Development and Effectiveness of Alternative Dispute Resolution (ADR) Methods in Bangladesh, India and Pakistan: A Comparative Study

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June, 2013

DEVELOPMENT AND EFFECTIVENESS OF ALTERNATIVE DISPUTE RESOLUTION (ADR) METHODS IN BANGLADESH, INDIA AND PAKISTAN: A COMPARATIVE STUDY

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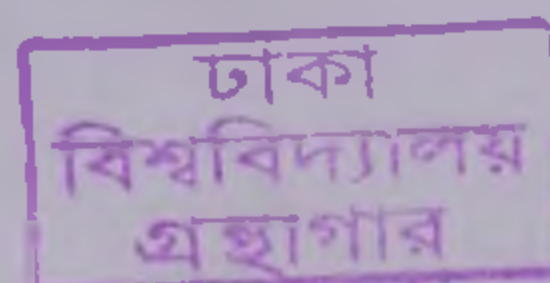

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DEVELOPMENT AND EFFECTIVENESS OF ALTERNATIVE DISPUTE RESOLUTION (ADR) METHODS IN BANGLADESH, INDIA AND PAKISTAN: A COMPARATIVE STUDY

A Thesis Submitted in Partial Fulfillment of the Requirement for the Degree of Master of Philosophy in the Department of Law, University of Dhaka.

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CERTIFICATE

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I have gone through the thesis carefully and recommended for its submission to the University of Dhaka for the award of the degree of Masters of Philosophy (M.Phill) in Law.

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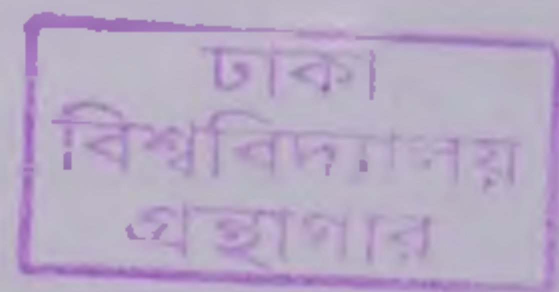

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DECLARATION

I hereby declared that this thesis entitled "**Development and Effectiveness of Alternative Dispute Resolution (ADR) Methods in Bangladesh, India and Pakistan: A Comparative Study**" for submission to the Department of Law, University of Dhaka for the Degree of Master of Philosophy (M.Phill) in Law is completed by my personal effort. I also confirm that no part of this thesis has been submitted elsewhere for the award of any degree or diploma or any other purpose.

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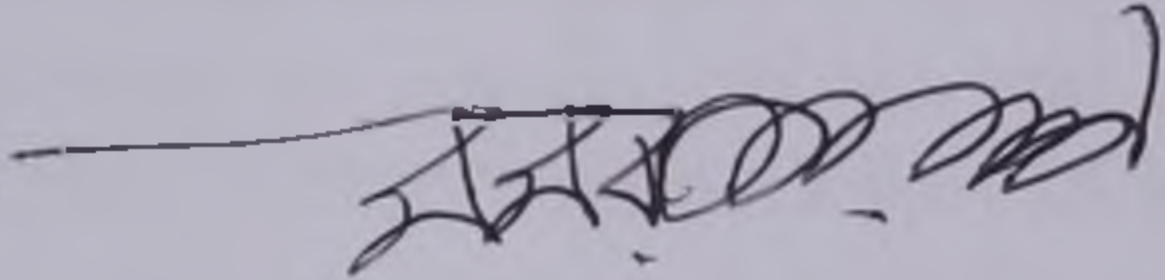

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LIST OF ACRONYMS

AAA	American Arbitration Association
AC	Arbitration Council
ADR	Alternative Dispute Resolution
ASK	Ain o Shalish Kendra
BBS	Bangladesh Bureau of Statistics
BILIA	Bangladesh Institute of Law and International Affairs
BLAST	Bangladesh Legal Aid and Services Trust
BLSG	Bangladesh Legal Study Group
BNWLA	Bangladesh National Women Lawyers'
BRAC	Bangladesh Rural Advancement Committee
CPC	Civil Procedure Code
CDR	Compliments Dispute Resolution
CEDR	Centre for Dispute Resolution
CMCA	Case Management and Court Administration
CAB	Conciliation Arbitration Board
CrPC	Code of Criminal Procedure
DLSA	District Legal Service Authority
DID	Department for International Development
DLSA	District Legal Service Authority
ED	Early Determination
EDE	Expert Determination Evaluation
ENE	Early Neutral Evaluation
FCO	Family Courts Ordinance 1985
FCR	Frontier Crimes Regulation
HCD	High Court Division
ICADR	International Centre for Alternative Dispute Resolution
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISDLS	Institute for Study and Development of Legal Systems
IFC	International Finance Corporation
ICSID	International Centre for the Settlement of Investment Dispute
LGO	Local Government's Ordinance
LJCBP	Legal and Judicial Capacity Building Project
MFLO	Muslim Family Laws Ordinance
MLAA	Madaripur Legal Aid Association
MENA	Middle East and North Africa
MIGA	Multinational Investment Guarantee Agency

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MLJPA	Ministry of Law, Justice and Parliamentary Affairs
MIGA	Multinational Investment Guarantee Agency
MELO	Muslim Family Laws Ordinance
MFLO	Muslim Family Laws Ordinance
MA	Musolihat Anjuman
NCW	National Commission for Women
NWFP	North-West Frontier Province
NCBPF	NOG Committee of Beijing plus Five
NGO	Non Government Organization
NCW	National Commission for Women
PC	Penal Code
PIL	Public Interest Litigation
PMLA	Paribarik Mohila Lok Adalat
PMLA	Paribaric Mohila Lok Adalat
SCMOCO	Small Claims and Minor Offences Courts Ordinances
UNDP	United Nations Development Programm
UNIFEM	United Nation International Fund for Women
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UP	Union Parishad
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL	United Nations Commission on International Trade Law

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LIST OF STATUTES

Arbitration Act 1940 X of 1940)

Arbitration Act 2001 (Act I of 2001)

Arbitration (Amendment) Act 2004 (Act II of 2004)

Chowkidari Act 1870 (Act VI of 1870)

Code of Civil Procedure 1908 (Act V of 1908)

Code of Civil Procedure (Amendment) Act 2003 (Act IV of 2003)

Code of Civil Procedure (Amendment) Act 2006 (Act VIII of 2006)

Code of Civil Procedure (Amendment) Act 2012 (Act No. XXXVI of 2012

Code of Criminal Procedure 1898 (Act V of 1898)

Dispute Resolution (Municipal Areas) Board Act 2004 (Act XII of 2004)

East Bengal State Acquisition and Tenancy Act 1950 (Act XXVIII of 1950)

Family Courts Ordinance 1985 (Ordinance XVIII of 1985)

Finance Act 2011 (Act XII of 2011)

Income Tax Ordinance 1984 (Ordinance XXXVI of 1984)

Industrial Relations Ordinance 1969 (Ordinance XXIII of 1969)

Labour Act 2006 (Act XLII of 2006)

Money Loan Courts Act 2003 (Act VIII of 2003)

Money Loan Courts (Amendment) Act 2010 (Act XVI of 2010)

Muslim Family Laws Ordinance 1961 (Ordinance VIII of 1961)

Muslim Marriage and Divorce (Registration) Act 1974 (Act LII of 1974)

Penal Code 1860 (Act XLV of 1860)

The Legal Aid Services Act 2000 (Act VI of 2000)

Village Courts Ordinance 1976 (Ordinance LXI of 1976)

Village Courts Act 2006 (Act XIX of 2006)

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ABSTRACT

Resolution of dispute is an essential and potential element of social peace and harmony and its footing and escalating inclusion in the academic and horizontal of conflict resolution is the hallmark in all over the world. From prehistoric times, the task of resolving dispute has fallen upon the shoulders of the village head, the tribal chiefs or the king or on the wise ones like the village tribunals of Panchayats or the Qazis. With the evolution of modern states and sophisticated legal systems, courts run on very formal lines and presided over by trained judges, came to be almost exclusively entrusted with the responsibility of resolution of disputes.

Simultaneously, all other adjudicatory flora fell into disuse and declined. In the formal adversarial system of dispute resolution there is a plethora of hurdles in procedures and capacities as well as in the system itself. In the context of the ever growing all, pervasive clash of interests, ADR is considered an effective check to the fastest growing number of formal litigations. The number of cases having increased on account of the high degree of formalization, the pace of administration of disputes became time-consuming. This led to a search for complimentary mechanism to the court process for speedy resolution of disputes. ADR encompasses a broad spectrum of activities ranging from a simple open door policy' through friendly intercession to binding arbitration of statutory claims. More specifically, such activities cover a gamut of purely informal to relatively formal mechanisms and forums.

Here, I explicate many theoretical concepts incorporated within this thesis are indispensable for gather an understanding of ADR's multi dimensional benefits. I think this thesis will outline and bridge the existing gap between the theory and practice of ADR in Bangladesh, India and Pakistan. The material objective of this thesis is not limited to discussion but it extended to a theoretical discussion on how we may use the ADR method more effectively to reach the goal and to ensure access to justice for all in the countries of Indian subcontinent like, Bangladesh, India and Pakistan.

With the advent of modern States, access to justice was conceptualized from personal perspective as one' ability to obtain a just, timely and quality remedy for violation of his rights and entitlements and right to equal access to courts as put forth in the national and international norms and standards. It necessarily denotes that justice shall be made available to all irrespective of the lack of legal representation, ability to afford cost of litigation and time. Justice is thought not only in the context of remedies for wrongs upon one's person or property but also in the context of his access to justice and gradually the old adjudicatory forums got replaced by sophisticated legal systems and courts ran on very formal lines by professional judges, almost exclusively entrusted with the responsibility of mitigating justice.

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During the last decade, ADR gained enormous currency in rural development arena as an informal justice institution in Bangladesh, India and Pakistan. As the intention of this study is to strengthen and enlighten this system with empowerment, right based and capability approach, this study revealed opportunities and constraints. Arguably, ADR provided the functional alternative of Traditional Shalish to the rural poor men and specially the poor women.

An effective and easy excess to justice and a successful judicial system is the hallmark of a civilized and a welfare society. The success of a judicial system is determined by its ability to dispense justice in a free, fair, less coast, timely and speedy manner. Every citizen expected that justice have to be delivered in accordance with law and due process. Ensuring less time consuming, inexpensive and expeditious justice is a bounded and a crucial duty cast on the state.

There is no direct ADR related provisions laid down in the Constitution of Bangladesh India and Pakistan but ADR related laws and special enactment are embodied in their domestic laws of each of these countries. The Code of Civil Procedure was amended to introducing the sections of 89A, 89B and 89C in Bangladesh, India and Pakistan. The Code of Criminal Procedure also amended the respective sections of these countries.

In the context of Bangladesh, the contesting parties have the opportunities for application to the court for withdrawal of the suit on the ground that they will refer the dispute to arbitration for settlement. The court shall allow the application and permit the suit to be withdrawn and thereafter the dispute shall be settled in accordance with Salish Ain, 2001(Act I of 2001). Section 89C inserted the law that the permits of the process of Mediation in appeal. An Appellate court may mediate or refer the appeal for mediation in order to settle the dispute or disputes, if the appeal is an appeal from original decree under Order XLI in the CPC. In mediation under this section the Appellate Court shall, as far as possible follow the provisions of mediation as contained in section 89A with necessary changes as may be required.

India, Pakistan and specially Bangladesh are densely populated, economically the less GDP's countries of the world, near about 34 per cent of population are living below the poverty line, illiteracy, unemployment and food deficiencies are manifest, in the denial of their fundamental and legal rights which are precipitated by their lack of access to institutions established for the enforcement of those rights. The affected and vulnerable sections are destitute, weak, disadvantaged and specially women, faces the hazards in accessing justice in the state organs which are plagued by corruption, delays, complicated procedures, exorbitant cost and class biases. In the context, to save the sufferers the respective countries authorities intended to resolve their legal disputes at the community or local level by the ADR mechanism. ADR mechanism

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may vary depending on culture, practice, geopolitics and tradition of the people in the particular contexts.

The idea of ADR mechanism has nourished and brought into maturity a persistent demand for the searching out of a satisfactory solution to all legal problems within the quickest possible time and cost. With the march of modernization of enjoyment of all the amenities and privileges of life, there has come into play the significant fact of theme of the entitlement of quick dispensation of justice. The object of ensuring inexpensive, time saving, less formulating and expeditious disposal of cases has been in the making in the minds of the legal luminaries in order to do away with the obstructions of belated justice system.

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CHAPTER-I

INTRODUCTION

Disputes are inescapable facts, and the crises they engender are pretty much shared by all of us. When we are stuck in a dispute, we have four basic needs, namely, to bring our thoughts and feelings under control, to understand the process for resolving the darn thing, to save time and money, and to figure out and follow through with a plan for reaching a fair result.[1]

The history of resolution of disputes dates back to the understanding of interest by human race. Initially dispute resolution was essential for maintaining social peace and harmony. With the transition of the concepts of individualism to statehood through family, the systems and concepts of dispute resolution underwent many changes. The tasks of resolving disputes were usually performed by the powerful actors in different structures of the clans, communes and societies e.g. the tribal chiefs or the kings or wise men.[2]

With the advent of modern States access to Justice was conceptualized personal perspective as one's ability to obtain a just, timely and quality remedy for violation of his rights and entitlements and right to equal access to courts as put forth in the national and international norms and standards.[3] It necessarily denotes that justice shall be made available to all irrespective of the lack of legal representation, ability to afford cost of litigation and time. Justice was thought not only in the context of remedies for wrongs upon one's person or property but also in the context of his access to justice and gradually the old adjudicatory forums got replaced by sophisticated legal systems and courts ran on very formal lines by professional judges, almost exclusively entrusted with the responsibility of mitigating justice.[4]

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[1] Crowley, Thomas E; Settle it Out of Court: How to Resolve Business and Personal, Disputes Using Mediation, Arbitration, and Negotiation, Published by the Author, 1994.

[2] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.

[3] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48.

[4] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.

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Since the 1960s, there have been widespread public talks about the crises of excessive delay, expense, inflexibility and technicality in the formal adjudication system in the USA. In juxtaposition to these talks, the social movement for Alternative Dispute Resolution (ADR) culminated into legal movement by enacting the Civil Justice Reforms Act, 1998 which opened up avenues for formal ADR mechanism in the US justice delivery system. Ever since, this ADR movement has grown rapidly from experimentation to institutionalization throughout the world.[5]

Though these systems are formally recognized in Bangladesh, India and Pakistan by some pieces of legislation, remedy can be obtained through formal or informal justice systems, also referred to in some cases as 'state' and 'non-state' systems. Informal systems include a range of traditional, customary, religious and informal normative frameworks and mechanisms that handle and resolve disputes.[6]

Obliged by circumstances to recognize the ADR within their respective legal framework in new paraphernalia Bangladesh, India and Pakistan have laid the foundations of ADR in their legal systems by way of amendment of relevant laws and new legislations aiming at setting up of methods and mechanisms of ADR. Bangladesh, India and Pakistan formally recognized the ADR mechanism in Nineteenth Century.[7]

Fortunately, Bangladesh has not lagged much behind in incorporating provision of ADR in general civil law as it passed and carried into effect the Code of Civil Procedure (Amendment) Act, 2003 by inserting three new sections relating to ADR through Court mechanism and introduced the provisions of formal ADR in Artha Rin Adalat Ain, 2003. Moreover, in the recent past, the issues of ADR are often & much talked about at the Governmental level.[8] All the Three countries subjugated for a long time to British rule, share the common social, political and legal legacies. Apart from

[5] Warren E Burger, Agenda for 2000 A. D. A Need For Systematic Anticipitation, 70 F. R. D. 83, 92 (1976)

[6] Kamal, Siddiqui, 1998. ' In Quest of Justice at the Grass Roots', Journal of Asiatic Society of Bangladesh, Vol. 43, no.1.

[7] Hossein, Sara, Shahdeen Malik, Greg Moran and Adam Stapleton. 2007. Joint Assessment of Prospects for Harmonisation within the Justice Sector in Bangladesh . (Draft) Dhaka June 2007.

[8] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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the political and social thinking of the British rulers, their thinking and policy formulation about the legal system was much innovative & progressive in certain areas in as much as provisions of ADR were incorporated long before in 1960s in the Code of Criminal Procedure and in 1900s in the Code of Civil Procedure. However in these two important legislations aimed at defining & implementing the rights the subjugated people, scope for active participation of the judges in the ADR process, otherwise other than merely facilitating the parties in procedural matters, was not enough as it has been thought in recent years. In other words shaping of the system was not thought as it is thought in recent years.[9]

About a century after the introduction of ADR in the CPC, scopes for working in a new perspective was widened in 2003. Official statistics on the achievement about ADR are scarce in respective organs. However, it is crystal clear from the statistics of pending cases that in the last five years situation has not improved at all; as the number of pending cases keeps on rise alarmingly. It seems that before incorporating the provisions of ADR in the CPC back in 2003, proper attention was not given to the existing provisions of laws in neighboring countries.[10] The success of ADR is being blocked by some shortcomings in the existing provisions.

The objectives and aims of this study are to obtain clarity on the nature and characteristics of informal justice systems in different countries like Bangladesh, India and Pakistan. The systematic aspects and issues with regard to the national normative frameworks and the informal justice processes and systems, human rights implications particularly related to the rights of children, women, and vulnerable groups and the society and the scope for improving respect for human rights, principles and practices in informal justice systems, including the possible control and accountability mechanisms that needed to be established for such improvements and key programming opportunities and challenges for supporting greater alignment of informal justice processes with formal justice system and to explore possibilities for

[9] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.
[10] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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future developments of ADR, sharing the findings with students, teachers, lawyers, judges, departments and agencies and the outcome of the study might, therefore, be of use for others as well.

1.1 Why the research has selected Bangladesh, India and Pakistan?

Bangladesh, India and Pakistan are the neighboring countries in the Indian sub-continent and gone through by the British colonial ruled near about 200 hundred years. Britain was the sacred land of Common law, different charters like the Historic Meghna Charta, Bill of Rights, several rules and regulations. The British ruled the Indian sub-continent through the Common law. Therefore, Bangladesh, India and Pakistan inherited Common law culture.[11]

After long repression and suppression by the British Government resulting the much upsurges and self-independent revolution of the people of Indian Sub-continent, the British government decided to give independence and divide the Indian sub-continent into India and Pakistan. As a result, 29 August 1947, gave birth the two separate independent countries in the India sub-continent.

Pakistan is consisting of two parts, namely West Pakistan and East Pakistan. After a long bloody liberation war, Bangladesh got independence on 16 December 1971. The three countries have the similarities of existing laws, rules, regulations and their socio-economic, geo-political culture.[12]

Bangladesh, India and Pakistan are carried out the legacies of the British Common Laws, rules and regulations. Existence of the poorest countries of the third world, host an estimated population of 1420 million of which 30% are reported as living below the national poverty line.[13] Apart from evident deficiencies in food, housing, health care, education and job opportunities, endemic poverty of millions of three countries people are manifest in the denial of their fundamental and legal rights, which are precipitated by their lack of access to institutions established for the enforcement of those rights. People, who are poor, week and disadvantaged and more particularly

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[11] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.
[12] Zahir, M 1988, Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.
[13] World Development Indicators, 2003, The World Bank, pp. 38&58.

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women, face innumerable obstacles in accessing justice from the more formal state organs, which are plagued by corruption, delay, complicated procedures, exorbitant costs and class biases.

In the circumstances, the common people prefer to resolve their problems and disputes at the community or local level in an informal way.

From beginning of the 19th century the three countries, existing judicial system did not cope with the reducing of backlog of the cases. Incessant growth of population over these countries the ratio of the litigants is increasing day by day.[14]

Prevailing above the circumstances there is an exigency to find-out a new system to reduce the backlog and mitigating the suffering of the litigants by the method of Alternative Dispute Resolution (ADR). That is why the research decided to select Bangladesh, India and Pakistan for the thesis in the field of Alternative Dispute Resolution.

1.2 Justification for the Study

Inaccessibility to justice is attributable to poverty. It can also be considered an obstacle to the eradication of poverty, gender inequality and cultural bias. The principle of equal access to justice is implicit in the concept of the rule of law and these concepts and principles are vital parts of the UN mandate to reduce poverty and fulfillment of the human rights, expectations and obligations. It includes both of strengthening national formal and informal justice systems and building peoples' capacity to make claims and demand accountability.[15] Proper access to justice requires legal empowerment of all segments of society including the underprivileged sections of the society and existence of accessible, prompt, effective and accountable judicial and legal systems so that all can claim their rights, through justice systems.

The segmentation and perception of interests inevitably led to the increase in the number of cases slowing down the pace of resolution of disputes. This led to a search

[14] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

[15] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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for a complementary mechanism to the court process for speedy resolution of disputes.[16] The major justification for the study is, thus thought to be founded upon the following considerations:

(a) Alternative Dispute Resolution (ADR) often used to mean a wide variety of dispute resolution mechanisms that are basically facilitated voluntary, non-coercive, often informal, participatory settlement of disputes as alternatives to full-scale Court processes.

(b) Alternative dispute resolution by way of mediation, arbitration or conciliation etcetera is not a panacea for all needs. Though it is not a complete substitute for formal adjudication of disputes by the courts, it is an alternative route to a speedier and less expensive mode of settlement of disputes. It is not a compulsory method of settlement, as trial of a case is, but a voluntary and willing way out of the impasse.[17]

(c) UN agencies have been increasingly working for strengthening and supporting their further alignment with international human rights standards. According to an evaluation report from the Danish Ministry of Foreign Affairs, 'the majority of the population is often not in a position to access the formal legal system for various cultural, linguistic, financial and logistical reasons'. Their access to justice largely depends on the functioning of informal systems, which have been neglected in terms of external support. Studies estimate that in many developing countries, traditional or customary justice systems handle 80% of the total caseload.[18]

All these factors mentioned above have basically led to the conducting and completion of this research. This study contains the hope that it will clarify the various aspects of "ADR Movement" including its objects, modes and effectiveness throughout Bangladesh, India, and Pakistan. More importantly, this study will tend to bring the uncompromising need of the ADR mechanism into a sharp focus.

