[[ASK OPEN END QUESTION TO KNOW EXACTLY WHAT HAPPENED TO MAKE THE MEDIATION EFFORT UNSUCCESSFUL]]]]]]

9) Do you have any idea about legal aid?

☐ Yes

☐ No

10) Do you know parties who resolve their cases through mediation can apply for legal aid?

☐ Yes

☐ No

11) Did you know that you can get back your court fees by resolving your dispute through mediation?

☐ Yes

☐ No

12) If your answer is 'a' in the question no 10, why you did not take any attempt of mediation on that date?

(a) There was no possibility of resolving the suit through mediation
(b) I did not want to sacrifice my legal right through mediation
(c) The lawyer was not interested to go through the process of mediation
(d) The judge did not refer the suit for mediation
(e) Other(pleasespecify)_____
_____

13) If you answer is 'b' in the question no 10, was the suit resolved through mediation?

☐ Yes

☐ No

14) If your case was successfully resolved through mediation, who acted as a mediator and how he did it? Express in few words.

_____

_____

15) If the mediation procedure became unsuccessful, why the attempt was failed?

(a) Both the parties were unwilling to settle the suit through compromise
(b) The mediator was not competent enough to handle the mediation procedure
(c) The lawyer advised us not to go through the process
(d) Nobody could accommodate enough time for resolving the suit in this way.
(e) Other (please specify)_____

_____

16) Do you have any idea about the District Legal Aid Office at Dhaka Judge's Courtthat can provide legal aid under CPC?

☐ Yes

☐ No

17) What is, in your opinion, the prospect of District Legal Aid Office for resolving the suit through mediation under CPC?

_____

_____

18) Do you think that your case is suitable for settlement through mediation under CPC?

☐ Yes

☐ No

☐ Not sure

19) Did your lawyer or judge inform you about the repayment of court fee if the mediation is successful?

☐ Yes

☐ No

20) According to you, what are the main causes of not taking the opportunity of settling the land disputes through mediation in the courts?

(a) ignorance of parties
(b) Not giving the idea about this provision by advocates or their clients
(c) For the perception that you will win the case and therefore, mediation is useless
(d) The tendency of the party to the suit to harass the other side
(e) Others

_____

Appendix C5
Questionnaire for court support staff

Place of Interview **Date**

Information of the Respondent

Name

Designation

Working place

1) How many cases are resolved through mediation under CPC in each month in the court you are working?

   ……..

2) Do you think that mechanism of mediation has decreased the number of civil suits in the court in which you are currently working?

(a) Yes; (b) No

3) If your answer is 'yes' who has contributed the most in making mediation successful ?

(a) Judges
(b) Lawyers
(c) Mediators
(d) Parties themselves
(e) Others

4) Please express your experience in few words.

   ……

5) If your answer is 'No' what is the reason behind its non-functioning?
   (a) Judge is over burdened and therefore, he cannot give time for mediation
   (b) Lawyer is not interested
   (c) Litigants are not interested
   (d) There is not adequate rooms, and other arrangements for conduction mediation
   (e) Others(Please specify) ……..

6) What do you think is the reason behind less interest of the parties to resolve their disputes through mediation?

(a) The parties are not acquainted with the concept of mediation
(b) The parties try to harass the other side by lingering the suit
(c) The lawyers always pursue their clients not to be involved with the process of mediation
(d) The parties do not get punished in case of non complying with the provision of mediation.
(e) The fees are not enough for the mediators
(f) Others(please specify)……..

(6) Do you think that trial mechanism is effective enough to decrease the case backlogs?
(a) Yes; (b) No; (c) Do not know;

7) What is the reason behind your answer to the question no 6?

…….

8) Do you think that mediation is an appropriate alternative of trial for resolving the suits effectively?

(a) Yes; (b) no; (c) Do not know.

9) If your answer is yes, why do you think the mediation as a better option?
(a) It resolves the litigations quickly
(b) It resolves the case with less cost
(c) Through mediation, the parties get fair decision from the court
(d) It develops mutual trust and confidence among the parties

10) If your answer is no, why do you think that mediation is a worse option than trial?
(a) Most of the cases are not suitable for mediation due to their complexity and muti party dispute.
(b) There are possibilities of exercise of power over the weak party to reach any unfair term in the settlement.
(c) It impair the dignity of judges before the parties as well as wastes valuable time of the court.
(d) Others(please specify)……

11) Do the court in which you are working have enough logistics to conduct mediation?

(a) Yes; (b) No; (c) Do not know

12) If your answer is 'No', how the logistics can be improved?

(a) Build a separate room for mediation
(b) Appoint separate judge for mediation
(c) Appoint separate staff structure for mediation mechanism
(d) Others(please specify) ……..

13) Who is in your opinion the most suitable person as mediator?

(a) Judge; (b) lawyer; (c) local elite person ; (d) other persons

14) What is the reason behind your choosing this group as your first choice?

…….

Appendix C6

Questionnaire for sub registrar

Place of Interview **Date**

Information of the Respondent

Name

Working place

1) How many cases do you solve in each day?
2) Do you find enough time to conduct the job of registration properly in each day?