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[16] Hossein, Sara, Shahdeen Malik, Greg Moran and Adam Stapleton. 2007. Joint Assessment of Prospects for Harmonisation within the Justice Sector in Bangladesh . (Draft) Dhaka June 2007.

[17] Kamal, Siddiqui, 1998. ' In Quest of Justice at the Grass Roots', Journal of Asiatic Society of Bangladesh, Vol. 43, no.1.

[18] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.

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1.3 Aims, Objective and Expected Outcomes

The fundamental purpose of this thesis is to present an outline of ADR developments, processes and resources in Bangladesh, India and Pakistan. It is intended to contribute to a better understanding of what ADR is and how it works. This study attempts an analysis of history, introduction, working and challenges of ADR mechanisms in Bangladesh, India and Pakistan in the justice dispensation systems. It sets out a brief discussion on various aspects, objects and modes of ADR mechanism throughout Bangladesh, India and Pakistan; different types of ADR existing in these countries and working difficulties, experiences and challenges ahead as a vehicle for easy and speedy access to justice. One of the objectives of the study is to explore possible future collaboration amongst the ADR related laws of Bangladesh, India and Pakistan.

The specific aims and expected outcomes of the study are to clarify:

a. Critically examine the major features, nature, characteristics of the traditional legal and informal justice systems in Bangladesh, India and Pakistan.
b. Analyzed the emerging rules and regulations on ADR and to see how far these are effective in delivering justice to the litigants and the systematic aspects and issues with regard to these three countries normative frameworks and the informal justice processes.
c. Human rights implications of those informal justice processes, particularly related to the rights of children, women and vulnerable and marginalized groups.
d. The scope for improving respect for human rights principles and practices in informal justice systems, including the possible control and accountability mechanisms that need to be established for such improvements.
e. Key programming opportunities and challenges for supporting greater alignment of informal justice processes with formal justice system and with the requirements of human rights standards, including possible opportunities for three countries joint programming.
f. To study at the field level problems being, faced by litigants or potential litigants in taking recourse to the traditional system and ADR.

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1.4 Research Methodology

The intention is to set a basic research tool for individuals and organizations wishing to gather information on the topic within the aforementioned parameters. This research is intended also to take one through various sources that provide a very wide perspective on the topic. However, ADR has been most often associated with marital and other family, civil and criminal matters in India, Bangladesh and Pakistan. Together with above focus would also be to commercial activities on investments and trades.

During study period, mix group of the communities and professionals, linked with informal justice system, were interviewed. Few of the interviewees avoided disclosing their names and, therefore, their identity has not been disclosed. The interviewees were informed that their input will be used purely for academic and research purposes and they will not be quoted in any way to any authority or stakeholders of formal/informal justice systems. Few cases were studied during the study.

The length of explanation under this research tool should not be considered an indicator of its relevance. Most of ADR takes place through established organizations and centers; therefore, a good proportion of information presented in this paper was obtained via sources found on the internet. This paper incorporates government documents and websites, legal journals and articles, commercial and specific search engines, news sources books, database, as well as other research guides. Primary and secondary methods including Statute, editorial, Case-Laws, International Treaties and conventions have been overviewed In addition, interview method will be used to collect data from judges, lawyers and clients walking in the field. Many of the sources laid out may lead one to additional avenues of information, allowing access to relevant information specific to one's needs. The study therefore proposes to compile relevant information and reviews of present judicial systems of Bangladesh, India and Pakistan. Examination would be carried into how ADR evolved through ages and its effectiveness was at different Courts of the sub-continent. Depending on how specific one wants to be, each source has its advantages and drawbacks. Moreover, this is only a snapshot of the tools that are available for our use. In any event, I hope it will be useful in our endeavors.

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1.5 Structure and Brief Contents

Keeping all the above principles in mind and for a convenient discussion of the subject, this work has been divided into **nine chapters**.

Chapter I being the introductory one deals with the justification for the study and aims and methods of the study. It also discusses the scope and limitations of the work, objectives of the study, research methodology and literature review.

Chapter II relates to the clarifications of the conceptual aspects of ADR mechanism. It actually talks about the themes and structure of ADR process, and the jurisprudential theories relating to the ADR movement.

Chapter III broadly discussed Historical Development of Alternative Dispute Resolution (ADR) in the Sub-Continent. In this chapter detailed discuss a brief history of Dispute Resolution systems in Bangladesh, India and Pakistan have been made on how the ADR method evolved and developed through ages.

Chapter IV relates to the discussion about the ADR method in Bangladesh and access to justice in social, cultural and geo-political variance. In this chapter elaborately narrate the different types of ADR mechanism in Bangladesh and the relating laws so far enacted and codifying in this country. It also deeply expounded function and functionaries of ADR mechanism and Case Management and Court Administration (CMCA) in Bangladesh. It also discussed the limitations and disadvantages of ADR in Bangladesh.

Chapter V deals with the updated deferent types of ADR and relating laws in India and access to justice in the context of social, community and geopolitical variance. In the chapter discussed the different types of ADR and related laws in India. In addition, in the chapter deeply discussed the formation, functions and jurisdiction of Lok Adalat in India.

Chapter VI connotes ADR in Pakistan and access to justice in social, cultural and geo-political variance. It also discussed the different types of ADR method and codification of related laws in Pakistan. Different ADR related conventions and charter have been discussed in the chapter.

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Chapter VII envisages the challenges and difficulties of ADR mechanism prevailed in Bangladesh, India and Pakistan.

In the very Chapter VIII, a study of 12 cases has been narrated and interviews of the judges, lawyers and clients conducted by the method of field working and the fill up of design questionnaire at different Districts in Bangladesh. In the field work and case study, we had practically gone through with the ADR mechanism and gained substantial experiences.

Chapter IX is the concluding chapter. This chapter we sum up the existed different ADR related laws and rules and contains the conclusion and recommendations of the work. In this chapter some suggestions are made to reform the laws as well as to build up special awareness among the stakeholders in the judicial arena and spread the flavor of informal justice system among the common people of Bangladesh, India and Pakistan.

1.6 Literature Review

The method of Alternative Dispute Resolution had attracted the serious scholarly and attention of the 19th century. The ADR mechanism had evolved the different countries through ages and the need of ADR mechanism is increasing day by day. Its essence of mitigating the backlog of the cases and reduce the sufferings of litigants gave the decisive characteristic in the field of mediation, arbitration and conciliation.

The Great Philosopher Confucius theory called the Confucianism, was the base of Alternative Dispute Resolution. **Dr. Mizanure Rahman**, Professor of law, University of Dhaka stated the philosophical aspect in his scholarly book of "**Alternative Dispute Resolution**" as follows: "The philosophy of Confucius was, in essence, one of harmony, of peace, and of compromise resulting in a win-win combination. The Confucian view is that the best way of resolving a disagreement is by moral persuasion and compromise instead of by sovereign coercion. These are the based on the strong belief that laws are not the appropriate way to regulate daily life and hence

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should only play a secondary role.[19] It is clear that the Chinese are resolve their dispute by Alternative Dispute Resolution in the faith of win-win.

The US President Abraham Lincoln remarks of the essence of ADR that "Discourage litigation, persuade your neighbours to compromise, whenever you can. Point out to them the nominal winner is often a clear loser, in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good person"[20]

Sophie Boyron in his **"The Rise of Mediation in Administrative Law Disputes: Experiences from England, France & Germany**" stated the essence of ADR. "ADR processes are held to have many advantages. They are considered to reduce the case load, cost cutting is a major justification. ADR methods such as mediation are much less stressful for the parties than the ordinary court process."

According to Berger, Chief justice of USA, "Our system is too costly, too painful, too destructive, too insufficient for a truly civilized people".

The ADR mechanism have rooted in the many charter of **United Nation's, The Geneva Conventions, The Bengal Regulation Act of 1772, The Civil Procedure Act of 1859, 1877, and 1882,tables of roman's in Rome, The Holy Quaran, Vade, Gita** and many other religious Books. The first Arbitration Act was passed in 1899 afterwards it was modified in 1940.

A Hand Book of Dispute Resolution: ADR[21] in Action edited by **Karl J. Machie, George Applebey wrote an Article Titled Alternative Dispute Resolution and civil Justice system**. In the Article, he described that how ADR evolved in England through ages. In November 1990, The Centre for Dispute Resolution (ADR) It is evident that Lord Woolf plays a vital role for ADR development in England.

In Bangladesh aspect, formed a Bangladesh Legal Study Group in 1999. Our judicial system followed the Common Law culture and adversarial system. Mr. Justice K. M.

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[19] Dr. Mizanur Rahman "Aternative Dispute Resolution", Human Rights summer School Mannual, September, 2007, p. 148.

[20] MLR (Journal) 2001, p. 29.

[21] Routledge and Sweet & Maxwell (1991) London p. 41.

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Hassan, Ex Chief Justice, Bangladesh Supreme Court, remarks in a seminar that The success of mediation in the Family Court is not the end, We look forward to the day when introduction of ADR mechanisms in other courts, like commercial courts will be achieved.[22]

Richard Shilliti says in his analytical book **"Mediation in Libel Actions"** about the possibility of mediation in libel actions. But recent experience suggest that, in some libel actions at least, it may be worth exploring. 86%, of cases referred to mediation settle. The research tentative conclusion, is that if the parties are keen to settle, then mediation is worth a try". ADR method- "the research has for a long time been skeptical about the philosophy of at least, it may be worth.

Dr. Sumaiya Khair wrote a scholarly Articles on the title "**Alternative Dispute Resolution: How it works in Bangladesh.** The article was published in the Dhaka University studies, Part F Vol. XV (I) : 59-92, June 2004. In this articles, Dr. Smaiya detailed explained the nature of ADR, working Process of ADR and explained different ADR related laws ,ordinances.

Dr. Naima Huq. Wrote a scholarly Articles about ADR in the title of ADR: **Recent Changes the civil process**. The article was published in the Dhaka University Studies, Part-F. Vol. XV (I): 37-58, June 2004. In the article Dr. Naima elaborately described that the existing related provisions of ADR in the CPC ,Cr.PC, Arbitation, Artha Rin Adalat Ain in the Bangladesh and other laws.

Dr. Aktaruzzaman, Additional District and Sessions Judge wrote the book on **the concept and laws on Alternative Dispute Resolution and Legal Aid**, First Edition, December-2007 by the author. In this book Dr. Aktaruzzaman elaborately explained how ADR evolved through ages and how ADR process works and mitigate the sufferings of the litigants. The writers also explained the contemporary ADR mechanism comparatively. Though ADR conception were existing in before the birth of Christ in many countries but these were not accumulated, compiled and codified.

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[22] Habiba, Umme. 2002. 'Mediation is an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48.

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The research thinks the writer is the only author who passionately and carefully compile and codify and the book is very enriched upto date laws, case laws, references and footnotes. The writers perception and evaluation contains the moral and practical values.

Md. Atickus Samad was another author of the books **ADR & Legal Aid** (A comparative of National and Foreign ADR Process With Legal Aid). The book is too enriched with contemporary ADR related information's. National Law Publications published the book in February

Barrister Md. Abdul Halim wrote the book "ADR in Bangladesh: issues and Challenges. In this book he elaborately explained how ADR mechanism works and mitigating the sufferings of the vulnerable and marginalized people. The book was published by CCB Foundation: Lighting the Darkin 2011. Barrister Halim wrote another book on **The Legal System of Bangladesh (A comparative Study of Problems and procedure in Legal Institutions)** is the another book that stated the comparative legal systems of Bangladesh and the neighboring countries. The writer wrote a series of book in different fields.

Dr. Jamila A. chowdhury wrote a precious knowledgeable Book title "ADR Theories and Practices" (A glimpse on Access to justice and ADR in Bangladesh). Dr. jamila's publication is the latest publication in the field of ADR mechanism. The writer compiled and codified the latest laws, regulation, ordinances, rules and special laws. The writer obtained Phd. On the very issues on Alternative Dispute resolution from Australia. The writer is the veteran of this field. In the book, the writer tried to show how the ADR mechanism works smoothly and mitigates the sufferings of the litigants.

An Analytical and evaluation of study was carried out by Mr. Justice Salee Akter, Mr. Justice Mushir Alam, Mr. Muhammad Shahid Shatiq and Mr. Iqbal Ahmed Detho. In the research elaborately explained how ADR evolved and worked in Pakistan.

Dr. Hamiduddin Khan. The author of "Jurisprudence & Comparative Legal theory" anupam Gyan bhander.

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The new Arbitration & Conciliation of India (A Comparative study of old and new law) by G. K. Kwtra, Published, the Indian council of Arbitration. In this book the Indian Arbitration and conciliation Act was detailed explained.

Alternative Dispute Resolution by the P.C.Rao & William Sheffield is the another publication about the ADR mechanism. The book contains the codification of 26 articles. All the Articles deals with the ADR mechanism.

On the basis of the above mentioned writings the research achieved a lot of enriched knowledge regarding the field of ADR mechanism. After a long study, the research shows that above the writings/publications are related to the specific subject matter. Many writers/publishers and researchers worked several times in the several portions of this method. Many of them are worked a segment/part of the method/issues. Many of them are worked the related issues, the segment of stakeholders and of them worked the implementation issues. The ADR spectrum have the wide range issues and it includes some basic elements in our practical life. In the above all the books, articles, journals are theoretical in nature, but the research was carried out with both the aspect, theoretical and practical.

In the context of Bangladesh, India and Pakistan's judicial, geo-political, socio-economic developments standard of communication and accessibility of access to justice strongly demanded to speed out the essence of Alternative Dispute Resolution's befit to the all sectors of judicial and the related area of sub-continent and specially in Bangladesh.[23]

The research is carried out for drastic eradication/root out the social and judicial injustice and to formulate the equal justice in all spare of life by ensuring equal justice and implementing Alternative Dispute Resolution so that the research can buildup the sonar Bangla.

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[23] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.

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CHAPTER-II

The ADR Mechanism: Concept, Themes and Components

2.1 The Concept of Dispute Resolutions

The transition of the humankind from primitive stage to modernity and the gradual developments of person to statehood through individual ownership bore in itself clashes of interests, which were in the very core of invention of systems of Dispute Resolution in different ways. Particularization of every such mechanism in societies for dispute resolution seems to be inevitable since every system has its own characteristics and drawbacks. "The practice of conflict resolution is as old as human civilization. We have moved from a primitive system of a clash of strength, brute force against brute force, to a clash of wills in an adversary system where vested interest is pitted against vested interest. Like the primitive system the conflict continues until there is a winner and a loser."[1]

Dispute resolution mechanisms innovated all through the turns and traces of human progress is in a continuous state of evolution.[2] Demands of any particular society in a time along with the lessons from their past contributed to most of the changes in new directions. In early historical period, man had successfully used the methods of arbitration and mediation. However, as society began to be more complex modern litigation systems emerged.

Shorter Oxford English Dictionary provides the meaning of dispute as 'an oral or written discussion of a subject in which arguments for and against are put forward and examined."[3] A dispute resolution is the process of resolving such disputes between the parties concerned.

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[1] Nelson W. Dorothy, Alternative Forms of Conflict Resolution- A pathway to peace. The second Annual Baha'I Lecture, The Baha'I Chair for World Peace, University of Maryland, 1996, pp. 10-11

[2] Zahir, M 1988, Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.

[3] Shorter Oxford English Dictionary, Fifth Edition-2002 Oxford University Press, P-709.

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2.2 What is ADR?

The term "Alternative Dispute Resolution" or ADR is often used to describe a wide variety of dispute resolution mechanisms that are alternative to full-scale Court processes. The term can refer to everything from facilitated settlement negotiations in which disputes were encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini-trials that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the rubric of community based ADR.[4]

Mediation: (Assisted Negotiation): (neutral /friendly) third party-'mediator'; attorney(s) may advise; inexpensive, private, flexible, reliable; certainty of process; self-structured result(s), through maximal exploration of acceptable alternatives; speedy and optimal resolution; non-binding, unless recorded and signed. Mediation is assisted negotiation; even though related to negotiation, it may be much more effective. Mediation is a voluntary collaborative process where the disputants identify issues, explore alternatives, evaluate options, and develop a consensual resolution. A neutral third party a mediator is brought in to help the parties develop a mutually acceptable solution. A mediator is not a decision-maker-but merely a facilitator-cum-moderator of discussion. It is up to the parties to craft a solution that meets their needs. It does not extinguish any rights one might have under the law. Mediation works best when the parties have room to be flexible and where there will be a continuing relationship once the issue is resolved. Consensus can range from total agreement by all the parties, to agreeing not to agree. In many cases, mediation succeeds in reducing the number of issues in dispute, thereby reducing the scope of the issues remaining to be heard by a court. Mediation works because it opens up lines

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[4] Alternative Dispute Resolution Practitioner's guide. What is ADR (Washington, DC Technical Publication Series, March 1998)
Center for Democracy and Governance, Bureau for Global Programs, Field Support, and Research, U. S. Agency for International development.
http/www.usaid.gov/out_work/democracy_and_governance/publications/pdfs/pnacb895.pdf(accessed on 24.04. 12)

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of communication between the disputants that are usually extinct in more adversarial forms of dispute-resolution, such as arbitration and litigation.[5]

Statutory Arbitration: presided over by qualified third party; less formal case-presentation and testimony; case-presentation by attorney(s); private, adversarial, structured like trial; less expensive, as to time and money, than litigation/trial; binding decision(award), with limited right of appeal; diminished certainty/ predictability as to rules of evidence and procedure; absence of precedent value. Arbitration is a process by which parties voluntarily refer their disputes to an impartial third person-an arbitrator-selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal.[6] It is initiated by any party invoking a pre-dispute agreement to arbitrate, such as an arbitration clause in a contract, or by the parties executing a post-dispute arbitration-submission agreement. Thus, arbitration cannot validly occur unless the parties have specifically agreed to use this process to settle their dispute. Devising the details of the arbitration process is left entirely to the parties. Unlike courts, arbitration tribunals are not required to apply court-established procedural and/or evidentiary rules, unless the parties specifically agree otherwise. If a party refuses to honour an arbitration-agreement, the other party may apply to the courts for an order compelling the recalcitrant party to submit to the arbitration. Arbitration is the best for cases where the parties want a decision without the expense and tribulation of a trial. Arbitration may even be better than mediation when the parties have no relationship except for the dispute. Records from ancient Egypt attest to its usage with high priests. Since arbitration is final and binding, except under very rare circumstances, the parties are bound to comply with the decision rendered-award-no matter how very arbitrary and even legally incorrect it may be. Yet, arbitration remains the most widely used form of ADR. Often the use of mediation and arbitration is progressive.[7] When parties cannot settle their differences

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[5] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

[6] Mercado, Carol. 2008. Barangay Justice System: Model of Citizen-Driven Justice System. Paper prepared for National Workshop on Local Justice, May 11-12, Dhaka.

[7] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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by negotiation, but do not wish to go to court, they can turn first to mediation, and later to arbitration if necessary.[8]

ADR is as old as dispute itself and a comparatively recently considered effective approach in its new dimensions to enhance the capacity of the litigant people of access to justice and thereby ensure less time consuming resolution of disputes in a comprehensive manner, at a less cost and with maximum satisfaction. In the formal adversarial system of dispute resolution there is a plethora of hurdles in procedures and capacities as well as in the system itself. In the context of the ever growing all pervasive clash of interests ADR is considered an effective check to the fastest growing number of formal litigations.[9]

Early advocates of ADR include Abraham Lincoln, who is attributed the following exhortation: "Dispute litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the loser in fees, expenses and cost of time."[10]

Mahatma Gandhi is quoted as saying of his practice: "I realized that the true function of a lawyer was to unite parties. A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul."[11]

According to the former chairman of Foreign Exchange Regulation Appellate Board of India, "ADR is considered to be the mode in which the dispute resolution process is qualitatively distinct from the judicial process. It is a process where disputes are settled with the assistance of a neutral third person generally of parties own choice."[12] Where the neutral is generally familiar with the nature of the dispute and the context in which such disputes normally arise: Where the proceedings are informal, devoid of procedural technicalities and are conducted, by and large, in the manner agreed by the

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[8] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.

[9] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[10] Lincoln, Abraham, Notes for a Law Lecture, 1850, cited from Lincoln the Lawyer, by Frederick Trevor Hill, The Legal Classics Library, 1996, New York, p. 102.

[11] Gandhi, Mahatma, The Story of My Experiments with Truth, Chapter, 214.

[12] Chandra, Sarvesh, 'ADR: Is Reconciliation the best process?' in Rao, P.C. and Sheffield, William, Alternative Dispute Resolution: What it is and how it works, Universal Law Publishing Co. 2011, p. 83.

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parties; where the dispute is resolved expeditiously and with less expense: where the confidentiality of the subject-matter of the dispute is maintained to a great extent: where decision making process ends at substantial justice, keeping in view the interests involved in contextual realities. In substance, the ADR process aims at rendering justice in the form and content which not only resolves the dispute but tends to resolve the conflict in the relationship of the parties which has given rise to that dispute.[13]

Though ADR has a predominant presence worldwide, it is neither an easy task to get a constant definition of it nor concretely shaping it. The term is used to denote various systems of dispute resolutions, which are not applied in formal litigation. In the words of the editors of Shorter Oxford English Dictionary, ADR is "a mediation process by which disagreements are settled out of court." The vital point of this definition is that ADR is a process, which is used in out of court settlement. Alternative dispute resolution is used to describe mainly the following processes—alternative litigation resolution, alternative means to litigation, alternative method of resolving a dispute, arbitration, litigation substitute, means to resolve a dispute, mediation, pretrial mediation Specially: arbitration, mediation, pretrial mediation.[14]

"Alternative Dispute Resolutions are procedures for settling disputes by means other than litigation; e.g. by Arbitration, mediation, or mini-trials. Such procedures, which are usually less costly and more expeditious than litigation, are increasingly being used in commercial and labor disputes, Divorce actions, in resolving motor vehicle and Medical Malpractice tort claims, and in other disputes that would likely otherwise involve court litigation."

Though the term Alternative Dispute Resolution is widely used, it is to some extent misnomer and misleading.[15] Neither every dispute arising out of human society goes to Court to be settled nor does every settlement process happen outside the court.

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[13] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.
[14] Zahir, M 1988, Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.
[15] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48.

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There are some disputes which are settled in the court in the ADR methods. However, due to wide use of the term ADR is accepted most by the legal community. The term ADR has been used to describe various systems that attempt to resolve dispute through methods other than litigation in Courts or Tribunals.

In a nutshell, ADR is a non-formal, non-coercive and consensual settlement of legal and judicial disputes at less expense and in a speedier way through the active, sincere and spontaneous cooperation of the contending parties providing them the highest satisfaction. Mediation, Conciliation, Arbitration and hybrid forms of these methods like Conciliation-cum-Arbitration, mediation settlements are being converted to compromise decree etc.[16]

There is lot of flexibility in the use of ADR methods. The flexibility is available in the procedure as well as the way the solutions are found to the dispute. The solutions can be problem specific. The rigidity of precedent as used in adversarial method of dispute resolution will not come in the way of finding solutions to the disputes in a creative way.[17]

Firstly, if the ADR method is successful, it brings about a satisfactory solution to the dispute and the parties will not only be satisfied, the ill-will that would have existed between them will also end. ADR methods especially Mediation and Conciliation not only address the dispute, they also address the emotions underlying the dispute. In fact, for ADR to be successful, first the emotions and ego existing between the parties will have to be addressed. Once the emotions and ego are effectively addressed, resolving the dispute becomes very easy. This requires wisdom and skill of counseling on the part of the Mediator or the Conciliator.

Secondly, the ADR method is participatory and there is scope for the parties to the dispute to participate in the solution finding process. As a result, they honor the solution with commitment. Above all these, the ADR methods work out to

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[16] Ameen, N 2005, 'Dispensing justice to the poor: The village court, arbitration council vis-à-vis NGO', The Dhaka University Studies Part F, vol. 16, no. 2, pp. 103-22.

[17] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

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be cheaper and affordable by the poor people also.[18] As of now, there are some variations when it comes to the expenses incurred in arbitration. In course of time when there are adequate numbers of quality arbitrators, the expenses of arbitration will also decrease. The promotion of institutional arbitration will go a long way in improving the quality of ADR services and making them cost effective.

Thirdly, the development of ADR methods will provide access to many litigants. It helps in reducing the enormous work load that is imposed on the judiciary. Once the litigation that is pending before the judiciary becomes manageable, the courts will be able to improve the quality of their decisions. All these will go a long way in improving not only the access to justice, but even the quality of justice.

Alternatives to the resolution of disputes through public court trial have deep and different roots worldwide. Adjudicators in many jurisdictions have, by custom or duty, sought to settle claims by exercising a conciliatory role. In the Middle East and Africa, China, South Asia and South America, the role of the elder-led informal community meeting for resolving disputes is well known. Mediation in family, community, and environmental, international diplomacy and workplace contexts has a range of different and long-standing cultural origins.[19]

In its modern synthesis, commercial mediation developed first in the USA in the late twentieth century, as part of a drive to find alternatives to the delay and expense of litigation as then perceived. Its development since the Pound Conference in 1976, and the visionary speech given there by Professor Frank Sander on the concept of the multi-door courthouse, has been just as much integral to the development of modern civil justice processes as alternative to them. ADR was soon taken up in Australia and

[18] Mercado, Carol. 2008. Barangay Justice System: Model of Citizen-Driven Justice System. Paper prepared for National Workshop on Local Justice, May 11-12, Dhaka.

[19] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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Canada and began to take root in England and Wales in the late 1980s, where family and community mediation were already growing.[20]

In the UK, its development has been increasingly symbiotic to civil justice processes rather than in competition with them. This is exemplified particularly by the reforms proposed by the then Chief Justice, Lord Woolf in his ground-breaking "Access to Justice" reports of 1995 and 1996, and the Civil Procedure Rules 1998 that followed and implemented them. Across Europe, the 2008 EU Mediation Directive by the European Parliament and Council, referring to cross-border disputes between disputants within member states, has had positive consequences for ADR. It has cemented into place the already high standards of ADR that are a pre-requisite in the twenty-first century for aspiring states to join the European Union, on occasion taking the form of court-annexed mediation. Indeed, whilst implementing the Directive, existing member states have been considering how mediation is accessed in their own jurisdictions. This has led to reviews of practice and in some instances quite substantial legislation.[21]

In the Middle East and North Africa (MENA) region, a number of recent projects initiated by donor organizations such as the World Bank/IFC and the UK Department for International Development (DID) have helped engineer similar reform, including updating civil procedure codes and rules of the courts, launching ADR centers, both independent and court-annexed and training cadres of mediators. Countries in the region where such projects are, or have been, operational include Pakistan, Bangladesh, Egypt, Morocco and India.

Mediation has become familiar in a range of business sectors, including construction, workplace and employment, public law, personal injury, clinical negligence, company and partnership, and applied to a wide range of contractual differences, as well as taking an increasingly significant role in the development of civil justice generally.[22]

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[20] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ ban.asp.

[21] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.

[22] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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2.3 The development of ADR processes and uses

Even though ADR is often construed as an innovation, in fact, it has existed for millennia. Archaeologists have uncovered evidence of the use of consensual, non-formalistic dispute-resolution measures in the ancient civilizations of Egypt, Mesopotamia (Iraq), and Assyria (Syria). [23] Records from ancient Egypt attest to its usage with high priests. Such measures were also extensively used by the ancient Greeks and Romans, and in forms very similar to those used today. It is almost certain that arbitration, as a dispute-resolution mode, predates formal courts. Aristotle (384-322 BC) wrote very tellingly: For an arbitrator goes by the equity of a case, a judge by the law, and arbitration was invented with the express purpose of securing the full power for equity. Under English law, the first law on arbitration was 'the Arbitration Act, 1697 but when it was passed, arbitration was already common. The first recorded English judicial decision relating to arbitration was in 1610. However, the noted Elizabethan English jurist Sir Edward Coke refers to an earlier decision dating from the reign of King Edward IV (ended in 1483). In 1606, King Edward III had ordained: And two Englishmen, two of Lombardie and two of Almaigne shall (be) chosen as mediators of questions between sellers and buyers. 'The Jay Treaty of 1794 between Britain and the United States, sent unresolved issues regarding debts and boundaries to arbitration, which took seven (7) years and proved successful. George Washington (1732-1799) included in his will a clause calling for arbitration of any dispute over the interpretation of his will and the distribution of his estate. Chief Justice Warren E. Burger (1907-1995) said during the course of a speech: I cannot emphasise too strongly to those in business and industry-and especially to lawyers-that every private contract of real consequence to the parties ought to be treated as a 'candidate' for binding private arbitration.[24]

Originally, US courts were very suspicious of ADR procedures. For several years, courts, and even governments, resisted and discouraged 'ADR' practices as a denigration of their jurisdiction and subversion of their writ. Indeed, early decisions

[23] Zahir, M 1988, Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.

[24] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ ban.asp.

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of US courts held agreements to arbitrate void as usurping the function of the court. Therefore, formerly all ADR was private and consensual.[25] As court-dockets increased, however, the courts began searching for ways to reduce and better manage their caseloads. Resultantly, the perception of ADR as undermining public policy quickly dissipated. In the 1980s, following adoption of 'the Federal Arbitration Act' in the US, a non-consensual type of arbitration-"judicial arbitration"-evolved, which operated under the aegis of the courts. Similar statutes were adopted by most States making arbitration agreements readily enforceable in most courts.

ADR has become a familiar shorthand label used to designate a whole range of dispute resolution activities. As a definition it has its shortcomings, however. 'Alternative' is a much-criticized component of the label. Settlement in many common law jurisdictions has become the norm (though by no means in all) and, as was argued for a time in Australia, often it is trial that is the alternative, in the sense of its being the process less frequently used. In England and Wales, trial is officially regarded as a last resort for cases that cannot be settled. Nor is ADR in general or mediation in particular only conducted as an alternative to court trial, as it is often deployed before proceedings have been started or even contemplated.[26]

While it might be expected that tensions would develop between those who promulgate the traditional civil justice system–judges and litigation lawyers – and those who promote ADR, in fact lawyers and judges have played a very important part in the growth of ADR.[27] Many of the early pioneers in ADR were lawyers seeking to offer a wider and more flexible range of options to clients wishing to resolve their disputes, and many mediators still come from the legal professions. The spectrum is much broader now, and there are trained mediators from all professional backgrounds and all sectors. Also, judges have trained as mediators, both while sitting and also shortly before retirement, whereupon some have developed new careers as mediators. Just as importantly, court decisions have encouraged the use of ADR. Many

[25] Kamal, Siddiqui, 1998. ' In Quest of Justice at the Grass Roots', Journal of Asiatic Society of Bangladesh, Vol. 43, no.1.

[26] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.

[27] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

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jurisdictions are adopting approaches to encourage ADR, for instance by holding information sessions for litigants, through court directions and ADR legislative support such as the EU Mediation Directive.

Problems with the ADR definition remain. Should the term embrace arbitration –the first modern alternative to public trial to emerge, but undoubtedly an adjudicative process much more closely allied in style to judicial determination – as is the norm in the USA? Should it embrace bilateral settlement discussions without a third-party neutral? This thesis concentrates on mediation, but the next section briefly reviews the other processes usually gathered under the ADR umbrella. Definitions matter less than the need to recognize that the real benefits of ADR, and particularly mediation, lie in the flexibility of practice which it offers, enabling fresh approaches to be developed to suit the needs of the parties and each dispute, making a better 'settlement event' available, at less cost in time and money.[28]

Thinking about mediation and how to train mediators has shown that the process involves far more than brokering a deal or banging heads together. This has led to academic analysis from the psychological, anthropological and socio-legal disciplines, along with negotiation and game theory; all these have gained significance. The approach in this thesis is strongly practical requiring intuitive as well as theoretical learned skills, and emotional as well as intellectual intelligence.

The thesis has identified mediation as a significant tool for business support and consolidating economic development across the globe; and CEDR often works closely with the judiciary and policy-makers over locating mediation appropriately in local civil justice systems.[29] What is striking is the ease with which mediation passes across jurisdictional and cultural boundaries. It has always been well regarded as a way of dealing with cross-border disputes, and the enthusiasm with which it has been adopted in so many countries has underlined its value in this context and for business disputes generally.

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[28] Mercado, Carol. 2008. Barangay Justice System: Model of Citizen-Driven Justice System. Paper prepared for National Workshop on Local Justice, May 11-12, Dhaka.

[29] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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Internationally we have seen legal developments facilitating the introduction and application of mediation in many jurisdictions, supported by the continued development of ADR bodies in these countries, and with recent interest in all continents of training mediators to an internationally recognized base-line level of competence, mediation is set to flourish worldwide.[30]

The growth of mediation has been connected with litigation and civil justice procedure. Increasingly, however, its value is being recognized in areas beyond and outside litigation - in resolving community development issues, in facilitating improved relations within the stakeholders, and in putting together difficult deals or agreements. The core competencies that underpin mediator training have been found to have wide applicability, and the mediation 'umbrella' within which these can operate has ever-growing reach for protecting organizations and individuals from the destructive potential of conflict and difficult conversations.[31]

2.4 Jurisprudential Theories of ADR

The classical Greeks conceived of justice as a virtue. Nevertheless, harmony divine command 'natural law' or human creation have all been variously attributed as the source of justice. Plato's dialogue 'Republic' employs the character of Socrates to postulate that justice is a proper, harmonious relationship between the discordant elements in a person or city. The proponents of the divine command theory expound that justice indeed the whole of morality, manifests the authoritative command of a Deity-the Supreme Being.

The exponents of the 'natural law' theory posit that justice is part of natural law, and involves 'the system of consequences which naturally derives from any action or choice-justice requires according individuals and groups what they actually deserve, merit, or are entitled to. From this perspective, justice emerges as a universal and absolute concept all religions, principles, laws etcetera, constitute attempts to codify

[30] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48.

[31] Ameen, N 2005, 'Dispensing justice to the poor: The village court, arbitration council vis-à-vis NGO', The Dhaka University Studies Part F, vol. 16, no. 2, pp. 103-22.

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that concept, often with unsatisfactory results.[32] For those who hold justice as a human creation, there is divergence of opinion as to whether justice is the creation of some, or all, humans. Thinkers like Thomas Hobbes hold that justice is created by public, enforceable, authoritative rules; injustice is whatever those rules forbid, regardless of their nexus to morality. Justice is created by the command of an absolute sovereign power. On the other hand, the 'social contract' theorists like John Locke and Jean Jacques Rousseau hold that 'justice' is derived from the mutual agreement of everyone concerned. Utilitarian's like John Stuart Mill believe that 'justice' is derived from the more basic standard of rightness consequentialism: the best consequences, measured in terms of the total or general welfare occasioned, constitute right. There are yet those who try to decipher 'justice' in terms of economics or egalitarianism.[33]

Notwithstanding all these philosophical, theological, and legal reflections on the essence of justice, Wikipedia appears to be more pertinent in holding that justice concerns the proper ordering of things, matters, and persons within a society. Thus, 'justice' emerges as a precept contrived for obtaining concord, and dispelling discord. As an abstract concept, 'justice' connotes a prevalence of concord, and absence of discord, in the interfacing of the constituent components of a society-it is an end itself. As a contrived precept, 'justice' embodies a mechanism for assuring concord, and obviating discord, within a society - it is a means to an end. The promotion of concord, and/or elimination of discord, the proper ordering of affairs-within a societal congregation, signifies the very essence of 'justice.

Discord is synonymous with dispute, among persons-it yields societal disorder! 'Dispute resolution' serves to restore order-it comes to fruition in concord/peace ! The imperfections inherent in earthly existence often enough not only occasion disputes, but also often enough frustrate all 'dispute resolution' endeavors, underscoring the inevitable finiteness of all human enterprise.[34] Nevertheless,

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[32] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[33] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ ban.asp.

[34] Zahir, M 1988, Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.

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endeavor is a human privilege, while fruition is a Divine prerogative. Conflicts are an integral part of life's experiences, and have a meaning; they are not an exception, but a norm familiar to all and sundry. Peaceful expression of conflict within the community is a positive value, as is individual and communal acceptance of responsibility for a conflict. A voluntary resolution of conflict between disputants is expression of positive values and attitudes.

Reconciliation may be regarded as part of a process of restoring a relationship gone awry, typically because of one party causing a disruptive rift. 'Dispute resolution' processes, entailing reconciliation, fall into two principal regimes viz. (i) adjudicative, and (ii) consensual. However, these domains neither represent any watertight compartmentalization, nor are they in strict sense mutually exclusive. The distinguishing hallmark of these two regimes is the formality governing the respective processes- adjudication embraces prescriptive formality of rigid procedure, in marked contra-distinction to the elective fluidity of the process of consensual reconciliation.[35]

There appears to be a more essentially intrinsic distinction in the jurisprudential schema of these two dispute resolution regimes. The adjudicative mechanism is a product of Legal Positivism-described in the Wikipedia as a school of thought in jurisprudence and the philosophy of law, claiming that laws are rules made, whether deliberately or unintentionally, by human beings; and there is no inherent/necessary connection between the validity conditions of law, ethics, or morality.[36]

'Legal Positivism' implies that law is something severable from ethics-laws and rules may be utterly devoid of ethical content, and yet enforceable by the sovereign power. Moreover, such laws are malleable and adaptable to meet pressing needs. Thus, 'Legal Positivism' can hardly be taken synonymously with 'ethical positivism' or even 'moral relativism'. Indeed, 'Legal Positivism' tends to treat law and ethics to be based on entirely different precepts of logic. At best, law is presumed to have its own internalized ethical underpinnings.

[35] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.
[36] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.

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Conversely, consensual dispute resolution processes flow from Natural Law-the law of Nature-detailed in the Wikipedia as an ethical theory positing existence of a law whose content is set by nature, and therefore, having universal validity.[37] The term Natural Law is, in general usage, opposed to Positive Law of a given polity: 'Natural Law' can indeed operate as a critical standard for evaluating Positive Law. Greek philosophy underscored the distinction between nature on the one hand, and law/custom/convention on the other; whatever was by law could vary from one place to another, but what was by nature ought to be the same everywhere. Based on this premise, Socrates and his philosophic heirs, Plato and Aristotle, asserted the existence of natural justice or natural right. Owing largely to the interpretation accorded to his works, Aristotle is off times deemed to be the father of natural law-the best testimony to his conviction as to the existence of natural law coming from his assertion, in the Rhetoric, that aside from the particular laws that each people sets up for itself, there is a common law that is according to nature.[38] Jurisprudentially, Natural Law may refer to several dicta: just laws are immanent in nature : they can be discovered or found, but not created; they can emerge by the natural process of conflict resolution, as embodied by the evolutionary process of the common law; the meaning of law is such that its content remains indeterminable except by reference to moral principles. The current reformulation of Natural Law, and New Natural Law focuses on basic human goods e.g., human life, knowledge, and aesthetics. Black's Law Dictionary_states that Natural Law, or Jus Natural purported to connote a system of rules/principles to guide human conduct; a system which, independently of enacted law or systems peculiar to a people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature i.e., his entire mental, moral, and physical constitution. In ethics, it comprises practical universal judgements which man himself elicits. These express necessary and obligatory rules of human conduct, which have been established by the author of human nature as essential to the divine purposes in the universe and have been promulgated by God solely through human reason.[39]

[37] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

[38] Mercado, Carol. 2008. Barangay Justice System: Model of Citizen-Driven Justice System. Paper prepared for National Workshop on Local Justice, May 11-12, Dhaka.

[39] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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In Law, custom may be described as the established patterns of behaviour that can be objectively verified within a particular social setting - what has always been done and accepted by law: opinio iuris. The modern codification of civil law developed out of customs, or customs, of the Middle Ages as expressions of law that developed in particular communities, and which were gradually collated and written down by local jurists. Over time, such customs acquired the force of law through becoming the undisputed rule regulating certain entitlements (rights) or obligations between the constituents of a community.

In common law legal systems, the law is created and/or refined by judges-a decision in the case currently pending depends on decisions in previous cases, and affects the law to be applied in future cases. In the absence of any authoritative pronouncement of the law, 'common law' judges bear the authority and duty to make law by creating precedent. The body of precedent is called common law, and it binds future decisions. Common Law originally developed under the inquisitorial system in England during the12th-13th centuries, as the collective judicial decisions based in tradition, custom, and precedent.[40] In 1154, Henry II became the first Plantagenet king; amongst his many accomplishments, he institutionalized 'common law' by instituting a unified system of law common to the whole country, through incorporation and elevation of local custom to the national level, thereby extinguishing local control and peculiarities, and eliminating arbitrary remedies. Henry II developed the practice of sending out judges from his own 'central court' to hear the disputes throughout the kingdom; these judges would resolve disputes on an ad hoc basis according to what they interpreted the customs to be. The King's judges would then return to London, often discuss their cases and their decisions with the other judges.[41] These decisions would be recorded and filed. In time, a rule, known as stare decisis 'precedent' evolved, whereby a judge would be bound to follow the decision of an earlier judge, in interpretation of the law and application of the principles promulgated, if the two cases embodied identical facts. This system of 'precedent led to the decisions

[40] Khair, S 1998 2004, 'Alternative dispute resolution: How it works in Bangladesh', The Dhaka University Studies, Part F, vol. 15, no. 1, pp. 59-92.
[41] Kamal, Siddiqui, 1998. " In Quest of Justice at the Grass Roots", Journal of Asiatic Society of Bangladesh, Vol. 43, no.1.

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becoming stuck and ossified; the pre-Norman system of disparate local customs was replaced by an elaborate and consistent system of laws that was 'common throughout the entire country-hence, the nomenclature "common law". Such forms of legal institutions resembled those, which existed historically in continental Europe, and other societies, where precedent and custom have been known to have played a substantial role in the legal process, including the Germanic law recorded in Roman historical chronicles. The form of reasoning employed in common law is termed as casuistry or case-based reasoning.

The delineation between civil law and common law legal systems is becoming increasingly blurred, owing to the growing importance of jurisprudence (case law) in civil law countries, and the concurrently growing importance of 'statute law' and codes in common law countries. The mechanics of consensual dispute resolution are quite discernibly rooted in equity too. Black's Law Dictionary defines equity as justice administered according to fairness as contrasted with the strictly formulated rules of common law. It is based on a system of rules and principles which originated in England as an alternative to the harsh rules of common law and which were based on what was fair in a particular situation. Equity is a body of jurisprudence, or field of jurisdiction, differing in its origin, theory, and methods from the common law.[42] As per the Wikipedia, equity is the name given to the set of legal principles germane to the English 'common law' tradition, which supplement strict rules of law operating harshly in application, with a view to achieving natural justice.[43]

Although in modern practice an important distinction between law and equity comprises the set of remedies each offers-money damages versus injunctions/decrees- from the jurisprudential perspective, the major distinction between law and equity remains the source of the rules governing the decisions. In the dispensation of justice in law, uniform application of rigid 'legal doctrines' or rules is resorted to. But equity lays much store by fairness and flexibility, and so only general guides, known as

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[42] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[43] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48.