(a) Yes; (b) No;

3) Please express your opinion in few words.

……

4) What do you do when the parties present inadequate documents before you for registering a particular deed?

…….

5) What you do when you find that the parties have submitted fake or fraudulent document before you for registration of a deed?

……..

6) What are the ways to verify the authenticity of documents presented before you for registration?

……

7) In what percentage of cases you find the documents of the parties proper and adequate ?

……..

8) What percentage of cases, proper registration is performed?

…….

9) In what percentage of cases, the courts of proper jurisdiction send the order for cancelling the registration of a documents?

……..

10) What is in your opinion, the reason behind such declaration by the court?
……..

11) How the volumes of registered deeds are preserved in your office? Do you have enough space and accommodation for this purpose? Is there any program for preserving those deeds in digitalized way?

……

12) How many times in a month, the courts call for the volume or original copy of the deed for their trial purpose?

……..

13) How often you becomes successful in sending those volume or deed to the courts?

……..

14) What are the reasons behind failure to send the required documents?
(a) Lack of manpower to carry the volumes to the courts.
(b) Improper preservation of the volumes along with other documents.
(c) Volumes are not prepared in due time
(d) Others(please specify)……..

15) What other problems do you face while performing your job as officer/staff of registration department?
(a) The laws have flaws
(b) There is inadequate logistics in this department.

Please specify the gaps…….

16) What is your recommendation for improving this situation?
(a) Amendment in laws…….
(b) Improvement in logistics……

Appendix C7

Questionnaire for Assistant Commissioner (land) office

Place of Interview **Date**

Information of the Respondent

Name

Working place

1) Due to which of the reasons, changes in the record of rights and mutation are mostly made ; (you can choose more than one option)
   (a) Due to transfer
   (b) Due to inheritance
   (c) Due to abandonment or acquisition of land
   (d) Property is vested upon the government
   (e) When orders are passed by the court
   (f) Others(please specify)

2) Have you ever faced any problem while making change in the record of rights and preparing mutation khatian?

(a) Yes; (b) No

3) If your answer is 'yes', which of the following may cause the highest hindrance while preparing the record of rights correctly?

(a) The other party do not come in due time in response to the notice served by the office
(b) The documents submitted by the parties are inadequate
(c) Documents submitted by the parties are found to be conflicting and confusing
(d) At the time of survey, proper measurement of land can not be done
(e) The parties to the application incorrectly represent the fact of ownership and possession
(f) Other(please specify)…….

4) In which percentage of cases, the other party do not come to contest the claim in spite of sending the notice and the claim is disposed of exparte ?
   (a) 10%
   (b) 30%
   (c) 50%
   (d) 80%

5) Is there any provision to challenge the exparte order by the other party?
(a) Yes; (b) No

Please explain……

6) In which percentage of cases, the parties are able to submit all the required documents before the office?
   (a)10%
   (b) 20%
   (c) 40%
   (d) 50%

7) How do you dispose of the case, when the parties appear to have submitted the inadequate documents?
   (a) The application of the applicant is refused.
   (b) The application remains pending as long as the party does not submit proper documents
   (c) The decision goes in favor of other side if that party can submit proper documents.
   (d) Others(please explain your experience)……..

8) In which percentage of cases, the parties seem to submit fake and fraudulent documents?
   (a)10%
   (b) 20%
   (c) 40%
   (d) 50%
9) How do you verify the genuineness of the documents which are submitted before you?
   (a) The volume from the sub registry office is called for
   (b) Other supporting witnesses are noticed to testify the document
   (c) Comparisons are made with other documents to reach at any decision
   (d) Others(please specify)……

10) Can you always arrive at accurate decision about area of land and owners of those particular area of land?

(a) Yes; (b) no;

11) What kind of problem do you face while conducting the field survey? Please express your experience in few words.

……..

12) Do you have any law or practice for settling the disputes amicably among the parties while correcting the record of rights?

(a) Yes; (b) No

13) If your answer is 'yes' which type of dispute in correction of record of right or mutation khatian are more appropriate for such amicable settlement?

(a) Claim through inheritance
(b) Claim through transfer
(c) Claim for partition
(d) Others(please specify)……..

14) Do you have any recommendation for improvement in logistic or legal improvement for creating proper atmosphere for amicable settlement ? Please express in few words.

…….

15) On which grounds you refuse to receive rents from the tenants of a particular khatian and what are the approximate number of such refual?

(a) The recorded tenant is dead
(b) The latest mutation khatian is not prepared
(c) The name of rent payee is not available in the record of rights
(d) Others(please specify)…….

16) In your opinion, why the land related suits are instituted in civil courts?

(a) For declaration of title
(b) For permanent injunction
(c) For partition
(d) Declaration of deeds to be void and non-binding
(e) Other type of suits(please specify)……

17) Do you think that those suits can be effectively resolved through mediation? Express your opinion in few words.

……..