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'maxims of equity' are the recourse of choice in equity. While law invokes the stipulations of the sovereign legal system, equity prods the conscience of the 'sovereign justice regime'. Over time, equity has evolved from an arbitrary exercise of conscience to an established corpus of legal norms.

In common parlance, the term dispute resolution is employed to signify ADR-alternative dispute resolution. ADR is a general term used to describe various problem-solving techniques that can be used as an alternative to litigation in court. These methods are designed to cater to the specific needs of the parties involved, and the nature of the dispute. The bedrock principle underlying litigation is the adversarial system, which is characteristically protracted, expensive, and disruptive. More significantly, by its very nature, it tends to embitter irreparably relationship between the disputant parties.[44]

The principal consideration underpinning recourse to ADR, therefore, is avoidance of expense in time and money, and stress. Where ADR is effective and resolves the dispute, it is far less costly and time-consuming than litigation. Much more importantly, a carefully planned and instituted ADR mechanism should result in a better resolution of the underlying dispute than traditional litigation.[45] This is largely because litigation imposes, upon the parties, a third party's findings as to the relative claims of the dispute. More often than not, the result is further litigation through an appeal, and/or initiation of a scheme to secure revenge. Lawyers are trained to advocate totally for their client's victory. Defenses are concocted; the opposing side is attacked / demeaned relentlessly. After all, even lawyers agree that the best lawsuit is the one avoided.

In contrast, ADR affords the parties an opportunity of investing time and effort into procuring their consensually accepted resolution to the dispute; they are, by the very nature of the process, committed to its success. Quite conspicuously, ADR has several advantages over a lawsuit, viz., speedier process; economical costs; flexible

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[44] Zahir, M 1988, Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.

[45] Ameen, N 2005, 'Dispensing justice to the poor: The village court, arbitration council vis-à-vis NGO', The Dhaka University Studies Part F, vol. 16, no. 2, pp. 103-22.

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process/procedure; collaborative/cooperative character; minimal stress; equitable; more satisfying. However, ADR is not a panacea for all conflicts. It is manifestly inappropriate for cases where a clear judicial precedent is required; cases purporting to test a law, or to create a new law; cases involving a public policy issue; cases involving perfection of title (fraudulent claim).[46] The patent demerits of ADR include: inappropriateness for some disputes; relinquishment of most court protections; deficit of full discovery; gamble for time vis-à-vis failure of lawsuit and limitations statutes. ADR encompasses a broad spectrum of activities ranging from a simple open door policy through friendly intercession to binding arbitration of statutory claims. More specifically, such activities cover a gamut of purely 'informal' to relatively 'formal' mechanisms and forums.

2.5 Psychology and Sociology of ADR

A person's speech and behavior are highly contingent upon what other people are saying and doing. People, who are deficient in social skill experience greater difficulties in social encounters, receive less positive feedback from others, view themselves as less skilled, and experience social anxiety more often than people who interact more skillfully. Nearly, other people mediate all of the outcomes that people strive to attain in life[47].

When people are publicly self-aware, they attend to aspects of themselves that may be observed by others. As a result, they become more concerned with how others were perceiving and evaluating them. As a result, they are more likely to monitor and control the images they covey in interpersonal encounters.

The effective and viable ADR process is strongly approaches the meditation, conciliation and arbitration of a human being. At the same time, it depends up the existing psychological and sociological context of a beneficiary stakeholder or the beneficiary groups. At the very advents of time, as the human beings were surviving

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[46] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48.

[47] Dhiman Chowdhury, Professor of Accounting, University of Dhaka- Knowledge, Interactions & peace- A Socio-Philosophical Analysis, Published by Dhaka Viswavidyalay Prakashana Samstha, University of Dhaka.

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for their existence in a prescribed society and they used to resolve their dispute using the conscience of psychology and sociology.[48]

Men can attain any goal through personal, organizational and institutional means. They have to organize land, labor, capital and organization together and define relationships and flow of information and actions for attaining those goals.

For achieving our goals, we need organization, control, logistics and communication. Very idea of an organization stems from the fact that the individual alone is unable to fulfill his or her needs and wishes.[49]

Men particularly in modern society find that they individually lack either ability or endurance to fulfill their basic needs lawful shelter, and safety. Organizational efforts make it possible, through the coordination of the lawful agencies. Conflict or dispute is an inevitable part of our social life and in course of time it intricate our mind and society. The mode of psychology and sociology are inflows the idea in the human mind to be rationale.

Psychology is a science, which studies the behavior of living organism in relation to its environment. The concept of mind was difficult to define at least operationally. By behavior,we mean those activities of an organism that can be observed by an outside person, or by an experimenter's instruments. By learning psychology, we know the perception, personality, emotion, filling and thinking of a man.[50]

Further, psychology is a science that diverted human's mind to decide any matter with deliberately, conscientiously and retionately. The ADR system, which in a position to make any effective decision needs effective motivation in a certain society. Psychology pervaded and infusion an effective stimulation over a human body and society to make him rationale.[51]

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[48] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

[49] Mercado, Carol. 2008. Barangay Justice System: Model of Citizen-Driven Justice System. Paper prepared for National Workshop on Local Justice, May 11-12, Dhaka.

[50] Muhammad Raushan Ali, Psychology- The science Of Behavior, department of Psychology

[51] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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Man is not only a biological organism but also a social being. His behavior is influenced and modified by others around him and in turn, their behaviors are modified by him. Psychology is, therefore, both a biological and social science. Social Psychology studies such phenomena as will influence behavior of individuals such as group pressure, socialization, intra and inter group conflicts, attitudes, prejudices and propaganda etcetera. By this way, men are being applied judicious and extra-judicious method with ADR in the arena of conflict and other activities of their social life to reduce their sufferings.

The term Sociology was invented at the beginning of the nineteenth century by the French Philosopher Augusta connote as a generic name for the social sciences, such as, economics and anthropology. Sociology is, in brief, the study of man in society. The emphasis of the study is on society and law as a mere manifestation, whereas Pound rather concentrates on law and considers society in relation to it[52]. It is a science which investigates the laws by which politically organized societies came into existence and the various social groups are related to each other, In fact, law regulates the life of the society and, as such, law and life of the society cannot be isolated[53].

Now we are explaining how the sociology influenced and justified the ADR method. From the very first of civilization of ancient society, the theme socialization prevailing to accumulate the hard needs of existing human beings. By socialization men reduce their sufferings and conflicts.

Sociology is, very simply, the scientific study of social behavior and human groups. It focuses on social relationships; how those relationships influence people's behavior; and how societies, the sum total of those relationships develop and change.[54] The sociological imagination-an awareness of the relationship between an individual and the wider group of a society. A key element in the sociological imagination is the ability to view one's own society as an outsider would, rather then only from the perspective of personal experiences and cultural biases. We can think of theories as attempts to explain events, forces, materials, ideas, or behavior in a comprehensive

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[52] Dean Roscoe Pound, Sociology of Law and Sociological Jurisprudence.
[53] Dr. Hamiduddin Khan, Jurisprudence and Comparative Legal Theory. P-34.

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manner. In sociology, a theory is set of statements that seek to explain problems, actions, or behavior. An effective theory may have both explanatory and predictive power.[55] That is, it can help us to see the relationships among seemingly isolated phenomena, as well as to understand how one type of change in an environment leads to other changes.

In sociological aspect, ADR evolved through ages in its own distinctive features. Contemporary all sorts of social problems were considered to be resolved with ADR mechanism. Sociology infused the ethical environmental atmosphere to resolve all sorts of conflict with ADR mechanism.[56]

2.6 Components of Successful ADR

A. Fairness

Any ADR enterprise developed and implemented by the EEOC must be fair to the participants. Both in perception and reality fairness should be manifested throughout all Commission ADR proceedings by incorporating each of the core principles identified in this policy as well as by providing as much information about the ADR proceeding to the parties as soon as possible. Fairness requires that the Commission provide the opportunity for assistance during the proceeding to any party who is not represented. Fairness also requires that any Commission-sponsored program include the following elements:

B. Voluntariness

ADR programs developed by the Commission will be voluntary for the parties because the unique importance of the laws against employment discrimination requires that a federal forum always be available to an aggrieved individual.[57] The Commission believes that parties must knowingly, willingly and voluntarily enter into an ADR proceeding. Likewise, the parties have the right to voluntarily opt out of a proceeding at any point prior to resolution for any reason, including the exercise of

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[55] Khair, S 1998 2004, 'Alternative dispute resolution: How it works in Bangladesh', The Dhaka University Studies, Part F, vol. 15, no. 1, pp. 59-92.

[56] Zahir, M 1988, Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.

[57] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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their right to file a lawsuit in federal district court. In no circumstances will a party be coerced into accepting the other party's offer to resolve a dispute. If the parties reach an agreement, the parties will be allowed to settle as long as the proposed agreement is lawful, enforceable, and both parties are informed of their rights and remedies under the applicable statutes.

C. Neutrality

Commission ADR proceedings will rely on a neutral third party to facilitate resolution of the dispute. ADR proceedings are most successful where a neutral or impartial third party, with no vested interest in the outcome of a dispute, allows the parties themselves to attempt to resolve their dispute. Neutrality will help maintain the integrity and effectiveness of the ADR program.[58]

The facilitator's duty to the parties is to be neutral, honest, and to act in good faith. Those who act as neutrals under EEOC auspices should possess a thorough knowledge of EEO law, and must be trained in mediation theory and techniques.[59]

D. Confidentiality

Maintaining confidentiality is an important component of any successful ADR program. Subject to the limited exceptions imposed by statute or regulation, confidentiality in any ADR proceeding must be maintained by the parties, EEOC employees who are involved in the ADR proceeding, and any outside neutral or other ADR staff. This will enable parties to ADR proceedings to be forthcoming and candid, without fear that frank statements may later be used against them. To accomplish this purpose, the Commission will be guided by the nondisclosure provisions of Title VII and the confidentiality provisions of ADR which impose limitations on the disclosure of information. In order to encourage participation in a Commission sponsored ADR program, the Commission will include confidentiality provisions in all of its ADR programs or projects, and will notify the parties to the dispute of the protection offered by confidentiality provisions.

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[58] Khair, S 1998 2004, 'Alternative dispute resolution: How it works in Bangladesh', The Dhaka University Studies, Part F, vol. 15, no. 1, pp. 59-92.

[59] Mercado, Carol. 2008. Barangay Justice System: Model of Citizen-Driven Justice System. Paper prepared for National Workshop on Local Justice, May 11-12, Dhaka.

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In order to ensure confidentiality, those who serve as neutrals for the Commission should be precluded from performing any investigatory or enforcement function related to charges with which they may have been involved. The dispute resolution process must be insulated from the investigative and compliance process.[60]

E. Enforceability

Any agreement reached during an ADR proceeding must be enforceable. An allegation that an ADR settlement agreement has been breached should be brought to the attention of the EEOC official responsible for that program function. The Commission will review and investigate the allegation and determine whether it will utilize its authority and resources to seek enforcement of the agreement.[61]

2.6.1 There might be six basic components to a Corporate ADR program

a. **Executive Education; Educate management**: Objective studies prove the effectiveness of ADR programs when they are supported by both top executives and line management educated in ADR principles.

b. **Counsel Selection**: Select counsel skilled in mediation and arbitration, but capable of litigation if the process fails. Counsel should understand the client's long-term interests. The key is counsel attuned to reasonable resolution, not the "killer" attorney.

c. **Administrative Assistance**: Choose administrators such as AAA, CPR, or the like, for staff services when the complexity of the case warrants the expense.

d. **Neutral Selection**: Maintain a list of competent and sophisticated mediators and arbitrators with expertise in the subject matter, a good track record, and an available venue for hearing the case. A good neutral maintains rapport with counsel and parties and helps them resolve the matter.

e. **Pre-hearing Preparation**: Support a full preparation for the mediation or arbitration sessions so that all understand the best and worst alternatives to a negotiated agreement. Be sure that there is adequate discovery, but not in a litigation mode that can cause costs to skyrocket.

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[60] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

[61] Khair, S 1998 2004, 'Alternative dispute resolution: How it works in Bangladesh', The Dhaka University Studies, Part F, vol. 15, no. 1, pp. 59-92.

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f. **Resolution Assessment**: Be open to a reasonable resolution. A willingness not to demand the last dollar can result in tremendous savings in costs and can create future goodwill.

2.6.2 Meaner

The hallmarks of arbitration are economy, efficiency and privacy. The agreement to arbitrate should spell out the jurisdiction whose law should govern, except for conflicts of law. Discovery should be limited.[62] Interrogatories should be no more than twenty (20) questions. No depositions except for witnesses who cannot or will not appear voluntarily. The agreement should spell out the hearing dates and the date after closing papers are submitted when a decision is to be rendered. At the option of any party, direct examination can be presented by affidavit with the right of the opponent to require the witness to be produced for cross-examination. If the parties want the rules of evidence to apply, the agreement should say so.[63]

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[62] Mercado, Carol. 2008. Barangay Justice System: Model of Citizen-Driven Justice System. Paper prepared for National Workshop on Local Justice, May 11-12, Dhaka.

[63] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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CHAPTER-III

Historical Development Of ADR In The Sub-Continent

In this Chapter, I will discuss about the concepts of Alternative Dispute Resolution (ADR) with its features historically different from traditional justice delivery systems in Bangladesh, India and Pakistan. I will also focus on the theories of ADR, various types of ADR especially negotiation, mediation and arbitration. The state of Case Management and Court Administration (CMCA) in these countries and needs for alternative dispute resolution mechanisms will also be discussed in this chapter. Indian sub-continent has a very rich tradition of ADR methods, which was existent in the form of Panchayats. In fact, the Judiciary respected the Panchayat's decisions also. In Sitanna v.Viranna, AIR 1934 SC 105, the Privy Council affirmed the decision of the Panchayat in a family dispute.

3.1 Brief History of Dispute Resolution systems in Bangladesh, India and Pakistan:

India and Pakistan gained independence in late 1940s and Bangladesh in early 1970s. The legal and socio-political systems of these countries have common colonial origins. Traditionally the mostly followed method of formal dispute resolution here is adversarial in nature.[1] "It passed through various stages and has been gradually developed as a continuous historical process. The process of evolution has been partly indigenous and partly foreign and the legal system of the present day enumerates from a 'mixed' system which have structured legal principles and concepts modeled on both Indo-Mughal and English law."[2] This sub-continent has history of over five hundred years of Hindu and Muslim periods and about 2 hundred years of British periods. Each period was distinctive it its legal system. The philosophy of crime and punishment in ancient India was based on the idea that punishment removes impurities from and reforms the character of the accused. Specific methods were followed in awarding punishments, i.e. by gentle admonition, by severe reproof, by fine and by

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[1] Mercado, Carol. 2008. Barangay Justice System: Model of Citizen-Driven Justice System. Paper prepared for National Workshop on Local Justice, May 11-12, Dhaka.

[2] Azizul Hoque The Legal System of Bangladesh, BILIA 1980 Page1

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corporal punishment.[3] The degrees of punishment would vary at length depending on nature of offences and age, physical condition, caste, sex etcetera of the accused. In the ancient Hindu period of Kingship extending over one and a half thousand years the administration of justice would fell under the absolute domain of the Kings reigning over states and regions of diverse populations. The Kings' Courts would work often under the advice of the Brahmins, Chief Justices and other Judges, Ministers and representatives of the trading communities to the Kings.[4] Next to that Court were Courts of the Chief Justice, Special Tribunal, District/Town Courts and Village Council. The composition, jurisdiction, functions and decision making processes of each of these Courts was different from others. The decisions of the King's Court were binding on all other Courts. Generally bench of Judges' would mitigate justice. The appointment procedures were both restrictive and selective. Neither Sudras nor women were allowed to be judges. In the ancient Hindu period trial would consist of filing of the plaint and reply, investigation and trial and final pronouncement of decision or verdict. Evidence consisted of basically documents, statements of witnesses and incriminating materials and sometimes the circumstances. Apart from the above judicial procedures trial was held also by ordeal and jury. The trial by ordeal would deal with disputes where direct evidences were not available depending on the religious faiths of the people and prevalent customs. The well known ordeals were by tire, water, poison, rice-grains and lot. Ancient jurors would assist the judges pronouncing the judgments formally through placement of facts about causes of disputes and truth of the allegations leveled.[5]

Medieval India passed through the Muslim rule beginning with the disintegration of Hindu Kingdoms after the invasion of Turkish Muslims introducing Turkish system of administration of justice. The system was basically rooted in the faith of absolute trust and faith in Almighty Allah, observance of the religious scripts like the Holy Quran, the Sunnah of Prophet (SM), Quias, Izma, Istihsan, Istidlal etcetera of the famous

[3] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

[4] The legal system of Bangladesh- a Comparative Study of Problems and Procedure in Legal Institutions. Barrister Md. Abdul Halim. P-37

[5] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48.

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Muslim Jurists.[6] The Muslim Period may grossly be subdivided to the periods of Sultanate of Delhi and Mughal, Empire. The Mughal period started in 1526 after Zahiruddin Mohammad Babar had conquered Delhi. Under the Sultanate different Courts in different administrative divisions having definitive jurisdictions existed. In the capital were the Courts of the King, Chief Justice, Sadar-e-jehan, Dewan-i-Mazalim, Dewan-i-Risalat and Dewan-e-Siyasat. The Sultan would be presided over the King's Court exercising original and highest appellate jurisdictions in all kinds of cases in the realm. Two highly educated and experienced Muftis would assist the Sultan in the discharge of his functions. The Courts of Dewan-i-Mazalim and Dewan-i-Risalat were the highest Courts of criminal and civil appeals respectively. In the absence of the Sultan Quazi-ul-Quzzat, appointed by the Sultan from among the most virtuous of the learned, men of the Kingdom, presided over these Courts. The office of Sadre Jahan was created in 1248AD remaining for a long time separate from the office of the Chief Justice.

The said posts were amalgamated and separated during the rule respectively of Emperor Alauddin and Firoz Tuughlak Dewati-e-Siyasat was established to deal with prosecution of cases of rebellion and high treason by Mufti, Pandit, Muhtasib and Dadbak. In the province there were Courts of Adalat Nazim Subah exercising both original and appellate jurisdiction in original cases. Adalat Kazi-e-Subah exercising both original and appellate jurisdiction against District Quazis in civil and criminal cases. Dewan-e-Subah exercising both original and appellate jurisdiction in revenue matters and Sadar-e-Subah exercising jurisdiction in grants etcetera: In theiDistrict level there were Courts ofthe District Quazi, Fouzdar, Mir Adil and Kotwal. Faujer Courts and Mir Adil Courts dealt respectively with petty criminal matters and land revenue matters. Kotowals were authorized to try the police and municipal cases. In the Fargana Headquarters there were Courts of Quazi-c-Faganah exercising jurisdictions over all civil arid criminal cases except appeals and Kotwals trying petty

[6] The legal system of Bangladesh- a Comparative Study of Problems and Procedure in Legal Institutions. Barrister Md.Abdul Halim. P-43

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criminal eases. In each group of villages there was a panchayet deciding petty local criminal and civil cases.[7]

The Mughal period extending from 1526 to 1757 AD was characterized by more or less continuation of the previous set-up of the Courts with creation of some distinctive feature! The Emperor created a Department of Justice in the capital.[8] There were the Courts of the Emperor, the Chief Justice and Revenue. In each of these Courts 4 officials namely Daroga-eAdalat, Mufti, Muhtasib and Mir Adil were attached. In the Provinces there were Adalat-e-Nazim-e-Subah, Adalat-e-Qazi-e-Subah and Adalat-e-Dewan-e-Subah, This category of Courts would hear appeals from the subordinate Courts together with exercising original jurisdiction. The 2nd category had jurisdiction over civil and criminal cases. The 3rd category of Courts was presided over by the Dewan-e-Subah having both original and appellate jurisdiction. In the District level there were Courts of the District Quazis, Fouzdars, Kotwals and Amalguzari Kutchery. In the Parganas there were the Quazi-e-Pargana, Kotwal and Amin-e-Pargana.

Before colonization in **Pakistan** it may be the head of the tribe or group of tribal chiefs (council of elders) presiding Jirga; and it was largely used as a customary law in pre-colonial settings, which was mandated to resolve both criminal and civil disputes amongst tribes. Thus Jirgas, where no procedure of law was adopted, were used as substitute for courts. The rulers of the sub-continent were having the system of Kardars[9] as revenue collectors with joint responsibility of controlling crimes. Thus the concept of the Jirga is embedded in the custom where the heads of the tribes used to decide the disputes of their tribes but later it was redefined in the light of crime, custom and law with differential powers vested in various tribes. As colonial masters opted for strategic compromises to secure indirect rule through a class of local middlemen, predominantly feudal lords and tribal chiefs, that led to the merging of tribal arbitration with English laws (common laws).

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[7] Khair, S 1998 2004, 'Alternative dispute resolution: How it works in Bangladesh', The Dhaka University Studies, Part F, vol. 15, no. 1, pp. 59-92.

[8] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[9] Nafisa shah, "Mdiations in the frontiers" in her Ph. D. dissertation, notes available on file with writer.

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As the then first Judicial and advocate-general of Sindh, Captain Keith Young wrote[10], "The only significant difference between the tribal and colonial legal system was that the law went from being oral to written and later it was used as semi-judicial body through which the local administration controlled the law and order situations by calming down the warring tribes in the frontiers of the British Empire." It is observed by many commentators that Jirga councils were constituted by the British as a political way to strengthen their borders by winning the loyalties of tribal chiefs. However, bureaucracy had the final say, as the chief officer in the area, called Political Agent, or then Deputy Commissioner, coordinated such Jirgas and had the last word[11]. Jirga members were sardars (chiefs, also called Tumandar) of the tribes and each Sardar in his capacity as a member of the Jirga had special administrative and punitive powers. Rather than rationalizing and making the formal system stronger, the British colonizing powers have left justice in the hands of the tribal judiciary.