Appendix D1

Response of Litigants about Trial

Serial number of respondents	**Number of suits**	**Brief description of the suit (Suit for declaration of title)**	**The tentative time for disposal**
1	622/2015 of 2nd Joint District Judge Court, Dhaka	It is for declaration that the CT survey khatian has been wrongly recorded in respect of 6.50 decimals land in the names of the defendant.	2 years
2	560/13 of 2nd Senior Assistant Judge Court, Dhaka	Declaration for decision of the governing body of the school in respect of his suspension from the service to be void and not binding upon him.	He does not know
3	378/2016 of 4th Joint District Judge Court Dhaka	It s for declaration of CT khatian wrongly recorded in respect of 22 decimals land in the names of the defendants.	1 year
4	903/2014of 2nd Joint District Judge Court, Dhaka	Suit for declaration of title and recovery of khas possession in respect of 5 decimals land as the defendant no 1 is in possession as an owner through a void power of attorney .	5 years
5	182/2017 of 1st Senior Assistant Judge Court	It is for declaration of CT khatian in respect of 35 decimals land wrongly recorded in the names of defendants	2 years
6	186/2014 of Keraniganj Senior Assistant Judge Court, Dhaka	It is a suit for declaration of CT khatian to be wrong in respect of 2 decimals land as the khatian has been recorded in equal portions whereas in the partition deed, the plaintiff gets 2 decimals more	He does not know.
7	728/2013 of 4th Joint District Judge Court, Dhaka	It is for declaration of CT khatian wrongly recorded against the defendants in respect of 26 decimals of land.	2 years
8	228/11 of 1st Senior Assistant Judge Court, Dhaka.	It is a suit for declaration of CT khatian to be wrongly recorded in respect of 25 decimals of land.	5 years
9	263/2017 of 6th Joint District Judge Court, Dhaka.	It is for declaration of CT khatian wrongly recorded against the defendants in respect of 12 decimals of land.	2 years
10	463/2012 of 2nd Senior Assistant Judge Court, Dhaka	It is for declaration of RS khatian to be wrong and baseless against RAJUK in respect of .30 acres land.	He does not know
11	650/2019 of 2nd Joint District Judge Court,	The heirs of the owners of the land have filed a suit against the government for declaration of CT record in respect of 10	2 years

	Dhaka	decimals of land wrong and not binding.	
12	863/13 of Nawabganj Senior Assistant Judge Court, Dhaka	It is for declaration that the suit property has been wrongly recorded as vested property against the government and for releasing such property	He does not know
13	209/2016 of 3rd Joint District Judge Court, Dhaka	It is for declaration of CT khatian wrongly recorded in respect of 120 decimals of land against the private persons	2/3 years
14	377/2015 of Senior Assistant Judge Court, Keranigonj.	It is declaration for decree on the basis of solenama of a partition suit to be wrong and not biding upon them.	3 years
15	389/2017 of 6th Joint District Judge Court, Dhaka	It is for declaration of CT khatian wrongly recorded in respect of 63 decimals of land against the private persons	2 years
16	228/2014 of 1st Senior Assistant Judge Court, Dhaka	Declaration of RS khatian in respect of 30 decimals land against the private party defendants.	5 years
17	199/2007 of 3rd Joint District Judge Court, Dhaka	Declaration in respect of a decision of Islamic foundation for handing over 30% area of commercial place.	The High Court Division ordered for deposal of suit within 6 months
18	155/2010 of Senior Assistant Judge, Dohar Court	Declaration about the decision of chairman of a village court to be void and not binding, the composition of which is not in compliance with legal requirement.	2 years
19	169/2015 of Senior Assistant judge, 6th Court Dhaka	Declaration of CT khatian to be wrongly recorded in respect of 5 decimals land in the names of defendants	The suit has been already disposed of
20	205/2016 of Senior Assistant Judge 5th Court, Dhaka	Declaration of CT khatian to be wrongly recorded in respect of 15 decimals land in the names of defendants	2 years
21	145/2011 of 5th Joint District Judge Court, Dhaka	The declaration of CT khatian as the excess amount has been wrongly recorded in the name of defendants which the defendants also agree.	He does not know
22	99/2016 of Senior Assistant Judge Court, Dhamrai	Declaration for Rs khatian wrongly recorded where the names of plaintiff are recorded in less amount of 5 decimals.	3 years
23	126/2015 of Senior Assistant Judge Dhamrai Court	Declaration for recording in CT khatian to be wrongly recorded in the name of government as well as the private persons. The suits was decreed exparte. When he sought for correction, the government started to contest.	The suit has already been disposed of
24	93/2013 of Senior	Declaration for recording in CT khatian to	He does not

	Assistant Judge, savar Court	be wrongly recorded in the name of private persons. The suit was decreed exparte. When he sought for preparing mutation, the private persons started to contest.	know
25	150/2006 of 2nd Joint District Judge Court, Dhaka	Declaration of CT khatian wrongly recorded in the name of defendant in respect of 50 decimals land.	He does not know
26	23/2016 of Senior Assistant Judge, 2nd court, Dhaka	Declaration of CT khatian wrongly recorded in the name of defendant in respect of 32 decimals land.	3 years
27	169/2005 of 1st Joint District Judge Court, Dhaka.	Declaration for CT khatian to be wrongly recorded as their names have been recorded in respect of 13.69 decimals while they are the owners of 15.75 decimals. The rest of the land is recorded in the names of city corporation.	He does not know.
28	03/2012 of Senior Assistant judge 3rd Court, Dhaka	Declaration for decision of board of directors of a private company for suspension from the service to be void and not binding upon him.	He does not know
Serial number of respondents	**Number of suits**	**Nature of the relief (Suit for declaration of deeds not binding)**	**The tentative time for disposal**
29	104/1962 of 3rd Joint District Judge Court, Dhaka	It was a suit for declaration that the partition deed was void and not binding upon them. On the basis of the void partition deed, the defendants filed a suit for pre-emption which was ended in compromise.	It was disposed in the year of 1985
30	23/2013 of 4th Joint District Judge Court, Dhaka	It was a suit for declaration of a deed of agreement and power of attorney to be void and not binding upon them. The defendant developer company violated the terms of the agreement by claiming excessive price and therefore, they filed the suit.	They do not know.
31	104 /2007 of Senior Assistant Judge 1st Court, Dhaka	The plaintiff father filed a suit against his son for cancellation of a heba deed stating that he did not execute the deed.	In the year of 2013, the suit was decreed on the basis of compromise.
32	511/2016 of 1st Joint District Judge Court, Dhaka	The husband plaintiff brought a suit against the wife stating that he never executed an heba deed towards his wife .	3 years
33	153/2016 of 4th Joint District Judge Court, Dhaka	Declaration of a sale deed to be void and recovery of possession	5 years
34	106/2015 of Senior	Declaration of title and declaration of a	3 years

	Assistant Judge Court, Savar	sale deed to be void and not binding upon them.	
Serial number of respondents	**The year of filing the suit**	**Nature of the relief they sought for (Suit for Partition)**	**Tentative date for disposal of the suit**
35	451/2015 in 5th Additional District Judge Court.	The plaintiff has filed the suit for partition against his brothers and sisters in respect of 26 decimals land.	2 years
36	113/1995 of 4th Joint District Judge Court	The respondent is defendant. The plaintiff has filed the suit for partition on the basis of a purchase deed from a minor through which he has purchased more than the share of minor.	He does not know.
37	296/2008 of Senior Assistant Judge 1st Court, Dhaka	It is suit for declaration of a heba deed void and partition.	He does not know.
38	203/2015 of Senior Assistant Judge, 2nd court, Dhaka	Suit for simple partition against the brothers and sisters.	3 years
39	256/2014 of Senior Assistant Judge, Keranigonj Court.	Declaration of RS khatian to be wrong and baseless and partition in which excess portion of land is wrongly recorded in the name of co-sharer defendants.	He does not know.
40	199/2005 of Senior Assistant Judge, Keranigonj Adalat	Simple suit for partition in which the original defendant died and their heirs are added as defendants.	He does not know.
Serial number of respondents	**Year of institution**	**Nature of the suit**	**Tentative date of disposal**
41	52/16 of 1st Joint District Judge Court, Dhaka	It is a money suit where the power development board did not pay the commission money of 3% violating the terms of agreement between them .	He does not know
42	154/14 of 1st Senior Assistant Judge Court, Dhaka.	Suit for recovery of possession where the defendants have dispossessed him from the suit property.	He does not know.
43	913/2015 of 2nd Joint District Judge Court, Dhaka.	It is suit for declaration of title and compensation where the developer company denied to hand over owner the suit property violating the terms of contract.	2 years
44	93/04 of Arbitration Court, Dhaka	Suit for reinstatement from the service and compensation for wrongful suspension by the authority of private company.	Within 6 months.
45	1089/12 of 1st Joint District Judge Court, Dhaka	It is a suit for compensation as the developer company handed over car parking space which was discovered to be defective.	5 years
46	903/14 of 1st Joint District Judge Court, Dhaka	It is a suit for declaration of title and recovery of possession wherein, the defendant no 11 executed power of	He does not know.

		attorney to the defendant no 1 and thereafter cancelling the same sold it to other party. The purchaser has filed the suit against defendant no 1 for recovery of possession.	
47	298/12 of 5th Joint District Judge Court, Dhaka.	It is a suit for injunction wherein the co-sharer defendant asked the plaintiff to hand over 2 decimals land for using the same as pathway.	They do not know
48	868/13 of Nawabganj Senior Assistant Judge Court,	The suit is under OrpitoShompottiProttorpon Tribunal for releasing the property from vested property list.	3 years
49	Miscellaniouscase of 3rd Senior Assistant judge Court, Dhaka	Suit for pre-emption in which the petitioner claims that he is the co-sharer by inheritance, on the other hand, the opposite party is a stranger. The opposite party also admits the fact. He says that he purchased the land with consent of the petitioner.	2 years
50	96/02 of 4th Joint District Judge Court, Dhaka	It is suit for specific performance of contract wherein the plaintiff purchased the property, acquired the possession and paid 70 thousand taka. He has filed the suit for enforcing the defendant to take rest portion of 80 thousand taka and execute and register the sale deed.	3 years