The legislative history of Jirga has been discussed by Superior court in various judgments[12]. From earlier days of colonization to independence and thereafter, a nexus existed between Tribal chiefs and the colonial British administrators, including the present civil bureaucracy (local Police); which is still going on. The judiciary as an institution has never been developed in Pakistan and particularly in tribal or semi-tribal areas largely because of the colonial administrative system itself; and moreover the mechanism of parallel judicial authorities of tribal chiefs arbitrating local customs was kept intact. The executive district magistrate, who was primarily a revenue collector, had judicial jurisdiction over criminal matters as well.

The British period went through remarkable changes in the entire concepts and systems; of administration of justice in India. In the Presidency towns of Bombay, Calcutta and Madras the Company participated and cooperated with the Mughal authorities on the strength of some Charters in running the administration of justice till 1726. There could hardly be harmony in procedures and practices between the

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[10] Amilie Baras, The mechanics of honor in Pakistan, Journal article 2, Vol. 3, No. 5 October 2004, by AHRC.

[11] Prominent laws which conferred widespread powers on colonizing administrators were Frontier Crimes Regulation enacted in 1901 and other laws during colonization period.

[12] PLD 1957 Quetta 1, PLD 1957 Peshawar 100, PLD 1991 Quetta 5 (Confirmed in PLD 1993 SC 341), 2004 P. Cr. L.J 1523 (Karachi).

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Company Courts and Crown Courts. Until 1772 the natives would run the civil and criminal justice delivery system. For the first time the Charter of 1726 opened up the way of influx of English law in India. The Charters brought changes in the Judiciary through establishing Mayor's Court in each Presidency town. These Courts had jurisdiction to decide civil cases arising out of the territorial jurisdiction of the Presidency towns and appeal of the subject matter of 1000 pagoda for more would lie in the Privy Council. For the first time recourse from the decisions of the Courts in India was made available to the litigants to the King-in-Council in England. Per contra the Governor-in-Council as Justice of the Peace would fully dominate the criminal administration of justice in the Presidency towns having both original and appellate jurisdiction in some specific criminal cases. Under this Court was the Court of Quarter Session composed of three Justices-of-Peace dealing with criminal cases committed in the Presidency towns except high treason.

The Charter of 1753 replaced the earlier one of 1726 introducing the provisions of subordination of the Mayor's Courts to the Government excluding the jurisdiction in civil disputes between the natives unless consented to and submitted before it by the parties. Under the Charter of 1753 the cases of the value of Rupees 15 the Court of Requests was created. Appellate Jurisdiction was vested in the Privy Council. The Court of the Governor- in-Council exercised both original and appellate jurisdiction in criminal matters and only appellate jurisdiction in civil matters. For some defects inherent in the above Charter Regulating Act of I 773 was passed by the House of Commons followed the establishment of the Supreme Courts firstly in Calcutta and thereafter in Madras and Bombay after replacing the Mayor's Courts through Charter of 1774.[13]

The Courts of the Collector Quarter Session. Justice of Peace and Requests were placed under the supervision of the Supreme Court. The Supreme Court exercised all types of jurisdictions and over British persons and persons directly or indirectly employed in the service of the Company. The creation of the Supreme Court and

[13] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48.

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existence of Company Courts led to inevitable clashes between the judiciary and the executive over power and positions, jurisdictions and procedures.[14] In the process of harmonious assimilation of the two sets of Courts the British Crown took over the governance of India in 1858 and subsequently uniform Codes of Civil and Criminal Procedure and Penal Code were enacted. Soon in mid and late 1860s under different Charters the Supreme Courts were replaced by the High Courts of Judicature in the 3 Presidency towns abolishing the Sadar Dewani Adalat and Sadar Nizamat Adalat. The High Courts of Judicature succeeded to the original and appellate jurisdiction of the Sadar Dewani Adalat and Sadar Nizamat Adalat. Appeals from the decisions of the High Courts of Judicature would lie to the Privy Council.

In the Mufassil areas Civil Courts of the District Judges, Additional District Judges, Sub-Judges and Munsiffs were created under the Civil Courts Act 1887 and criminal Courts of Sessions, Presidency Magistrates. Magistrates of the 1st, 2nd and 3rd Class were created under the Code of Criminal Procedure 1898 while the Courts of Small Causes operated under the Small Cause Courts Act 1887. The Government of India created Federal Court above the High Courts and under the Privy Council. The Federal Court was presided over by 3 Judges appointed by His Majesty.[15]

In post-colonial societies where the formal modern judicial institutions have not been developed and strengthened properly, the informal and the traditional justice systems are still widely in practice particularly in South Asia. With the adoption of new Constitutions in India and Pakistan the highest Courts became the Supreme Court and the subordinate Courts and the judicial structure were the same as in 1947.[16] Gradual changes, though very slowly, begun to take place in the justice delivery systems. One notable feature was that the personal laws of the communities predominant in each country were changed, modified or enacted whereas other laws existing in 1947 went through little changes with the exception of introduction of ADR in the justice delivery systems.

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[14] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[15] Khair, S 1998 2004, 'Alternative dispute resolution: How it works in Bangladesh', The Dhaka University Studies, Part F, vol. 15, no. 1, pp. 59-92.

[16] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

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In fact, contending parties in the sub-continent refer to resolve their disputes for years to local bodies like Punchaiats, Jirga, Village Courts, Municipal Board, Lok Adalat etcetera composed of honorable elders nonetheless elected representatives of the community. In Pakistan, nowadays Jirga is not only used as a customary practice to legitimize honor crimes or harmful traditional practices like Vani, a system in which girls are given as compensation to settle the disputes, which is not the primary thrust of this study whereas it is also used as a mode of reconciliation, mediation or arbitration mainly for perceived communal harmony known as Restorative Justice.[17]

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[17] Mercado, Carol. 2008. Barangay Justice System: Model of Citizen-Driven Justice System. Paper prepared for National Workshop on Local Justice, May 11-12, Dhaka.

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CHAPTER-IV

ADR IN BANGLADESH AND ACCESS TO JUSTICE

This Chapter will give a brief introduction to the legal systems of Bangladesh. The administrations of justice system in this country, which the research has selected for the work on 'Alternative Dispute Resolution' (ADR) will shortly be discussed. Bangladesh follows the adversarial legal system embedded in her long colonial rule for nearly two centuries. Consequently, the defects and the inherent in adversarial system will also be discussed in this chapter.

In this Chapter, I would like to embark on the trends, mechanisms, and prospects of ADR in Bangladesh. Different relevant laws such as the Code of Civil Procedure, 1908, the Shalish Ain, 2001, the Village Court Act 2006 etcetera will be analyzed. We will show the function of Alternative Dispute Resolution in Bangladesh and different methods used here to reach out a solution out of court system.[1]

4.1 Different Types of ADR Practiced in Bangladesh

Arbitration: Arbitration was devised to overcome some of the problems encountered in litigation, and is often regarded as part of the ADR repertoire. In England and Wales arbitration is regulated by the Arbitration Act 1996. Although arbitration empowers a third party to decide the outcome of a dispute, it is more likely that the arbitrator will have subject-area expertise, which, for some, makes the decision more palatable. The decision is made according to the relevant law, is binding and is not normally subject to appeal[2].

Like litigation, the process of arbitration is adversarial and mostly formal; however, unlike a court hearing, the proceedings take place in private, and the parties usually select the arbitrator or panel of arbitrators. In arbitration, the parties have greater control of procedural matters to suit the nature of the case. Where a dispute involves complex issues, extensive documentation and large numbers of witnesses, arbitration can be more expensive and more time-consuming than litigation in the courts.

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[1] Justice Mustafa Kamal Review's of the Family Courts Ordinance, 1985 round table talk, The Daily Star Sunday, April 29, 2007)

[2] The IFC Mediator Handbook
http: // www. ifc. org / wcm / connect / topics_ext.

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High-Low Arbitration: This is a form of arbitration in which the parties have agreed the parameters for the outcome prior to the arbitration. The arbitrator may or may not know what the parameters are in advance of issuing the award. Should the arbitrator make an award within the range established by the parties, the award made would become final. If the arbitrator awards an amount lower or higher than the range established by the parties, the lower or higher limit set by the parties will apply. This variant is selected when the parties wish to limit their risks.

'Baseball' arbitration (or 'pendulum' or 'final-offer' arbitration) is a variation of high-low arbitration, sometimes used in the USA, named from the method used in player salary negotiations in major-league baseball. Each party names a figure at which they are prepared to settle. The arbitrator must then choose between the two figures, but does not have the authority to modify the figures.

4.1.1 Potentially Binding Third Party Decisions

Adjudication: The most common form of adjudication is by written submissions to a neutral third party, who is usually a specialist in the area of dispute. In some cases, these submissions are all that the adjudicator has and thus, as there is no opportunity for revision, there is great pressure on the parties to present their best case. In some cases, the parties may each give a response to the other party's submission. There may also be an oral hearing or a site visit. The process is generally short and the decision is binding, although there is usually provision for appeal within a stipulated period. Consumer Adjudication schemes operated by trade associations, industry sectors or large companies with a consumer focus, are also now quite common to help deal with consumer complaints about their members, and generally focus on low value claims and aim to provide efficient results[3].

Expert Determination (ED): Expert determination may be used to decide on a specific matter of contract or other law, or on disputed facts or financial valuations. Usually the expert, who is selected by the parties, investigates and reports on the

[3] The IFC Mediator Handbook
http: // www. ifc. org / wcm / connect / topics_ext

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issue, and does not rely exclusively on submissions made by the parties. The decision is usually binding and cannot be appealed.[4]

Ombudsperson Services: Originating in Scandinavia, there are now many ombudsperson schemes in the UK and other countries in a range of public and private sector contexts. Decisions are usually based upon written evidence, although there is an increasing trend towards meeting with the parties, both jointly and individually. The process provides a cheap and relatively informal means for individuals to complain of maladministration or improper decisions by major institutions, businesses or government.

Most ombudsperson schemes will not investigate a complaint until the seller of goods or provider of services has been through pre-set steps, making a serious attempt to resolve the complaint, and the parties have become deadlocked. Most ombudsperson services are funded through a levy on the industries they serve, and are free to the individual complainant. Most ombudsperson decisions are binding on the industry member but not on the complainant.[5]

Med-Arbitration: Short for mediation-arbitration, this process gives the parties the opportunity to use mediation to reach a settlement, and then to rely on a decision by a neutral if there are issues on which no agreement can be reached. This process encourages parties to create their own settlement in the knowledge that an arbitrator will otherwise impose an outcome.

Sometimes, the parties choose to have the same person act as both mediator and arbitrator, while others choose one person to be the mediator and another to be the arbitrator. Knowledge that the mediator may eventually act as arbitrator may cause parties to be more restrained in revealing their real needs and positions. There are other potential difficulties if the same person acts in both roles; particularly challenging is the question of how to treat information obtained confidentially in private meetings. It is therefore often desirable for a different neutral to arbitrate on

[4] Dr. Md. Akhtaruzzaman, 2011, "Concept and Laws on Alternative Dispute Resolution and Legal Aid, Law's Empire Publishing, Dhaka.

[5] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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the outstanding issues, even though this will involve a further presentation of the parties' cases and some further costs[6].

Occasionally, the reverse arrangement of Med-Arb is used, with the arbitrator given the formal obligation to hear the case and decide on an award, keeping the decision private, and then to operate as a mediator; if the case does not settle, the decision and the award are disclosed.[7]

4.1.2 Non-binding Third-Party Involvement

Early Neutral Evaluation (ENE): Early neutral evaluation is a preliminary assessment of facts, evidence or legal merits by a neutral. It is not binding, but provides an unbiased evaluation of relative positions as well as guidance as to the likely outcome if the case were to be heard in court. The parties appoint an independent person who expresses an opinion on the merits of issues specified by the parties. The process is designed to serve as a basis for further and fuller negotiations or, at least, to help parties avoid unnecessary stages in litigation.

Judicial Appraisal: This is similar to ENE described above. The most common form of judicial appraisal is where the case is presented in written form to a judge (usually retired), who then gives an appraisal of the likely result if the case goes to court. It is different from obtaining counsel's opinion in that the judge receives submissions from both sides. The parties must agree the form and extent of submissions and whether the appraisal is to be binding or not; reaching agreement on those preparatory issues may sometimes be a challenge in itself. In the USA, this route has been extended to a 'summary jury trial'.

This is a non-binding, abbreviated, mock trial using a panel of actual jurors. Rules of evidence and testimony are usually modified to expedite the process. The trial is usually followed by a negotiation or mediation. A judge may be selected by the parties

[6] The IFC Mediator Handbook
http: //www. ifc. org /wcm /connect / topics_ext
[7] Siddiqui, K 2005, Local government in Bangladesh, The University Press Limited, Dhaka.

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to moderate the trial and to act as mediator following the jury award. The parties may question the jurors about the factors that influenced their decision[8].

Neutral Fact Finder: This process is similar to expert determination, described above, but restricted to the clarification of particular factual issues, and non-binding in that the neutral does not normally make an award.[9]

Mediation: Mediation is the primary form of ADR and covered in detail in this handbook.

4.1.3 Variations On Mediation Include

Co-mediation: In certain situations parties may require the assistance of more than one experienced mediator. From the outset, the two (or more) mediators, both neutral, will work with the parties to design the process to be used during the mediation. They will both act as mediators throughout the process and usually have equal status.

Project or Alliance Mediation: This is a dispute prevention mechanism whereby a mediator is appointed at the outset of a long project, or a new major business relationship, to act as the point of contact when communication problems or disagreements are anticipated or arise.

Executive Tribunal: Sometimes called the 'mini-trial'. A senior executive from each party joins the mediator, or neutral, and they sit as a panel to hear the submissions from each side's advisers in joint meeting. The executives normally have had no previous direct involvement in the dispute and bring a senior management perspective to the issues. After the submissions in joint meeting, the senior executives retire, usually with the neutral, and negotiate a settlement. The neutral may act as chairperson or even adviser.[10]

Conciliation: The meaning of the terms conciliation and mediation may differ or be interchangeable, depending on the country or dispute sector involved. In the UK health sector, for example, conciliation is often used to mean a process of neutrally

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[8] The IFC Mediator Handbook
http: // www. ifc. org / wcm / connect / topics_ext

[9] John Bolton, *The mediation handbook: A practical guide for lawyers on the art of mediation*, Chusid, Melbourne.

[10] Halim, MA. 2011 ADR In Bangladesh: Issues And Challenges.

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facilitated discussion of complaints, with no agreement over financial compensation normally included in the outcome. By contrast, in civil engineering contracts, conciliation traditionally included a solution to a dispute being recommended by the neutral. Around the world, in many customary and traditional forms of dispute resolution, conciliation by a family or community elder involves the third party making recommendations on potential settlement options to the parties[11].

Independent Interventions and Facilitations: Often described under the umbrella term of facilitation independent interventions are the involvement of an impartial third party to facilitate negotiations, discussions, consensus building, problem solving, or relationship building, or to manage existing or potential difficulties in a wide variety of situations.

The aim of an independent intervention may be to:

- encourage a dialogue, where the intervention allows voices to be heard and issues raised
- plan the next steps to be taken or devise a framework for future action
- enable finality – a decision or agreement
- Prepare for other processes such as mediation, ENE or adjudication.[12]

Processes are tailored to the needs of the users, and can draw on a range of models such as:

Assisted Stakeholder Dialogue – the neutral uses practical and flexible processes to improve relationships between stakeholders in order to clarify issues, resolve an existing conflict or achieve consensus.

Brokered Talks–A neutral act as an impartial, creative force to hold ‘talks about talks’, when negotiations have become deadlocked because of the number of parties or the complexity or sensitivity of the issues.[13]

Deal Mediation–a neutral assists with contractual negotiations between businesses, although there is no dispute as such.

[11] The IFC Mediator Handbook
http: // www. ifc. org / wcm / connect / topics_ext

[12] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

[13] Dr. Md. Akhtaruzzaman, 2011, “Concept and Laws on Alternative Dispute Resolution and Legal Aid, Law’s Empire Publishing, Dhaka.

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Independent Chairing - an independent chairperson will manage the process rather than dictate the content or the outcome. Independent chairing can be an end in itself, or it may lead to formal brokered talks or another form of dispute resolution.[14]

Independent Review - an impartial investigator sets up terms of reference for an inquiry into facts, an identified problem or a difficult set of circumstances, and makes recommendations or reports findings according to agreed terms of reference.

Relationship Building – interventions can be within organizations to strengthen or restore working relationships, generate a common purpose and increase trust. Alternatively, the aim can be to enhance external relationships, for example, with suppliers or contractors.

4.2 ADR Offers Flexibility and has Applications Beyond an Individual Dispute

ADR is flexible and adaptable, and specific ADR processes can be devised to suit complex disputes in commercial and other sectors.

ADR also has a role beyond the individual litigated dispute. Businesses often seek a structure that will provide a sustainable way of preventing or minimizing conflict with, for example, employees, suppliers or joint venture partners, and ADR processes frequently feature as an integral part of such designed dispute resolution systems.[15] ADR can also be used as part of a consultative design process. Where there is a willingness to resolve a dispute, tackle a problem or take preventative action, an appropriate process can be found or designed.

ADR systems may be generally categorized as negotiation, conciliation/ mediation, or arbitration systems. Negotiation systems created a structure to encourage and facilitate direct negotiation between parties to a dispute, without the intervention of a third party. Mediation and conciliation systems are very similar in that they interject a third party between the disputants, either to mediate a specific dispute or to reconcile their

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[14] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

[15] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ban.asp.

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relationship.[16] Mediators and conciliator may simply facilitate communication, or may help direct and structure a settlement, but they do not have the authority to decide or rule on a settlement. Arbitration systems authorize a third party to decide how a dispute should be resolved.

4.3 Functions and Functionaries of ADR in Bangladesh

In the subcontinent, like Bangladesh, India and Pakistan ADR are used in multifaceted dimensions. From all the attention that it has received recently, particularly from the time of inauguration of the International Centre for Alternative Dispute Resolution (ICADR), one may get an impression that it is a recent concept. Arbitration, conciliation and mediation have long traditions in several parts of the world particularly, in the Indian subcontinent.

There is a long and old tradition in the subcontinent of the encouragement of dispute resolution outside of the formal legal system[17]. However, with the advent of British Raj the formal legal system introduced by the British began to rule on the basis of the concept of omissions rule of law and the supremacy of law. It was only after independence and after realization that the formal legal system will not be in a position to bear the entire burden, it is felt that the system requires drastic changes.[18] The mounting arrears in the courts, inordinate delays in the administration of justice, and expenses of litigation have gradually undermined the people in the system. Besides this the Red-tapisom and other barriers/obstacles of civil administration functionaries hampered effectualized and materialized of this method.

Early in the sixties, the existing context of ADR, the jurists, deeply thinker and eminent people in the legal, administrative and commercial fields have come together to establish an institution known as "The International Centre fore Alternative Dispute Resolution" (ICADR). The international centre was registered as a society under the

[16] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.

[17] K. Jayachandra. "Alternatives Dispute Resolution in India", edited by P.C Rao and William Sheffield in Alternative Dispute Resolution: Universal Law Publishing Co. Pvt.Ltd.,pp 79-81.

[18] Dr. Md. Akhtaruzzaman, 2011, "Concept and Laws on Alternative Dispute Resolution and Legal Aid, Law's Empire Publishing, Dhaka.

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societies Registration Act. The international center is intended to spread ADR culture in this part of the world.

The main objectives of the centre are:[19]

(i) to propagate, promote and popularize the settlement of domestic and international disputes by different modes of ADR;

(ii) to provide facilities and administrative and other support services for holding conciliation, mediation, mini-trials and arbitration proceedings;

(iii) to promote reform in the system of settlement of disputes and its healthy development suitable to the social, economic and other needs of the community;

(iv) to appoint conciliators, mediators, arbitrators, etcetera; when so requested by the parties;

(v) to undertake teaching in ADR and related matters and to award diplomas certificates and other academic or professional distinction;

(vi) to develop infrastructure for education, research and training in the field of ADR;

(vii) to impart training in ADR and related matters and to arrange for fellowships, scholarships, stipends and prizes.

In addition to efforts of private institutions such as the International Centre for ADR, there is an urgent need for the judiciary to evolve court-annexed ADR schemes and make ADR a part of the judicial repertoire of dispute management.[20]

ADR uses or designs to materialize a wide variety of goals of the society. Some of these goals are directly related to improving the administration of justice and rule of law. Some are related to other development objectives such as economic restructuring or the management of tensions and conflicts in communities. Efficient dispute resolution may be encouraged the economic development and delayed justice or corruption inhibit foreign investment and economic restructuring.[21]

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[19] Halim, A.B "The Legal System of Bangladesh"

[20] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48.

[21] Halim, MA. 2011 ADR In Bangladesh: Issues And Challenges.

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It is thought that ADR can encourage the positive court reforms, by-pass ineffective and discredited court system procedure, upheld popular satisfaction with dispute resolution, increase access to justice for disadvantaged, removing case backlog, assisting illiterate poor who cannot afford to maintain the cost of the courts, introducing small informal systems which can better reach geographically dispersed population and reduce the cost of resolving disputes. It can also increase the sense of civic engagement, reduce the level of tension and conflict in a community[22]. ADR method can provide streamlined procedures to accelerate case disposition. In some cases, these procedures may serve as models that can letter be incorporated into formal court procedures. If so, court-annexed ADR may turn out to be a catalyst for more extensive court reform.[23]

4.4 ADR and Case Management and Court Administration (CMCA)

The introduction of management practices in the judiciary has been a topic of discussion for quite some time now. During this period, many ideas have been mooted to tackle the enormous backlog of pending cases. While some of these ideas were implemented, others did not cross the stage of discussion and debate.