Appendix D2

Response of Litigants about Mediation

Serial number	Number of cases[1]	Attitude of the lawyer	Result of the suit	Reason behind
1	104/1962 of 3rd Joint District Judge Court, Dhaka	Encouraging	Succesfully compromised.	It was a long pending case and at one stage, the defendants became tired and then both the parties urged for mediation and the suit was successfully resolved.
2	378/2016 of 4th Joint District Judge Court Dhaka	Neutral	Unsuccesful	The lawyer did not have adequate time to sit with both the parties
3	903/2014of 2nd Joint District Judge Court, Dhaka	Encouraging	Unsuccessful	The defendant did not come to sit for mediation
4	186/2014 of Keraniganj Senior Assistant Judge Court, Dhaka	Discouraging	Unsuccesful	The lawyer asked them to go for trial instead of mediation and accordingly they did not proceed.
5	463/2012 of 2nd Senior Assistant Judge Court, Dhaka	Encouraging	Unsuccessful	Though the lawyer attempted, the other party did not come forward to mediate
6	169/2015 of Senior Assistant judge, 6th Court Dhaka	Discouraging	Unsuccessful	The lawyer suggested them to proceed with trial in lieu of mediation
7	145/2011 of 5th Joint District Judge Court, Dhaka	Neutral	Successful	The defendant admitted the case of the plaintiff and they themselves settled the suit through compromise.
8	23/2013 of	Discouraging	unsuccessfull	Neither lawyer nor the opposite party was

[1] In the topic of 6.4.1 the nature of the relief in individual suit is elaborated.

	4th Joint District Judge Court, Dhaka			willing to sit for mediation.
9	104 /2007 of Senior Assistant Judge 1st Court, Dhaka	Encouraging	Successful	The lawyer of the defendant son attemted to arrange the settlement procedure and during pendency of the suit, the suit was decreed on compromise.
10	511/2016 of 1st Joint District Judge Court, Dhaka	Discouraging	Unsuccessful	No attempt was made to reconcile the matter.
11	451/2015 in 5th Additional District Judge Court.	Discouraging	Unsuccessful	Before and after filing of the suit, several attempts were made among the parties, but the lawyers insisted them to go for trial and the parties failed to reach any settlement.
12	113/1995 of 4th Joint District Judge Court	Neutral	Unsuccessful	The defendants are habituated to grab the properties of others and the lawyer also remained inactive in this matter.
13	203/2015 of Senior Assistant Judge, 2nd court, Dhaka	Discouraging	Unsuccessful	The lawyer found no time and willingness to arrange the parties for mediation.
14	256/2014 of Senior Assistant Judge, Keranigonj Court.	Discouraging	Unsucceesful	The lawyer was unwilling to spend time in this regard and the parties failed to madiate among themselves.
15	199/2005 of Senior Assistant Judge, Keranigonj Adalat	Neutral	Unsuccessful	The defendants did not show any interest to settle and the lawyer remained inactive in this matter.
16	52/16 of 1st Joint District Judge Court, Dhaka	Encouraging	Unsuccessful	The lawyer tried to settle the matter and called the opposite party but they did not come forward to take any initiatve in this matter.
17	1089/12 of 1st Joint	Neutral	Unsuccesful	The plaintiff personally appraoched to the defendant company for comong into

	District Judge Court, Dhaka			mediation but the defendant did not come forward.
18	903/14 of 1st Joint District Judge Court, Dhaka	Discouraging	Unsuccessful	The lawyer of the plaintiff did not approach for mediation to the defendants and did also never showed any interest.
20	298/12 of 5th Joint District Judge Court, Dhaka.	Encouraging	Unsuccessful	The plaintiff approached through their lawyer to the defendant and had several sittings. But they failed to reach any unanimous agreement.
21	Suit for Pre-emption	Discouraging	Unsuccessful	They did not appraoch for mediation at all and the defendant did not want it at all.
22	Suit for specific performance of contranc t	Discouraging	Unsuccesful	The lawyer told the that they will get the decree and the suit is not suitable for any settlement through compromise.

Appendix D3

Response of Litigants about Suitability of their Suits for Mediation

Serial number of respondents	Number of suits	Response of the litigants	Probable terms of settlement/reasons of non-settlement
1	622/2015 of 2nd Joint District Judge Court, Dhaka	Yes	In return of payment of money to the defendants, he wants the khatian to be recorded in his name.
2	560/13 of 2nd Senior Assistant Judge Court, Dhaka	Not sure	He want the reinstatement to the service and all the arrears but he will forego the cost of litigations incurred by him so far. He is not sure about the intention of the other party.
3	378/2016 of 4th Joint District Judge Court Dhaka	Not sure	He does not know the attitude of other party whether they will sit for mediation and the mentality of the lawyers as well.
4	903/2014of 2nd Joint District Judge Court, Dhaka	Yes	He wants to get back the possession, he will not claim any rent from the defendant no 1 who stayed there illegally for years
5	182/2017 of 1st Senior Assistant Judge Court	No	The defendants are land grabbers and they will not in any way renounce their claim from the property.
6	186/2014 of Keraniganj Senior Assistant Judge Court, Dhaka	Not sure	As the plaintiff and defendants are relatives, they sat for several times before filing the suit and their effort was not successful. He does not know whether the interference of the court would make it successful or not
7	728/2013 of 4th Joint District Judge Court, Dhaka	Yes	He will forego 2/3 decimals of land to the defendants in order to get rid of the hassle of the suit.
8	228/11 of 1st Senior Assistant Judge Court, Dhaka.	No	He owns the land entirely and the defendants have nothing. Therefore, it is not a suitable case for mediation.
9	263/2017 of 6th Joint District Judge Court,	Not sure	The resolution of the suit through mediation depends upon the attitude of the other party and