Consequently today, when we talk of the pendency of cases, we refer to figures running into several cores. So much so that it has been said that at the current rate of disposal, it would take more than 300 years to clear the backlog, provided no fresh cases are instituted during this period.

While this assessment needs no comment, the fact remains that even on a conservative estimate, it may take decades to achieve a stage of zero pendency.[24]

4.5 Past attempts in Indian Legal System

It is not as if there has been any lack of effort to speed up the justice delivery system. Unfortunately, the attempts that have been made yielding to limited results. For example, the Criminal Procedure Code has been overhauled and yet the pendency of

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[22] Abdul Halim. Md. Barrister at Law. Goals or Objectives of ADR: ADR in Bangladesh: Issues And Challenges CCB Foundation: p-63-65.

[23] Folberg, Jay and Taylor, Alison 1984, *Mediation: A comprehensive guide to resolving conflicts without litigation*, Jossey-Bass, San Francisco.

[24] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ban.asp.

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criminal cases remains very high. Over the years, several Tribunals have been set up ostensibly to provide quick, informal and inexpensive remedies to the litigants apart from providing for a uniformity of approach, predictability of decisions and specialist justice.[25]

However, in the Report of the Arrears Committee (1989-90) popularly called the Malimath Committee Report it was concluded that not all Tribunals functioning in the country have inspired confidence in the public mind. The reasons include lack of competence, objectivity and a judicial approach. The constitution, power and method of appointment of personnel thereto and the actual composition of the Tribunals are also said to be contributory factors.

The Supreme Court has also not been particularly charitable in its assessment of the functioning of various Tribunals. In R.K. Jain vs. Union of India the Supreme Court observed:

> "An intensive and extensive study needs to be undertaken by the Law Commission in regard to the constitution of tribunals under various statutes with a view to ensuring their independence so that the public confidence in such tribunals may increase and the quality of their performance may improve. We strongly recommend to the Law Commission of India to undertake such an exercise on priority basis."[26]

More recently, in L. Chandra Kumar vs. Union of India and others the Supreme Court unequivocally said,

"That the various tribunals have not performed up to the expectations is a self-evident and widely acknowledged truth."[27]

4.5.1 Some Basic Assumptions

Given the optimism of the Supreme Court of India and an understanding of the milestones of the recent past, some basic assumptions can be made and kept in mind.

[25] Erll, Astrid and Rigney, Ann 2009, *Mediation, remediation, and the dynamics of cultural memory*, Walter de Gruyter, Berlin.
[26] R.K. Jain vs. Union of India
[27] L. Chandra Kumar vs. Union of India

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First and foremost, we need to get our facts and figures straight. Effective planning and management is not possible unless we know what we are up against. Experimentation is good upto a point, but when it does not yield any result, it becomes a drag. In any case, management of the judicial system is too serious a business to be experimented with.[28]

Secondly, while there have been 'intensive and extensive' studies of some of the problems faced in the judicial system, no effective grassroots solution has come about. This is because attempts at managing the judicial system have tended to be isolated and sporadic, without looking at the overall picture.[29] Consequently, legislative changes have only a cosmetic effect and do not become a part of the solution.

Thirdly, changes that may have to be brought about should come from within the system and not be superimposed by some outside agency. For example, it has been repeatedly said that there is an acute shortage of judges. Evidence of this first surfaced in the 120th Report of the Indian Law Commission on Manpower Planning in the Judiciary (1987). The 'manpower shortage' (a little anachronistic in a country of a billion people) has remained so for many years and will continue to so remain. Is increasing the number of judges the only available solution?

Finally, changes have inevitably taken place with the passage of time. There is a need to identify these changes and capitalize on them to our advantage, to the extent permitted by our limited resources. For example, there has been a revolution in information technology. Surely, we can capitalize on this.[30]

It is said that we learn from our mistakes. If so, it is necessary to identify and study the failures of the past and avoid the pitfalls. It is also necessary to identify the successes to enable the creation of a workable court management system.

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[28] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.
[29] Zahir, M 1988, Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.
[30] Goldberg, Stephen B. 2003, *Dispute resolution: Negotiation, mediation, and other processes*, 4th edn, Aspen Publishers, New York.

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4.6 The Stakeholders

For any management system to succeed and this equally applies to Court management, it is essential to identify the stakeholders. This is not particularly difficult so far as the judicial system is concerned. There are only four players in any judicial system. They are (not necessarily in order of importance):[31]

i. The judges
ii. The lawyers
iii. The litigants
iv. The Court staff and the Registry

Each of these stakeholders has specific role to play for ensuring the success of case management and Court administration.

4.6.1 Judges as Managers

A judge is the person in charge of a Court. Barring any unforeseen event, the litigation before a judge has to be controlled by him. What is important in this regard is time management. It is for the judge to decide, for example, how many cases should be scheduled for hearing on any given day; how much time has to be granted for completing the procedural formalities such as completion of pleadings; how many adjournments if any, should be granted and how much time has to be allotted for the hearing of a case.[32]

Systematic and proper management of time in respect of each case will go a long way in reducing the laws delays. A judge must also determine the general complexity of a case so that the progress of a case can be effectively managed. For example, Rule 1800 of the California Rules of Court defines a complex case. Subdivision (a) refers to an action as being complex if it: enquires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case,

[31] Halim, MA. 2011 ADR In Bangladesh: Issues And Challenges.
[32] John Bolton, *The mediation handbook: A practical guide for lawyers on the art of mediation*, Chusid, Melbourne.

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keep costs reasonable, and promote effective decision making by the court, the parties and the counsel.[33]

Subdivision (b) then lists out a set of factors which would require to be taken into account for determining if a case is complex or not. A list of cases provisionally designated as complex cases is the subject matter of subdivision (c). Cases such as environmental or toxic tort claims and those generally involving many parties are treated as complex unless the judge determines otherwise.

Depending upon the complexity of a case, the judge can decide what tasks to delegate to a subordinate judicial officer, including exploring the possibility of alternative dispute resolution mechanisms. Time and effort have to be invested in case management so that the progress of litigation is effectively monitored. Apart from anything else, the investment enables a judge (rather than the lawyer or litigant) to take control of the case. A judge can, thereby, optimally utilize his time for performing core judicial functions for effective dispute resolution, rather than spend it on peripheral issues, which can be dealt with by others.[34]

4.6.2 Role of Lawyers and Litigants

If time is precious for a judge, it is equally precious for a lawyer or a litigant. None of these stakeholders would like to spend more time than is necessary on routine administrative matters, some of which are not within their control.[35]

Apart from certainty in the decision-making process and quick disposal of cases, lawyers and litigants are concerned with two key areas of Court administration. These are:

1. Availability of information.

2. Preparation of documents.[36]

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[33] Zahir, M 1988. Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.

[34] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ban.asp.

[35] Boulle, Laurence, *Mediation: Principles, process, practice*, Butterworths 1996.

[36] John Bolton, *The mediation handbook: A practical guide for lawyers on the art of mediation*, Chusid, Melbourne.

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Good Court management practice requires that information pertaining to a case must be readily available to a lawyer or litigant. For example, it is essential for them to know whether service has been affected on all concerned or whether any document filed by them suffers from some filing defect or is placed under some objection raised by the Registry. It does not help anybody's cause if the lawyer or litigant is told at the last minute that his case will, in all probability, be adjourned because of some technical snag, which could have been rectified at the appropriate time if the information was available earlier.[37]

Litigants usually complain about the non-availability of documents. The most common grievance relates to a certified copy of an order or the decree sheet not being ready. A simple and routine task like this results in a colossal waste of time and effort for lawyers and litigants. With the use of computer systems and photocopying machines, it is possible to firstly, make ready any Court order almost immediately and to certify it with the use of digital signatures. Secondly, if for some reason, a copy of an order or decree is not available, information in that respect can be disseminated through the Internet or an Interactive Voice Response (IVR) mechanism. Unfortunately, the present system requires that for limitation purposes, a litigant or a lawyer should physically present himself for checking up whether a certified copy is ready or not. Surely, any efficient management practice can remedy this situation.[38]

4.6.3 Court Registry as a participant

Court management cannot succeed without the unstinted support of the Court staff and its Registry. They are the backbone of the system and the administrative burden really falls on them. All papers pertaining to a case, from the stage of filing a case to the supply of a certified copy of the judgment passes through their hands. They are responsible not only for all the documentation but also giving effect to miscellaneous orders passed by the Court. The efficiency of a Court depends upon them, much more than anyone would care to admit.[39]

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[37] Eadie, William F. and Nelson, Paul E. 2001, *The Language of Conflict resolution*, Sage Publications, Thousand Oaks.

[38] Goldberg, Stephen B. 2003, *Dispute resolution: Negotiation, mediation, and other processes*, Aspen Publishers, New York.

[39] Halim, MA. 2011 ADR In Bangladesh: Issues And Challenges.

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While there may be complaints of 'manpower shortage' in so far as judges are concerned, no one has yet complained about a shortage of Court staff. Is it not possible to utilize their expertise, if not their sheer numbers, to improve the working of the Court administration?

Other procedural tasks, which are not strictly administrative, but are related to judicial functions, can be delegated to the Court staff by investing them with limited judicial functions. Subordinate judicial officers can perform miscellaneous tasks, including identification of issues, attempting to limit disputes arising out of the pleadings and actively participating in alternative dispute resolution systems. If nothing else, this makes them participative functionaries in the overall process of dispensing quick justice, and recognizes their status as one of the stakeholders in the judicial system.[40]

4.6.4 Use of Technology

Recent technological developments need to be harnessed and full utilization should be made of modern gadgets, which are now easily accessible and at an affordable price.

A personal study on the digitization of the Supreme Court of Bangladesh have yielded mixed results, mixed partly due a lack of effective monitoring and supervision. Eventually, it is for each Court to plan out how best it can utilize the available gadgetry. A few areas where changes can be brought about for the better are illustrated below.[41]

i. A filing pro forma, to be filled up when a case is filed. The form contains essential data ready for scanning. A case-by-case database is built up, which can be drawn upon for planning effective Court management procedures.

ii. Categorization of cases so that cases raising similar issues can be dealt within one group. This is particularly helpful in mass litigation such as land acquisition cases or repetitive litigation such as income tax cases.

iii. Creation of a website, enabling those having access to Internet to obtain necessary information anytime.

iv. Online availability of essential judicial orders so that time is not spent in inspecting a file for obtaining a copy of an order. With the help of a digital signature, it is now possible to provide a certified copy of any judicial order.

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[40] ibid

[41] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.

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v. Daily generation of information through computers indicating report of service, documents under objections in the filing counter etc.

vi. Setting up a Facilitation Centre to function as a Reception and Information Counter. An IVR system can function from this centre.[42]

4.7 ADR within Legal Framework

4.7.1 The Code of Criminal Procedure, 1898.

Section 345 Compounding offences.- (1) The offences punishable under the sections of the Penal Code[43] specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table:-

Offence	Sections of the [Penal Code] applicable	Persons by whom offence may compounded
Uttering words, etc; with deliberate intent to wound the religious feelings of any person.	298	The persons whose religious feeling intended to be wounded
Causing hurt.	323, 334	The person to whom the hurt is caused
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined
Assault or use of criminal force.	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour.	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person.	426, 427	Person to whom the loss or damage caused.
Criminal trespass. House trespass.	447 448	The person in possession of the pro trespassed upon
Criminal breach of contract of service.	490, 491, 492	The person with whom the offend contracted.
Adultery. Enticing or taking away or detaining with criminal intent a	497 498	The husband of the woman.

[42] Halim, MA. 2011 ADR In Bangladesh: Issues And Challenges.
[43] Subs. By Act VIII of 1973, s.3 abd 2nd sch, as amended by Act of LIIIof 1974, for "Pakistan Penal Code".

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married woman.		
Defamation. Printing or engraving matter, knowing it to be defamatory.	500 501	The person defamed.

Offence	**Sections of the [Penal Code][44] applicable**	Persons by whom offence may compounded
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	502	The person defamed.
Insult intended to provoke a breach of the peace.	504	The Person insulted.
Criminal intimidation except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.
Act caused by making a person believe that he will be an object of divine displeasure.[45]	508	The person against whom the offence was committed.

(2) The Offences punishable[46] under the sections of the [Penal Code][47] specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column in that table :

Offence	**Sections of the [Penal Code] applicable**	**Persons by whom offence may compounded**
Rioting.[48]	147	The person against whom force or violence has been used.
Rioting armed with deadly weapon.	148	Ditto

[44] Subs. By the Code of Criminal Procedure (Amdt.) Act 1923 (XVIIIof 1923), s. 90 for "described"
[45] Inserted by the Code of Criminal Procedure (Amdt.) Act,1923 (XVIII of 1923), s. 90
[46] Subs. Ibid, for the original sub-section (2)
[47] Subs. By Act. Of Viii of 1973, s.3 and 2nd Such, as amended by the LIII of 1974. "Pakistan Penal Code".
[48] Inserted by Ordinance No. XXIV of 1982 s. 25.

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Voluntarily causing hurt by dangerous weapons or means.	324	The person to whom hurt is caused.
Voluntarily causing grievous hurt on grave and sudden provocation.	335	Ditto
Act endangering human life or the personal safety of others[49]	336	Ditto
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	337	Ditto
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	338	Ditto
Wrongfully confining a person for three days or more.	343	The person confined.
Wrongly confining for ten or more days[50].	344	Ditto
Wrongly confining a person in secret.	346	Ditto
Wrongful confinement to extort property or constrain to illegal act.	347	The person wrongfully confined.
Wrongful confinement to extort confession or compel restoration of property.	348	Ditto
Assault or criminal force to women with intent to outrage her modesty.[51]	354	The woman assaulted, or to whom the criminal force was used.
Assault or criminal force attempt to commit theft of property worn or carried by a person.	356	The person assaulted or to whom criminal force is used.
Assault or criminal force in attempting wrongfully to confine a person.	357	The person assaulted or to whom the force was used.
Theft.	379	The owner of the property stolen.
Theft in dwelling house.[52]	380	Ditto
Theft by clerk or servant of property i possession of master ***	381	Ditto
Dishonest misappropriation of property	403	The owner of the property misappropriated.

[50] The entries were inserted by Ordinance No. XLIX of 1978 (w. e. f. the 1st June, 1979)
[51] The entrics were inserted by Ordinance, No. XLIX of 1978 (w.e.f. the 1st June,1979)
[52] Inserted by the Ordinance, No. XXIV of 1982, s. 25.

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Offence	Sections of the [Penal Code] applicable	Persons by whom offence may compounded
Criminal breach of trust ***	406	The owner of the property in respect of which the breach of trust has been committed.
Criminal breach of trust by a carrier, wharfinger, etc.	407	Ditto
Criminal breach of trust by a clerk or servant.	408	ditto
Dishonestly receiving stolen property, knowing it to be stolen.[53]	411	The owner of the property stolen.
Assisting in the concealment or disposal of stolen property knowing it to be stolen.[54]	414	Ditto
Cheating.	417	The person cheated.
Cheating a person whose interest the offender was bound, by law or by legal contract, to protect.	418	Ditto
Cheating by personation.	419	Ditto
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.	420	Ditto
Fraudulently removal or concealment of property etc. to prevent distribution among creditors[55].	421	The creditors who are affected thereby.
Fraudulent preventing from being made available for his creditors a debt or demand due to the offender	422	Ditto
Fraudulent execution of deed of transfer containing false statement of consideration.	423	The person affected thereby.
Fraudulent removal or concealment of property.	424	Ditto

[53] The entries were inserted by Ordinance No. XLIX of 1978.

[54] The comma and words "where the value of the property stolen does not exceed taka five hundred" omitted by Ordinance No. LX of 1982, s 12.

[55] The entries were inserted by Ordinance No. XLIX of 1978.

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Offence	**Sections of the [Penal Code] applicable**	Persons by whom offence may compounded
Mischief by killing or maiming animal[56].	428	The owner of the animal.
Mischief by killing or maiming cattle, etc.	429	The owner of the cattle or animal.
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage cause is loss or damage to a private person.	430	The person to whom the loss or damage is caused.
House-trespass to commit an offence (other than theft) punishable with imprisonment	451	The person in possession of the house trespassed upon.
Using a false trade or property mark	482	The person to whom loss or injury is caused by such use.
Counterfeiting a trade or property mark used by another.	483	The person whose trade or property mark is counterfeited.
Knowingly selling or exposing or possessing for sale or for trade or manufacturing purpose, goods marked with a counterfeit trade or property mark.	486	Ditto
Cohabitation caused by a man deceitfully including a belief of lawful marriage.[57]	493	The woman with whom cohabitation was caused.
Marry again during life time of a husband or wife.	494	The husband or wife of the person so marrying
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.	509	The woman whom it is intended to insult or whose privacy is intruded upon
Attempting to commit offences punishable with transportation or imprisonment.[58]	511	The person against whom such attempt was made or committing the offence.

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

[56] The words "of the nalue or taka ten or upwards" were omitted by Ordinance. No. LX of 1982, s-12.
[57] Inserted by Ordinance, No. XXIV of 1982, s. 25.
[58] Added by Ordinance, No. XXIV of 1982.

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(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, and person competent to contract on his behalf may[59] with the permission of the Court compound such offence.

(5) When the accused has been sent[60] for trial or when he has been convicted and an appeal is pending, on composition for the offence shall be allowed without the leave of the Court to which he is sent or, as the case may be, before which the appeal is to be heard.

(5A)[61] The High Court Division acting in the exercise of its powers of revision under section 439[62] and a Court of Session so acting under section 439, may allow any person to compound any offence which he is competent to compound under this section.

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with who the offence has been compounded.

(7) No offence shall be compounded except as provided by this section.

4.7.2 The Code of Civil Procedure, 1908.

Alternative Dispute Resolution[63]

S 89A (1)[64]. Except in a suit under the Artha Rin Adalat Ain, 1990 (Act No. 4 of 1990), after filing of written statement, if all the contesting parties are in attendance in the Court in person or by their respective pleaders, the Court may, by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit, or refer the dispute or disputes in the suit to the engaged pleaders of the parties, or to the party or parties, where no pleader or pleaders have been engaged, or to a mediator from the

[59] Inserted, ibid.
[60] The word "sent" was substituted by Ord. XLIX of 1978, for the word of" committed" (w.e.f. the Ist June, 1979.
[61] Inserted, ibid.
[62] Subs. By Act. VIII of 1973, s-3 and 2nd scg. As amended by Act LIII 0f 1974, for "A High Court".
[63] The words "Alternative Dispute Resolution" were substituted, for the word "Arbitration" by the Code of Civil Procedure (Amendment) Act, 2003 (Act No. IV of 2003), section-2.
[64] Section 89A and 89B were inserted by the Code of Civil Procedure (Amendment) Act, No. IV of 2003), section-3.

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panel as may be prepared by the District Judge under sub-section (10), for undertaking efforts for settlement through mediation:

Provided that, if all the contesting parties in the suit through application or pleadings state to the Court that they are willing to try to settle the dispute or disputes in the suit through mediation, the Court shall so mediate, or make reference under this section.

S 89A (2). When the reference under sub-section (1) is made through the pleaders, the pleaders shall, by their mutual agreement in consultation with their respective clients, appoint another pleader, not engaged by the parties in the suit, or a retired judge, or a mediator from the panel as may be prepared by the District Judge under sub-section (10), or any other person whom they may seem to be suitable, to act as a mediator for settlement:

Provided that, nothing in this sub-section shall be deemed to prohibit appointment of more than one person to act as mediator:

Provided future that, a person holding an office of profit in the service of the Republic shall not be eligible for appointment as mediator.

S 89A (3). While referring a dispute or disputes in the suit for mediation under sub-section (1), the Court shall not dictate or determine the fees of the pleaders and the mediator, and procedure to be followed by the mediator and the parties; and it shall be for the pleaders, their respective clients and the mediator to mutually agree on and determine the fees and the procedure to be followed for the purpose of settlement through mediation; and when the Court shall mediate, it shall determine the procedure to be followed, and shall not charge any fee for mediation.

S 89A (4). Within ten days from the date of reference under sub-section (1), the parties shall inform the Court in writing as to whether they have agreed to try to settle the dispute or disputes in the suit by mediation and whom they have appointed as mediator, failing which the reference under sub-section (1) will stand cancelled and the suit shall be proceeded with for hearing by the Court; and should the parties inform the Court about their agreement to try to settle the dispute or disputes in the suit through mediation and appointment of mediator as aforesaid, the mediation shall

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be concluded within 60(sixty) days from the day on which the Court is so informed, unless the Court of its own motion or upon a join prayer of the parties, extends the time for a further period of not exceeding 30(thirty) days.

S89A (5). The mediator shall, without violating the confidentiality of the parties to the mediation proceedings, submit through the pleaders, to the court a report of result of mediation proceedings; and if the result is of compromise of the dispute or disputes in the suit, the terms of such compromise shall be reduced into writing in the form of an agreement, bearing signatures or left thumb impressions of the parties as executants, and signatures of the pleaders and the mediator as witnesses; and the Court shall, thereupon, pass an order or a decree in accordance with relevant provisions of Order XXIII of the Code.

S 89A 6. When the Court itself mediates, it shall make a report and passed order in a manner similar to that as stated in sub-section (5).

S 89A (7). When the mediation fails to produce any compromise, the Court shall, subject to the provision of sub-section (9), proceed with hearing of the suit from the stage at which the suit stood before the decision to mediate or reference for mediation under sub-section (1), and in accordance with provisions of the Code in a manner as if there had been no decision to mediate or reference for mediation as aforesaid.

S 89A (8). The proceedings 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, their pleaders, representatives and the mediator, shall be deemed privileged and shall not be referred to and admissible in evidence in any subsequent hearing of the same suit or any other proceeding.

S 89A (9). When a mediation initiative led by the Court itself fails to resolve the dispute or disputes in the suit, the same court shall not hear the suit, if the Court continues to be presided by the same judge who led the mediation initiatives; and in that instance, the suit shall be heard by another court of competent jurisdiction.

S 89A (10). For the purposes of this section, the District Judge shall in consultation with the President of the District Bar Association, prepare a panel of mediators (to be

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updated from time to time) consisting of pleaders, retired judges, persons known to be trained in the art of dispute resolution, and such other person or persons, except persons holding office of profit in the service of he Republic, as may be deemed appropriate for the purpose, and shall inform all the civil 'courts under his administrative jurisdiction about the panel:

Provided that, a mediator under this sub-section, shall not act as a mediator between the parties, if he had ever been engaged by either of the parties as a pleader in any suit in any Court.

S 89A (11). Notwithstanding anything contained in the Court fees Act, 1870 (Act No. VII of 1870), where a dispute or disputes in a suit are settled on compromise under this section, the Court shall issue a certificate directing refund of the court fees paid by the parties in respect of the plaint or written statement; and the parties shall be entitled to such refund within 60(sixty) days of the issuance of the certificate.

S 89A (12). No appeal or revision shall lie against any order or decree passed by the Court in pursuance of settlement between the parties under this section.

S 89A (13). Nothing in this section shall be deemed to otherwise limit the option of the parties regarding withdrawal, adjustment and compromise of the suit under Order XXIII of the Code.

Explanation-(1) Mediation under this section shall mean flexible, informal, non-binding, confidential, non-adversarial and consensual dispute resolution process in which the mediator shall facilitate compromise of disputes in the suit between the parties without directing or dictating the terms of such compromise.

(2) "Compromise" under this section shall include also compromise in part of the disputes in the suit.

89B (Arbitration)

S 89B (1). 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 for settlement, the Court shall allow the application and permit the suit

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to be withdrawn; and the dispute or disputes, thereafter, shall be settled in accordance with Salish Ain, 2001 (Act No. 1 of 2001) so far as may be applicable:

Provided that, if, for any reason, the arbitration proceeding referred to above does not take place or an arbitral award is not given, the parties shall be entitled to re-institute the suit permitted to be withdrawn under this sub-section.

S 89B (2). An application under sub-section (1) shall be deemed to be an arbitration agreement under section 9 of the Salish Ain, 2001 (Act No. 1 of 2001).

S. 89C (Mediation in Appeal)

S. 89C (1)[65]. 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, if the appeal is an appeal from original decree under Order XLI, and is between the same parties who contested in the original suit or the parties who have been substituted for the original contesting parties.

S 89C (2). In mediation under sub-section (1), the Appellate Court shall, as far as possible, follow the provisions of mediation as contained in section 89A with necessary changes (mutatis mutandis) as may be expedient.

The above provisions were incorporated in the Code of Civil Procedure, 1908 through the Code of Civil Procedure (Amendment) Act, 2003 (Act IV of 2003) to introduce ADR through mediation or arbitration in all kinds of non-family litigations. The amendment is alike the provisions in India and Pakistan. Interesting enough the scope for mediation has been restricted to time after filing of written statement by the defense with the object, as presumable, of securing a documentary basis for the claims by the parties. The parties, other than those litigating, entrusted for ADR under Code are actors having professional experiences in the legal field. This is an institutional approach to ADR in as much as the parties, or the learned lawyers or even the judge can mediate when the contending parties desire so.

[65] Section 89C was inserted by the Code of Civil Procedure (Amendment) Act, 2006 (Act No. VIII of 2006), section 2.

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The provisions provide for twofold consequences in case of failed ADR, namely, firstly, for trial of the suit by another Judge having jurisdiction in case of failure of mediation by the court in seizing of the suit and secondly, whatever transpires in the mediation proceedings is not receivable in evidence at the trial of the case in question or at the trial of any other case between the parties. This is presumed that these safeguards are for the encouragement of the parties to resort to ADR and to disclose all the necessary information for successful ADR. However this safety and encouragement has not been extended to ADRs failed but initiated by persons otherwise than the Court. As ADR is consensual a decree given through mediation is not amenable to appeal or revision. Through the Code of Civil Procedure (Amendment) Act, 2006 (Act VIII of 2006) the provision for Mediation in Appeal have been incorporated.

4.8 Examination of Parties by the Court (Order X) in the Civil Procedure Code

1. 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 as are 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.
2. At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.
3. The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.
4. (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the court is of opinion that the party whom he represents ought to answer, and is likely to be able to

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answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

4.9 Withdrawal and Adjustment of Suits (Order XXIII) in the Code of Civil Procedure:

1. (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

   (2) Where the Court is satisfied

   (a) that a suit must fail by reason of some formal defect, or

   (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

   (3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he will be liable for such costs as the Court may award ad shall be precluded form instituting any fresh suit in respect of such subject-matter or such part of the claim.

   (4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

2. In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.
3. Where it is proved to the satisfaction of the Court that suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement,

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compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

4. Nothing in this Order shall apply to any proceeding in execution of a decree or order.

More than a hundred years ago, the Code of Civil Procedure 1908, was enacted keeping the provision of ADR under Order 23 rule 3 circuitously under the caption compromise of suit. The said provisions in verbatim is-

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

4.10 Muslim Family Laws Ordinance 1961

Section 7 of the Ordinance provides thus: (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to ten thousand taka or with both.

(3) Save as provided in subjection (5), a talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under subsection (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

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(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under this section from re-marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

4.11 Family Courts Ordinance 1985

Section 10 of the Family Court Ordinance 1985 provides thus:

(1) When the written statement is filed, the Family Court shall fix a date ordinarily of not more than thirty days for a pre-trial hearing of the suit.

(2) On the date fixed for pre-trial hearing, the Court shall examine the plaint, the written statement and documents filed by the parties and shall also, if it so deems fit, hear the parties.

(3) At the pre-trial hearing, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible.

(4) If no compromise or reconciliation is possible, the Court shall frame the issues in the suit and fix a date ordinarily of not more than thirty days for recording evidence.

Section 13 of the Family Court Ordinance 1985 provides thus:

(1) After the close of evidence of all parties, the Family Court shall make another effort to effect a compromise or reconciliation between the parties.

(2) If such compromise or reconciliation is not possible the Court shall pronounce judgment either at once or on some future day not beyond seven days of which due notice shall be given to the parties or their agents or advocate and, on such judgment, a decree shall follow.

The Family Courts Ordinance, 1985 went a step further in providing guideline for resolving disputes arising out of marriage through conciliation during in the process of

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gradual progress of the family suit. Two types of court-annexed ADR namely pre-trial reconciliation proceeding under section 10 and post-trial reconciliation proceeding under section 13 have been envisaged in the Ordinance. The Ordinance has built-in conciliation mechanism enabling disputant parties to resolve the outstanding issue informally, inconspicuously and with a sense of accommodation in which the Family Courts play the role of a well-wisher and friend rather than adjudication. The role of the Family Court judges is of vital importance for attempting such reconciliation between the parties. In fact the enactment of the Family Court system was rooted in a social welfare philosophy to establish a link between the legal and social sciences.

4.12 The Insolvency Act, 1997

Section 43. Compositions and schemes of arrangement:

1) Where a debtor, after the making of an order of adjudication, submits a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, in this Chapter referred to as the Proposal, the Court shall fix a date for the consideration of the Proposal, and shall issue a notice to all creditors in such manner as may be prescribed, or in the absence of any rules, as the Court considers proper, and shall also direct the Receiver to examine the Proposal keeping in view of the information available on record and submit a report on the feasibility of the Proposal and thereupon the Receiver shall submit the report with specific opinion.
2) If, in the consideration of the Proposal, two-thirds in value of all the creditors whose debts are proved and who are present in person or through an Advocate or other authorized agent resolve to accept the Proposal, and if the Court approves the Proposal, the same shall be deemed to have been duly accepted by al the creditors.
3) The debtor may, during the consideration of the Proposal referred to in sub-section (2), amend the terms of his Proposal and the Court may, if the amendment is, in the opinion of the Court, calculated to benefit the general body of creditors, approve such amendment.
4) Where the Court is, after hearing and considering the report of the Receiver on the Proposal and after considering any objections which may be made by or on

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behalf of any creditor, of opinion that the terms of the Proposal are not reasonable or not calculated to benefit the general body of creditors, the Court shall refuse to approve the Proposal.

5) When any matter relating to the Proposal appears, on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the Proposal, unless, after such notice and hearing as the Court deems appropriate, the debtor provides a reasonable security for payment to his creditors:

   Provided that security for payment of an amount of 15% to 65% percent and 25% to 75% percent of the total claims of unsecured creditors and creditors holding bank debt respectively, as may be fixed by the Court, shall be deemed to be reasonable security for the purposes of this sub-section:

   Provided further that, in fixing the reasonable security, the Court shall consider the following circumstances in relation to the debt, namely:-

   a) if the debtor has suffered a misfortune for which he can not be held responsible, the degree of the misfortune.
   b) the degree of risk associated with any enterprise for which the debtor received financing.
   c) the actions of the debtor which are contrary to good sense or ethical conduct;

6) No composition or scheme shall be approved by the Court which does not provide for the payment of the debts specified in section 75 in priority to other debts.
7) In any other case, the Court may either approve or refuse to approve the proposal.

4.13 Shalish Ain, 2001

Section 2(n) "Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

The area where the Courts in Bangladesh and India have recognized ADR is in the field of arbitration. The first Indian Arbitration Act was enacted in 1899, which was replaced by the Arbitration Act, 1940. This Act of 1940 was in force until 2001 when

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the Arbitration Act, 2001 was enacted. Under the Act of 1940 the Courts were very much concerned over the supervision of Arbitral Tribunal and they were very keen to see whether the arbitrator has exceeded his jurisdiction while deciding the issue which was referred to him for arbitration. There was much delay in settlement of disputes between parties in law Courts, which prevented investment of money in Bangladesh by other countries. As such Bangladesh has undertaken major reforms in its arbitration law in the recent years and finally in 2001 the Arbitration Act, 2001 was enacted by the Parliament bringing in substantial reforms in arbitration, regarding domestic and intentional disputes.

Section 9. Form of arbitration agreement:

1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

2) An arbitration agreement shall be in writing a an arbitration agreement shall be deemed to be in writing if it is contained in –

   (a) a document signed by the parties;
   (b) an exchange of letters, telex, telegrams, Fax, E-mail or other means of telecommunication which provide a record of the agreement; or
   (c) an exchange of statement of claim and defence in which in the existence of the agreement is alleged by one party and not denied by the other.

   Explanation: The reference in a contract is a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Section 10. Arbitration of the dispute:

1) Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement of ay person claiming under him in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may, at any time before filing a written statement, apply to the Court before which the proceedings are pending to refer the matter to arbitration.
2) Thereupon, the Court shall, if it is satisfied that a arbitration agreement exists, refer the parties to arbitration ad stay the proceedings, unless the Court finds

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that the arbitration agreement is void, inoperative or is incapable of determination by arbitration.

3) Notwithstanding that an application has been made under sub-section (a) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

Section 21. Powers of the arbitration tribunal to make interim orders

1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute, and no appeal shall lie against this order.
2) The arbitral tribunal may require a party to provide appropriate security i connection with a measure ordered under sub-section (1).
3) No order under this section shall be passed without giving a notice to the other parties–
Provided that the arbitral tribunal may, where it appears that the object of taking interim measure under this section would be defeated by delay, dispense with such notice.
4) An order of an arbitral tribunal requiring the taking of interim measures may be enforced by the court, on an application made there for, by the party requesting the taking of such interim measures.
5) The application filed before the Court for the enforcement of the interim measures under sub-section (4) shall be deemed not to be incompatible with section 7 or with the arbitration agreement or a waiver of the agreement.

Section 39. Award to be final and binding

1) An arbitral award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding both on the parties and on any persons claiming through or under them.
2) Notwithstanding anything contained in sub-section (1), the right of a person to challenge the arbitral award i accordance with the provisions of this Act shall not be affected.

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4.14 Artha Rin Adalat Ain, 2003

Section 21- Settlement Conference:

i) Whatever provision contained under chapter -4relating to trial or hearing of the suit, subject to the provision of section-24 of this Act, if the Court deems proper may convene a settlement conference for settlement of dispute after filing of written statement by the defendant in an alternative way keeping pending all other proceedings of the suit; and the court may ask the parties, their engaged lawyers and their representatives to remain present in the said settlement conference.

ii) The judge of the Artha Rin Adalat shall preside over such conference and shall fix the venue, procedure and functions of the Settlement conference and the Settlement conference as scheduled to be held under this procedure shall take place in camera.

iii) The judge shall explain the points of disputes before the parties, their engaged lawyers and representatives and shall streamline his endeavor in such efforts, but the judge shall not exert any influence upon the parties to accept his own proposal.

iv) If the dispute is settled through the Settlement conference, the terms and conditions of the settlement shall be recorded in the agreement and the parties in dispute shall sign as executors, lawyers and the representative present in the conference shall sign over the agreements as witnesses; afterwards, the judge shall pass an order or necessary degree under the provisions of related order xx111 of the Code of Civil Procedure, 1908.

v) The process of settling the dispute shall be completed within 60 days of passing order by the court for settling the dispute through Settlement Conference, unless the time is extended for further 30 days on the basis of written representation of the disputing parties or courts own accord recording the cause of such extension.

vi) The initiative as taken for settling the dispute through settlement conference, if failed and judge of the aforesaid court if not transferred in the mean time, next hearing of the suit shall not be taken up, the suit shall be transferred for

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hearing to any other court having jurisdiction and the next hearing of the suit shall be resumed from its previous position in such a manner, as if no efforts were taken for settlement of the disputes through settlement conference.

vii) If the suit could not be transferred to any court having proper jurisdiction under sub section 6 for any other reasons, the District judge may appoint any other judge to that court under his jurisdiction on ad-hoc basis for hearing of the suit.

viii)The process of settlement conference under this section shall be held in camera and any suggestion, advice or counseling amongst the representatives as adduced, an admission, deposition or comment shall be considered to be strictly confidential and at later stage, the aforesaid matter be cited or shall not be acceptable as evidence.

ix) No appeal or revision shall lie in the higher court against any order of the court or any issue settle through the settlement conference under the provision of this Act.

Explanation: Under the provision of this Act Settlement Conference shall mean, such conference as presided over by the judge of the(Artha Rin Adalat) and where the parties to the suit, lawyers engaged by the parties, their representatives are authorized to be present and the court shall play a positive role in disposing the suit in a non-formal way, where an atmosphere of voluntary will, un-conflicting attitude, mutual co-operation and the basis of which shall be fellow feelings and compromising in nature.

Section 22-Arbitration

i) If no order is given for settling the dispute through Settlement conference under S-21 after submission of written statement by the defendant, subsequent proceedings, subject to the provisions of section-24,the court may refer the case to the engaged lawyers or may send the dispute to the parties for settlement, if no lawyers have been engaged: provided that, if the parties file petition to the court and agree that they are interested to settle the dispute through arbitration, it shall be compulsory for the court to send the case for settling through arbitration.

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ii) The case as referred under sub-section 1, the lawyers engaged for conducting the case, on mutual consultation with the parties to the suit, may engage a lawyer on mutual consultation, who is engaged by neither of the parties or may engage any retired judge or a retired officer of a bank or a financial institution or any other competent person as arbitrator in the interest of settling the dispute. Provided that, person employed in any profitable post of the Republic is barred to be appointed as arbitrator under this section.

iii) When the court sending any suit for disposal through arbitration, the lawyers, arbitrator shall determine their remuneration and procedure of settlement on basis of mutual consent.

iv) The date on which, the court shall give order for settling the matter through arbitration, the arbitration process shall have to be completed within 60 days through arbitration process, unless the court extends time further 30 days on persuasion by the parties or on its own initiatives showing cause thereof.

Provided that under sub-section-(i) the parties shall communicate the Court in writing within 10 days of arbitration order whether they have been agreed to take step for settling the dispute through arbitration and who has been engaged for settling dispute:

Further Provided that, if the parties fail to communicate the Court within 10 days of passing the order as per provision of sub-section-(i), said order shall be recalled and the hearing and the subsequent process of the suit shall immediately be started in such manner as if no order was given for settling the matter through arbitration under the provision of sub-section-(i).

v) The arbitrator shall submit a report to the Court on his arbitration activities without disclosing the secrecy of the parties.

vi) If the disputing issues of the suit have been settled through arbitration, the terms and conditions of the agreement so settled, shall have to be incorporated in the aforesaid report and the parties and the lawyers shall sign or put the left the thump impression as may be applicable over the agreement as executors and the lawyers as witness.

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vii) The Court shall give necessary order or pronounce the decree on the basis of aforesaid report as may be applicable according to the relevant rules of Order-XXIII of the Code of Civil Procedure, 1908.

viii) If the process for settling the dispute through arbitration fails, the Court shall resume the hearing from the previous stage in such a manner that there was no attempt at all to settle the dispute by means of arbitration.

ix) The arbitration process under this Section shall be held secretly and the discussions or suggestion or the depositions of the witnesses, any admission or statement or any comments shall be treated secret and at the later stage, at the time of hearing or at any stage, the reference of the above proceedings shall not be accepted as evidence or shall be mentioned at any stage of proceedings of the Court.

x) Despite anything contained in the Court Fees Act, 1870 (Act No. VII of 1870), if any suit is settled through arbitration under this Act, the Court shall issue an order allowing return of court fees and on the basis of the said order, the plaintiff shall be entitled to get return of the Court fees which was deposited with the plaint when filed the suit.

xi) No appeal or revision shall lie in the Higher Court against the Order of this Court if there is a settlement through arbitration under the provision of this Section.

Section 38 Compromise at execution stage

i) The parties in dispute under this Act, may arrive at a settlement at any stage of the execution process of the decree and may communicate the same to the court.

ii) If amicable settlement arrived at between the parties under sub-section-(i), shall have to be lawful according to the rules and procedures as prescribed under Section-24 of this Act.

iii) If the court is convinced and satisfied being informed over the legality of the amicable settlement under sub-section- (i), it shall pronounce an order that the suit has finally been disposed of.

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Section 45 Compromise and settlement of suit

i) In spite of the provisions of Section-21 and 22, no provision of this Act shall obstruct the parties to arrive at a settlement in any stage of the suit.

ii) The other steps as taken for disposal of the suit under the provision of this Act, shall not stand as a bar to the scope for amicable settlement of the dispute as provided under the sub-section-(i) aforesaid.

In the Money Loan Recovery Act, 2003 the mechanism of ADR selected is a Settlement Conference to be presided over by the trial Judge and to be held in camera. The Court Fees paid by the parties will be refunded if the Settlement Conference results in a compromise decree. The conference and its proceedings are confidential. If the Conference is not successful the case will be tried by another Judge of co-equal jurisdiction, provided the Settlement Conference Judge has not been transferred in the meanwhile. To enact legislation is one thing and to put it into practice is another. Since the earlier provisions of Settlement Conference has not yield desired result so the present Government brought about a change and included mediation in place of Settlement Conference by amending the Loan Recovery (Amendment) Act, 2010 (Act XVI of 2010) and thereby new provisions were incorporated under sections 22 and 23 of the Loan Recovery Act, 2003. Section 38 of the said Amended Act provides the parties to mediate the case even at the Execution stage. Section 44Ka says that ADR may be made during appeal and revision stage. We do expect this will obviously bring new dimension in our Loan Recovery Law.

4.15 Dispute Resolution (Municipal Area) Act 2004

Section 3 of the Dispute Resolution (Municipal Area) Act 2004 provides thus:

(1) There shall be a Conciliation Board in every Pourashava to try all cases of offences and matters specified in Schedules and such Board shall be named after the name of the concerned Pourashava.

(2) The Conciliation Board shall discharge its trial proceeding in Pourashava office.

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4.16 The Village Court Act, 2006

Section 5 of the Village Courts Act 2006 provides thus :

(1) A Village Court shall consist of a Chairman and two members to be nominated, in the prescribed manner, by each of the parties to the dispute:

Provided that one of the two members to be nominated by each party shall be a member of the Union Parishad concerned.

The adjudication process of the Village Court or Board of Conciliation may be viewed as ADR from the following considerations:

(a) Both the systems of the Village Court and Conciliation Board are based on informal traditional shalish system which is considered as ADR. Since the functioning of the Village Court and Conciliation Board are more or less similar with shalish system, they are also considered as modes of ADR.

(b) Unlike formal judicial adjudication, where there are huge formalities of evidence taking and procedural complexities, the Village Court and Board of Conciliation, although statutory forums with state functionaries, are not required to follow the law of evidence and other procedural law. As a result, there does not seem to have any problem of providing easy and speedy rural justice by these forums and as such they may be viewed as forums of ADR.

4.17 Village Court Bill-2013[66]

The Village Court (Amendment) Bill-2013 was placed in parliament yesterday amidst protest by BNP-led opposition lawmakers. The bill was aimed to reduce backlog of lawsuits. In the proposed amendment, the bill sought to hike the financial jurisdiction of village court to Tk 75,000 from Tk 25,000.

It also proposed that a revision application against the court's verdict need to be disposed within 30 days of obtainment.

According to the proposed legislature, there will be no review or appeal once any issue is settled down through compromise.

If anyone files case against others without valid reasons and intentionally, he or she will be fined Tk 2,000, it said.