	Dhaka.		advice of the respective lawyers. He is not sure about the attitude of other party.
10	463/2012 of 2nd Senior Assistant Judge Court, Dhaka	Not sure	He is willing but he doubts about the sincerity and willingness of RAJUK.
11	650/2019 of 2nd Joint District Judge Court, Dhaka	No	It will not be possible to involve the government within the purview of mediation.
12	863/13 of Nawabganj Senior Assistant Judge Court, Dhaka	Not sure	He does not know whether the government would consent to sit for mediation
13	209/2016 of 3rd Joint District Judge Court, Dhaka	No	It include a big area of land and many parties and therefore, it will not be possible for all the parties to reach at any agreement.
14	377/2015 of Senior Assistant Judge Court, Keranigonj.	yes	The plaintiff as a co-sharer is entitled get the share and if he gets the same, he has no objection to enter into an agreement.
15	389/2017 of 6th Joint District Judge Court, Dhaka	Yes	He will forego 2/3 decimals of land to the defendants in order to get rid of the hassle of the suit.
16	228/2014 of 1st Senior Assistant Judge Court, Dhaka	Not sure	The mediation will depend upon the willingness of other parties and attitude of both the lawyers
17	199/2007 of 3rd Joint District Judge Court, Dhaka	No	The High Court Division ordered for deposal of suit within 6 months. They have tried for mediation in several times but failed.
18	155/2010 of Senior Assistant Judge, Dohar Court	Not sure	The mediation will depend upon the willingness of other parties and attitude of both the lawyers
19	169/2015 of Senior Assistant judge, 6th Court Dhaka	yes	The suit has been already disposed of mediation among the parties
20	205/2016 of Senior Assistant Judge 5th Court, Dhaka	Yes	He is ready to renounce his claim over 1/2 decimals land and relinquish the claim of expenditure of running the suit.

21	145/2011 of 5th Joint District Judge Court, Dhaka	Yes	Defendants agree with plaintiff
22	99/2016 of Senior Assistant Judge Court, Dhamrai	Not sure	He does not know whether the other side will be positive enough to sit for mediation.
23	126/2015 of Senior Assistant Judge Dhamrai Court	No	It would not be possible to sit for mediation with government. The suit has been resolved through trial. Now it is at the stage of appeal.
24	93/2013 of Senior Assistant Judge, savar Court	Not sure	He does not know the attitude of the other party as well as the mentality of the lawyers.
25	150/2006 of 2nd Joint District Judge Court, Dhaka	Not sure	He does not have idea as to what would be the terms of mediation, he will have to talk with his lawyer first.
26	23/2016 of Senior Assistant Judge, 2nd court, Dhaka	Not sure	He does not have idea as to what would be the terms of mediation, he will have to talk with his lawyer first
27	169/2005 of 1st Joint District Judge Court, Dhaka.	No .	The attitude of the other party is not good and he being the plaintiff is not ready to relinquish his legitimate claim.
28	03/2012 of Senior Assistant judge 3rd Court, Dhaka	Not sure	He does not know the attitude of the parties and lawyers
Serial number of respondents	**Date of institution**	**Response**	**Terms of mediation/reasons for failure**
29	104/1962 of 3rd Joint District Judge Court, Dhaka	yes	The suit was resolved as the defendants were not able to proceed the suit any further and they agreed to settle the suit through compromise.
30	23/2013 of 4th Joint District Judge Court, Dhaka	No	They have tried for several times to settle the suit but failed .
31	104 /2007 of Senior Assistant Judge 1st Court, Dhaka	Yes	In the year of 2013, the suit was decreed on the basis of compromise.
32	511/2016 of 1st Joint District Judge Court, Dhaka	Yes	The plaintiff husband is willing to pay the dower money and get the heba deed cancelled.
33	153/2016 of 4th Joint District Judge	NO	The opposite party will not come forward to sit for mediation as

	Court, Dhaka		several previous attempt was failed due to their non-cooperation
34	106/2015 of Senior Assistant Judge Court, Savar	Not sure	He will have to talk with his lawyer first and then be able to tell about the suitability.
Serial number of respondents	**The year of filing the suit**	**Response**	**Terms of mediation/ reasons for failure**
35	451/2015 in 5th Additional District Judge Court.	No	They have approached for several times for mediation but failed. Now the suit is in appeal stage.
36	113/1995 of 4th Joint District Judge Court	Yes	The plaintiff is ready to pay the market price to the purchaser defendant about the excess area of land and settle the suit.
37	296/2008 of Senior Assistant Judge 1st Court, Dhaka	Not sure	The previous attempt to settle the dispute before filing the suit with her brother defendant failed but she does not know whether the mediation will be successful if the court intervenes.
38	203/2015 of Senior Assistant Judge, 2nd court, Dhaka	Yes	It is a fit case to be settled through mediation as the shares are admitted
39	256/2014 of Senior Assistant Judge, Keranigonj Court.	No	The opposite party will not settle the suit by admitting anything.
40	199/2005 of Senior Assistant Judge, Keranigonj Adalat	Not sure	It is not possible to predict the mentality of the heirs of original co-sharer for settling the suit and attitude of the lawyer.
Serial number of respondents	**Year of institution**	**Response**	**Terms of mediation/ reasons for failure**
41	52/16 of 1st Joint District Judge Court, Dhaka	Not sure	Plaintiff is always ready to sit for mediation but the defendants has no willingness in this regard.
42	154/14 of 1st Senior Assistant Judge Court, Dhaka.	no	The plaintiff have been forcibly disposed from the land and defendant will never sit for any discussion about mediation. .
43	913/2015 of 2nd Joint District Judge Court, Dhaka.	No	The plaintiff have tried for mediation but the company did not come forward to sit for mediation.
44	93/04 of Arbitration Court,	Yes	The plaintiff will stand for her claim of reinstatement, compensation and

	Dhaka		expenditure of the suit. But she will relinquish the matter of defamation.
45	1089/12 of 1st Joint District Judge Court, Dhaka	Not sure	The nature of dispute is very trifle but the defendants are not willing to sit for any settlement.
46	903/14 of 1st Joint District Judge Court, Dhaka	Yes	The matter of possession can not be relinquished but the plaintiff is ready to give up the rent he is entitled during the pendency of the suit.
47	298/12 of 5th Joint District Judge Court, Dhaka.	No	The land claimed is owned and possessed by him and therefore, this right cannot be adjusted in any way.
48	868/13 of Nawabganj Senior Assistant Judge Court,	No	It is not a fit case to sit for mediation against the government.
49	Miscellaniouscase of 3rd Senior Assistant judge Court, Dhaka	Yes	The petitioner is ready to pay the market value and the opposite party also admit the petitioner as co-sharer.
50	96/02 of 4th Joint District Judge Court, Dhaka	Not sure	The defendant admits the sale, the dispute which remains is the consideration money of the sale. Such money can be determined again by sitting together for mediation.

Appendix E

The Proposed Amendment Relating to Court-connected Mediation under Section 89A of the CPC

Based on the empirical study at different levels of the stakeholders relating to court-connected mediation (e.g. judges, lawyers, clients, mediators, legal aid officers as mediators, Sub-registers of AC land office and staffs in the courts etc.) respondents from The following amendments are suggested in the existing provisions for mediation under 89A of the CPC.

Providence of lump-sum fees for mediation*: There will be a replacement in the sub-section (3a) of 89A as: 'At the date fixed for mediation under section 89A, the mediator shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The mediator shall record such admissions and denials. The mediator shall record such admissions and denials for the purpose of categorizing the suits as fit for mediation or less fit for mediation and write it down in the record. While referring a dispute or disputes in the suit for mediation under sub-section (1) to the pleaders or Panel of mediators, the court shall fix a fee according to the nature of suit (simple or complex) and valuation thereof and the parties will have to deposit the fees on the date fixed for mediation.*

Consequence of non-deposit: *In case of failure by the plaintiff to submit the fees, the suit shall be dismissed, and in case of failure on the part of the defendant, the suit shall proceed ex parte.*

Consequence in case of non-co-operation to the formalities of mediation procedure: *There shall be a replacement in sub-section Sec 89A (7a) as: 'If any party according to the report prepared under 89(1)A, does not attend the sessions of mediation, the mediation judge shall prepare a report, and on the basis of such report, the sitting judge shall impose fine upon the defaulting party at the time of pronouncement of judgment'.*

Strengthening the Panel of mediators*: There shall be a replacement in sub-section Sec 89A (10) as: 'The District Judge shall create and maintain a panel of mediators consisting of*

lawyers/pleaders licensed to practice in law in respective District Bar Association and a separate panel of non-lawyer mediators from retired judges. The Panel of mediators shall be selected by a committee, including a representative of the respective District Bar Association. For the purpose of this sub-section, the District Judge shall invite application from lawyers/pleaders in the Panel who have at least ten years experience as a practicing lawyer or judge. The applicant shall submit a statement of professional qualification, experience, training and other qualifications required by the District Judge'.

Formation of a mediation court: *There shall be an amendment in sub-section Sec 89A (14) as: There shall be a mediation court against each court, and it will be presided over by a Joint District Judge, and he will have the same power and authority to summon the parties, dispose of all the interlocutory matters for settling the dispute through mediation and shall keep the record of mediation procedure as mediator according to sub-section (4) and (5). The sitting judge of the suits shall pronounce decree on the basis of the report of successful mediation and report of unsuccessful mediation due to the absence or non-cooperation of any party, and the same shall form a part of the record during the trial of the suit.*

Each district shall contain a mediation committee headed by an officer equivalent to District Judge and two other judges, and their task will be to monitor the activities of the mediation court.

According to all the judges and mediators' opinions, like many other countries, a separate Rule is essential for effective procedure of mediation, and the rules may be termed as Rules of *Court -connected Mediation under CPC.* Some key provisions under these proposed Rule for court-connected mediation would be as follows.

Proposed Rules for Court-connected Mediation under CPC

(i) Mediation process by the judge himself

(a) If all the parties in attendance before the court by themselves or by their respective pleaders, in a case where the judge mediates himself, he will fix a date for the mediation meeting. He will preside over the meeting, prepare an order sheet to write down the activities of mediation, will take note of the attendance of the parties and their pleaders and read out the activities of the meeting to both the parties and take signatures from them.

(b) At the stage of mediation's session, the judge may adjourn the meeting if the activities are not completed within a session, but such period of adjournment will not be more than seven days.

(c) The sitting judge will be able to do interrogatories under section 30 and order 10 of CPC such as appoint advocate commissioner, etc. for the purpose of elucidating the matter of dispute.

(d) During the proceeding of mediation, the judge shall keep a record of each mediation session, and at the end of the proceeding, if the parties reach any settlement, the presiding judge shall prepare a report, writing down the terms of the agreement. If the parties do not reach an agreement, the judge shall prepare a report containing the reasons for unsuccessful mediation such as the absence of the parties or failure of the parties to answer any interrogatories of the judge.

(e) If any party fails to cooperate during mediation proceeding, and the result of the suit goes against them, the trial court shall impose a fine upon the party at the time of pronouncement of judgment.

(ii) The mediation procedure for mediation court:

(a) The mediation judge shall keep a record of all the sessions of mediation proceeding containing the signature of the parties.

(b) After preparing the report, the mediation judge shall send the report to the trial judge, and on the basis of the report, the trial court shall pass a decree. In case the mediation judge sends a report of unsuccessful mediation, it shall form a part of the record of the

dispute filed in the trial court, and the trial judge shall take necessary actions as laid down in section 89A(3a) and 89A(7a).

(c) The mediation judge shall not submit any bill for allowance of successful mediation.

(iii) Mediation initiated by District Legal Aid Officers

(a) If the presiding judge, refers the case to the District Legal Aid Officer, he shall choose the suits from the list of suits fit for mediation.

(b) After receiving the dispute for mediation, the district legal aid officer shall exercise the same authority and jurisdiction to that of the sitting judge to pass any interlocutory order.

(c) If any of the parties do not appear before the District Legal Aid Officer, the officer shall have the authority to write down a report against that party. Such report shall have evidentiary value and can be used against that party at the time of disposal of the suit after trial.

(d) The District Legal Aid Officer shall submit the report about the number of a suit he has dealt as a mediator under section 89A and the detailed contents of success and failure of mediation mechanism.

(iv) Fees for mediators/pleaders: While computing the fees for mediators/pleaders, the following Chart shall be followed:

Amount in dispute	Dispute of simple nature	Dispute of complex nature
Upto 2,00,000/-	20,000/-	22,000/-
Above 2 lacs to 4 lacs	20,000/-+ 1% above 2 lacs	22,000/- +.1% above 2 lacs
Above 4 lacs to 10 lacs	25,000/-+ .50% above 4 lacs	28,000/- + .50 % above 4 lacs
Above 10 lacs	30,000/ +.25% above 10 lacs Maximum 50,000/-	34,000/+.25 above 10 lacs Maximum 60,000/-

(a) Amount in dispute indicates the market value of the subject matter of dispute. If any suit does not indicate any monetary value, the fixed fee of Tk. 20,000/- would be payable.

(b) The total fee shall be divided into equal two parts, and such fee shall be payable by each party.

(c) The pleaders and in the appropriate cases panel mediators will receive the fee. The pleaders will receive this fee irrespective of the fact that the mediation is handled by the judge mediator.

(d) The pleaders/panel mediator will withdraw half before the mediation and withdraw remaining half if the mediation procedure becomes successful.

(v) The formalities to be undertaken by the mediators at the time of mediation proceeding:

(a) He will create a favourable situation for mediation;

(b) He will explain the procedure and rules of mediation;

(c) He will collect information from the parties about the matter of dispute;

(d) He will find out the real matter of dispute;

(e) He will acquire neutrality by different mechanisms;

(f) He will initiate mechanisms for interactions between the parties;

(g) He will propose options for helping them to reach a decision;

(h) He will act as a mediator for the parties.

(vi) The procedure of the mediation presided over by the mediator

(a) He will determine the procedure for mediation;

(b) He will highlight the benefits of the settlement of the disputes to the parties or their representatives;

(c) He will take the signature of the parties in the attendance sheet of each sessions;

(d) After the completion of the mediation proceeding, the mediator will read out the procedure as well as the decision of mediation to the parties or their representatives;

(e) The mediator shall prepare a report of the decision of the mediation, either successful or unsuccessful and send it to the concerned trial judge;

(f) Value of the mediation report presented by the mediator: In case of a successful mediation, the pressing judge shall pass a decree on the basis of such report and in case, the mediation is failed due to non-compliance of the formalities of mediation by any party, the mediator shall prepare a report to that effect. Such report will form part of the evidence in such suit;

(g) Withdrawal of fees by the mediator: The mediator will withdraw the fees, and pleaders will withdraw the fees upon submission of mediation report.