[66] Source The Daily Star, Friday June 28, 2013

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SCHEDULE

PART I

4.18 In The Criminal Cases

1. Sections 143 and 147 of the Penal Code (Act XLV of 1860), read with the Third or the Fourth clause of section 141 of the said Code, when the common object of the unlawful assembly is to commit an offence under section 323 or 426 or 447 of the Code, and when not more than ten persons are involved in the unlawful assembly.
2. Sections 160,334,341,342,352,358,504,506 (first part), 508 509 and 510 of the Penal Code (Act XLV of 1860).
3. Sections 379, 380 and 381 of the Penal Code (Act XLV of 1860), when the offence committed is in respect of cattle.
4. Section 379, 380 and 381 of the Penal Code (Act XLV of 1860), when the offence committed is in respect of any property other than cattle, and the value of such property does not exceed twenty five thousand taka.
5. Section 403, 406, 417 and 420 of the Penal Code (Act XLV of 1960), when the amount in respect of which the offence is committed does not exceed twenty five thousand taka.
6. Section 427 of the Penal Code (Act XLV of 1860), when the value of the property involved does not exceed twenty five thousand taka.
7. Sections 428 and 429 of the Penal Code (Act XLV of 1860), when the value of the animal does not exceed twenty five thousand taka.
8. Sections 24, 26 and 27 of the Cattle-Trespass Act, 1871 (I of 1871).
9. Attempts to commit or the abetment of the commission of any of the above offences.

The criminal justice system in our country is the earliest adopter of ADR though its gradual popularity around the world as an alternative to traditional retributive justice system is a recent phenomenon. Restorative and reformative practices generally bring the persons in contact with laws e.g. offender, the victim and the community at large at discussion table on points of the behaviors of the parties, the incident and solutions in the presence of trained facilitators. All the actors and stakeholders have equal

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responsibilities within the process, and solutions are achieved through consensus. Currently, restorative justice is most often used in juvenile cases.

PART II

In The Civil Cases

1. Suit for the recovery of money due under any contract, receipt or any other document. 2. Suit for the recovery of movable property or value of such property. 3. Suit for the recovery of possession of immovable property within one year of dispossession. 4. Suit for recovery of compensation for damage to or forcible dispossession of immovable property. 5. Suit for the recovery of compensation of cattle trespass. 6. Suit for the recovery of compensation and wage payable to agricultural laborer .	When the money claimed is, or the value of the movable property, or the value of the immovable property subject of crime is not exceeding Taka twenty five thousand.

4.19 ADR under the Labour Law

The legislation for the first time where the concept of ADR in the form of negotiation and conciliation has been effectively introduced and recognized by law is in the field of labour law, namely, Industrial Relations Ordinance, 1969 which is now replaced by the Labour Code, 2006. This Code being both social and legal legislation envisages two different approaches to dispute resolution:

(a) pure legalistic approach to individual employment dispute; and

(b) socio-legalistic approach to industrial dispute.

4.20 ADR under Customs Act, 1969 (Act IV of 1969)

The said Act was amended by Finance Act, 2011 (Act XII of 2011) thereby incorporating provisions for Alternative Dispute Resolution in Chapter XVIIIA covering sections 192A to 192K. It has really brought new dimension in our international export and import. The procedures depicted within the boundary of that law is unique.

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4.21 ADR under Income Tax Ordinance, 1984

By Finance Act, 2011 a ground breaking change made in the Income Tax Ordinance, 1984 by incorporating Chapter XVIIIB under the caption Alternative Dispute Resolution including sections 152F to 152S. I find the provision exhaustive and it has added new jurisprudence in our tax matter which is really very complicated and cumbersome.

4.22 ADR under Value Added Tax Act, 1991 (Act XXII of 1991)

By Finance Act, 2011 under section 41Ka to 41Ta the procedure of ADR procedure has been incorporated that brings new phenomenon in our Revenue Law.

4.23 Offence against other laws

In the schedule of the Code of Criminal Procedure provides that any offence other than Penal Code is punishable with imprisonment for less than 2 years and not more than 5 years were made bailable but non compoundable and any offence other than Penal Code punishable with imprisonment for less than 2 years or with fine only also made bailable but non compoundable. If those offences are made compoundable with the consent of the court back log of criminal cases will be reduced.

Offence other than Penal Laws	**Offence**
Section 138 of the Negotiable Instrument Act 1881.	Dishonor of cheque for insufficiency of fund etc.
Section 6(5) (b) of the Muslim Family laws Ordinance, 1961.	Any man who contracts another marriage without the permission of the Arbitration Council.
The Forest Act 1927.	Offence relating to forests, the transit of forest, and duty leviable on timber.
Section 11 (Gha) of The Women and Child Repression Act 2000	Causing simple hurt for dowry.
The Children Act. 1974	Any offence committed by Child except murder.
The Narcotics Control Act, 1990.	Section 19 clause (Kha) highest punishment is five years lowest six months and clause (Ga) highest punishment is one year lowest six months.

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Anti Corruption Cases	Offences relating to corruption.
The Protection of Conservation of Fish Act, 1950.	Offence relating to catching, carrying, transporting, offering, exposing or possession for sale or barter of fishes below the prescribed size and Prohibition of using Current Jal (Net).
The offences which are permitted to be tried summarily for any Penal Offences under Section 260 of the Cr. P. C.	
The Public Examination (Offences Act 1980)	Publication or distribution of question paper before public examination Helping examinees, obstruction in public examinations.
The Cattle trespass Act, 1871	

Section 170 of The Motor Vehicles Ordinance 1983 says that notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), an offence punishable under sections 137, 139, 140, 142, 146, 149, 151, 152, 153, 154, 155, 156 and 158, may be compounded by any Magistrate of the first or second class or any police officer of or above the rank of Deputy Superintendent of Police specially authorized in this behalf by the Government and the cases may be disposed of in the manner as may be prescribed.

4.24 Plea bargaining in Bangladesh

There is no direct provision in our Criminal jurisprudence on plea bargaining. The appellate Division, Supreme Court of Bangladesh in the case of Md. Joynal and others vs. Mohammad Rustum Ali Miah and others reported in 4 BCR(AD) 29, considering the nature of section 345 observed that our criminal administration of justice encourages compromise of certain disputes and some of the cases can be compounded as provided under section 345, Cr.P.C. Section 345(6) says that the composition of an offence under this section shall have the effect of an acquittal of the accused with

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whom the offence has been compounded. Section 345(7) provides that no offence shall be compounded except as provided by this section.[67]

Section 345(3) provides that when any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner. Section 345(4) says that when the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court compound such offence. Section 345(5) provides that when the accused has been sent for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of he Court to which he is sent or, as the case may be, before which the appeal is to be heard. Section 345(5A) provides that the High Court Division acting in the exercise of its powers of revision under section 439, and a Court of Session so acting under section 439A, may allow any person to compound any offence which he is competent to compound under this section.

The Appellate Division in the case reported in 38 DLR(AD) 38 under paragraph 5 reiterated the significance of compromise in the following thus:"The Court in the case of Md. Joynal and others Vs. Md. Rustom Ali Mia and others reported in Bangladesh Case Reports 1984 AD 29, considered the nature of section 345 and observed that our criminal administration of justice encourages compromise of certain disputes and some of the cases can be compounded as provided by section 345 Cr.P.C., Section 379, Penal Code is compoundable by the owner of the property stolen. Mrs. Jobeda Khatun is the complainant and is the owner of the property in question. She has now filed an affidavit praying for compositions of the offence as the parties are inter-related. As we have noticed that the law encourages the composition of the offence and since this matter is pending by way of special leave before this Court, we have no hesitation in allowing the composition and as a result this composition shall have the effect of acquittal of the accused.

[67] Documents and Settings Yaseen Desktop Present and future tends of ADR-2609 11 doc.

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In this result, therefore, this appeal is allowed and the convictions of the appellants are set aside and they are acquitted of the offences."[68]

For the accused, the real benefit is that by confessing to a crime and bargaining for the prison term, he or she may escape with a lesser punishment than what the court may award after a complete trial.[69]

Plea bargaining, in a wider sense, includes the processes by which a prosecutor and a criminal defendant negotiate an agreement, where the defendant pleads guilty to a lesser offense or to a particular charge in exchange for some concession by the prosecutor, such as a more lenient sentence or a dismissal of other charges. **Plea** bargaining is thus an agreement by which the accused changes his plea from not guilty to guilty in return for an offer by the prosecution or when the judge has informally let it be known that he will minimize the sentence if the accused pleads guilty.[70] It is an instrument of criminal procedure which reduces enforcement costs for both parties and allows the prosecutor to concentrate on more meritorious cases. It is generally seen in these days that most of the accused charged with commission of crimes punishable under certain penal sections are offered plea bargain because of the fact that it gives an opportunity to the accused to reduce his/her punishment by honestly accepting his own guilt.

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Plea bargaining may be either charge bargaining either multiple or unique, or fact bargaining or sentence bargaining. In multiple charges some charges are dropped in return for a plea guilty to one of them. In a unique charge, a serious charge is dropped in exchange for a plea of guilty to a less serious charge. In fact bargaining, a prosecutor agrees not to contest an accused version of the facts or agrees not to reveal aggravating factual circumstances to the court. There is an agreement for a selective presentation of facts in return for a plea of guilty. In sentence bargaining, ordinarily the judges opt for imposing sentences not severe than those recommended by prosecutors or else afford accused an opportunity to withdraw their guilty pleas.

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[68] 38 DLR(AD) 38

[69] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

[70] Dr. Md. Akhtaruzzaman, 2011, "Concept and Laws on Alternative Dispute Resolution and Legal Aid, Law's Empire Publishing, Dhaka.

ঢাকা বিশ্ববিদ্যালয় গ্রন্থাগার

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Plea bargaining gradually became a widespread practice and it was estimated that 90% of all criminal convictions in the United States were through guilty pleas. In 1970, the constitutional validity of plea bargaining was upheld in Bra v. United States, 397 US 742 (1970) where it was stated that it was not unconstitutional to extent a benefit to a defendant who in turn extends a benefit to the state. One year later, in Santobello v. New York 404 US 257 (1971) 261 the United States Supreme Court formally accepted that plea bargaining was essential for the administration of justice.[71]

Disputes are an inescapable fact of life, and the crises they engender are pretty much shared by all of us. When we're stuck in a dispute, we have four basic needs: (1) to bring our thoughts and feelings under control, (2) to understand the process for resolving the darn thing, (3) to save time and money, and (4) to figure out and follow through with a plan for reaching a fair result.[72]

Benefit of plea bargaining can not be ignored. When we look into the conceptual aspect of plea bargaining, the notion comes in our mind is that, well now the back logging in courts will be reduced and justice can be delivered quickly and efficiently. But when we check the reason as to why the criminals go for plea bargaining, then it comes to the fact that because they are able to reduce their punishment, which if they would not do quickly will make them stay in arrest for more time through litigation. Moreover, it is presumed that when an accused pleads guilty, the punishment of the accused gets reduced.

The benefit which the guilty gets by plea bargaining is also the reduction of the costs and time consuming trial of his case. It is also presumed that the accused gains responsibility in his favor to enter the correctional system in a frame of mind that may afford hope for rehabilitation over a shorter period of time.[73] The object of 'Plea Bargaining' is to reduce the risk of undesirable orders for either side. Another reason for introducing the concept of 'Plea Bargaining' is the fact that most of the criminal courts are over burdened and hence unable to dispose of the fact that it gives an

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[71] Santobello v. New York 404 US 257 (1971) 261

[72] Crowley, Thomas E: Settle it Out of Court: How to Resolve Business and Personal, Disputes Using Mediation, Arbitration, and Negotiation, Published by the Author, 1994.

[73] Dr. Md. Akhtaruzzaman, 2011, "Concept and Laws on Alternative Dispute Resolution and Legal Aid, Law's Empire Publishing, Dhaka.

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opportunity to the accused to reduce his/her punishment by honestly accepting his own guilt.

Plea bargaining may be either charge bargaining either multiple or unique, or fact bargaining or sentence bargaining. In multiple charges some charges are dropped in return for a plea guilty to one of them. In a unique charge, a serious charge is dropped in exchange for a plea of guilty to a less serious charge. In fact bargaining, a prosecutor agrees not to contest an accused version of the facts or agrees not to reveal aggravating factual circumstances to the court.[74] There is an agreement for a selective presentation of facts in return for a plea of guilty. In sentence bargaining, ordinarily the judges opt for imposing sentences not severe than those recommended by prosecutors or else afford accused an opportunity to withdraw their guilty pleas.

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The disadvantages of plea bargaining: The disadvantageous part of the story is that sometimes the prosecutor forces the accused to admit his guilt with unconscionable pressures. Even the accused may go escape with less punishment by pleading his guilt and thereby diverting a little favorable decision in his favor. But most of the times it

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[74] Atickus Samad, M. ADR & Legal Aid. National Law Publications.
[75] Santobello v. New York 404 US 257 (1971) 261
[76] Crowley, Thomas E: Settle it O ut of Court: How to Resolve Business and Personal, Disputes Using Mediation, Arbitration, and Negotiation, Published by the Author, 1994.

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happens that the accused do not have the required amount of resources available at their disposal to minutely investigate each and every case. There are following points which talk against it viz. The role of police in Plea Bargaining process offers coercion it leads towards corruptions and to some extent court's impartiality is impugned. Some how, if the plead guilty application of the accused is rejected then it is almost impossible for accused to prove himself/herself innocent.

4.25 Access to justice under the Constitution of Bangladesh

The right to access to justice has been ensured and guaranteed in different articles of the Constitution of Bangladesh. The constitution is the Supreme law of the Land.[2] Article 27 of the Constitution states: "All citizens are equal before law and are entitled to equal protection of law." Article 31 guaranteed equal protection of law as an inalienable right of every citizen of Bangladesh be stating that, "to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh.[77]"

Evidently, the term "access to justice" is not specifically embodied in these articles; the meaning of "access to justice" is incorporated with the terms "equal" and "protection of the law". So, if both articles we read together, we can be understand that people's right to access justice is inalienable and equal, irrespective of socio-economic and political status. When we established these rights as fundamental rights (as defined in Part III of the Constitution) which can be enforced by law – it can be assumed that the constitution asserts a Constitutional 'guarantee' of these rights. Article 26 of the Constitution reconfirms that any part of law made contrary to any fundamental right granted under the Constitution will be void from the commencement of the Constitution. The fundamental principles of state policy, as discussed under Part II of the Constitution, also emphasized on this issue. Though fundamental principles are not legally enforceable, these principles act as a guide to the interpretation of the

[77] Dr. Jamila A. Chowdhury – ADR Theories And Practices- A glimpse On Access To Justice And ADR In Bangladesh. Published by: London College of Legal Studies (South), 2013.

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Constitution and also carry an idealistic and promotional value for the government. As stated in the Constitution of Bangladesh:

The fundamental state policy under Article 11 of the Constitution states that "The Republic shall be a democracy in which fundamental human rights and freedoms... shall be guaranteed..." As 'Right to access to justice' is one of the fundamental human rights recognized in the United Declaration of Human Rights 1948, Protection of this rights is also incorporated as fundamental state policy. Therefore, when read together, Articles 8(2), 11, 27 and 31 establish the notion that the right to access to justice is constitutionally recognized as a fundamental right and also promoted to ensure this right by incorporating in it as a fundamental principle.

4.26 Limitations and Scope of Further Evolution of ADR Mechanism in Bangladesh

The disadvantages of ADR are that ADR programs do not set precedent, define legal norms, or establish board community or national standards, nor do they promote a consistent application of legal rules, that ADR programs cannot correct systemic in justice, discrimination, or violation of human rights, that ADR programs do not work well in the context of extreme power imbalance between parties, that ADR settlements do not have any educational, punitive, or deterrent effect on the population, that it is inappropriate to use ADR to resolve multi-party cases in which some of the parties or stakeholders do not participate and that ADR is non-consistent with Rule of Law.[78]

[78] Halim, MA. 2011 ADR In Bangladesh: Issues And Challenges.

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CHAPTER-V

ADR In India And Access To Justice

Chapter IV I will give a brief introduction to the legal systems of India. The administrations of justice system in this country, which the research has selected for the work on ADR, will shortly be discussed. India follows the adversarial legal system embedded in their long colonial rule for nearly two centuries. Consequently the defects and the inherent in adversarial system will also be discussed in this chapter

India has the world's second largest populated by country. In Chapter IV our focus will be the ADR system in this densely populated country. The ADR system in India carries its legacy of colonial history when the British Indian legislature passed the Arbitration Act in 1940. Though components of ADR can be found in many previous laws as well, the Arbitration Act was the first comprehensive address to the issue. The Lok Adalat system of modern India and other relevant laws will be discussed.

5.1 Different Types Of ADR In India[1]

Alternative dispute resolution encompasses a range of means to resolve conflicts short of formal litigation. The modern ADR movement originated in the United States in the 1970s, spurred by a desire to avoid the cost, delay, and adversarial nature of litigation. For these and other reasons, court reformers are seeking to foster its use in developing nations. The interest in ADR in some countries also stems from a desire to revive and reform traditional mediation mechanisms.

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

[1] Palanithurai, Ganapathy, *Dynamics of new panchayet raj system in India*, Concept publishing company, New Delhi.

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and reducing court backlog, while at the same time preserving important social relationships for disputants.[2]

Community-based ADR is often designed to be independent of a formal court system that may be biased, expensive, distant, or otherwise inaccessible to a population. New initiatives sometimes build on traditional models of popular justice that relied on elders, religious leaders, or other community figures to help resolve conflict. India embraced lok adalat village-level people's courts in the 1980s, where trained mediators sought to resolve common problems that in an earlier period may have gone to the panchayat, a council of village or caste elders.

These forms of ADR along with a lot of other hybrid processes are discussed in that chapter of the thesis. Therefore, it can observed that the term "Alternative dispute resolution" can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other, prior to some other legal process, to arbitration systems or mini-trials that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included into the rubric of ADR.[3]

Elaborate explanation of the various kinds of ADR mechanisms as practiced in India:

a) **Arbitration:** Arbitration, in the law, is a form of alternative dispute resolution — specifically, a legal alternative to litigation whereby the parties to a dispute agree to submit their respective positions (through agreement or hearing) to a neutral third party (the arbitrator(s) or arbiter(s)) for resolution.[4]

5.1.1 Species of arbitration

i) **Commercial arbitration**: Agreements to arbitrate were not enforceable at common law, though an arbitrator's judgment was usually enforceable (once the parties had already submitted the case to him or her). During the Industrial Revolution, this situation became intolerable for large corporations. They argued

[2] John Bolton, *The mediation handbook: A practical guide for lawyers on the art of mediation*, Chusid, Melbourne.
[3] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.
[4] Palanithurai, Ganapathy, *Dynamics of new panchayet raj system in India*, Concept publishing company, New Delhi.

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that too many valuable business relationships were being destroyed through years of expensive adversarial litigation, in courts whose strange rules differed significantly from the informal norms and conventions of business people (the private law of commerce, or jus merchant). Arbitration appeared to be faster, less adversarial and cheaper. Since commercial arbitration is based upon either contract law or the law of treaties, the agreement between the parties to submit their dispute to arbitration is a legal binding contract. All arbitral decisions are considered to be "final and binding." This does not, however, void the requirements of law. Any dispute not excluded from arbitration by virtue of law (e.g. criminal proceedings) may be submitted to arbitration.[5]

ii) **Other forms of Contract Arbitration:** Arbitration can be carried out between private individuals, between states, or between states and private individuals. In the case of arbitration between states, or between states and individuals, the Permanent Court of Arbitration and the International Center for the Settlement of Investment Disputes (ICSID) are the predominant organizations. Arbitration is also used as part of the dispute settlement process under the WTO Dispute Settlement Understanding. International arbitral bodies for cases between private persons also exist, the International Chamber of Commerce Court of Arbitration being the most important.[6] The American Arbitration Association is a popular arbitral body in the United States. Arbitration also exists in international sport through the Court of Arbitration for Sport.

iii) **Labor Arbitration:** A growing trend among employers whose employees are not represented by a labor union is to establish an organizational problem-solving process, the final step of which consists of arbitration of the issue at point by an independent arbitrator, to resolve employee complaints concerning application of employer policies or claims of employee misconduct. Employers in the United States have also embraced arbitration as an alternative to litigation of employees' statutory claims, e.g., claims of discrimination, and common law

[5] John Bolton, *The mediation handbook: A practical guide for lawyers on the art of mediation*, Chusid, Melbourne.
[6] ibid

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claims, e.g., claims of defamation. Arbitration has also been used as a means of resolving labor disputes for more than a century.

This type of arbitration is commonly known as interest arbitration, since it involves the mediation of the disputing parties' demands, rather than the disposition of a claim in the manner a court would act. Interest arbitration is still frequently used in the construction industry to resolve collective bargaining disputes.[7] Unions and employers have also employed arbitration to resolve employee grievances arising under a collective bargaining agreement.

iv) **Judicial Arbitration:** Some court systems have promulgated court-ordered arbitration; family law (particularly child custody) is the most prominent example. Judicial arbitration is often merely advisory, serving as the first step toward resolution, but not binding either side and allowing for trial de novo.[8]

v) **Proceedings:** Various bodies of rules have been developed that can be used for arbitration proceedings. The two of the most important are the UNCITRAL rules and the ICSID rules. The general rules to be followed by the arbitrator are specified by the agreement establishing the arbitration. Some jurisdictions have instituted a limited grace period during which an arbitral decision may be appealed against, but after which there can be no appeal. In the case of arbitration under international law, a right of appeal does not in general exist, although one may be provided for by the arbitration agreement, provided a court exists capable of hearing the appeal.

vi) **Arbitrators:** Arbitrators are not bound by precedent and have great leeway in such matters as active participation in the proceedings, accepting evidence, questioning witnesses, and deciding appropriate remedies. Arbitrators may visit sites outside the hearing room, call expert witnesses, seek out additional evidence, decide whether or not the parties may be represented by legal counsel, and perform many other actions not normally within the purview of a court. It is this great flexibility of action, combined with costs usually far below those of

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[7] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

[8] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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traditional litigation, which makes arbitration so attractive.[9] Arbitrators have wide latitude in designing remedies in the arbitral decision, with the only real limitation being that they may not exceed the limits of their authority in their award. An example of exceeding arbitral authority might be awarding one party to a dispute the personal automobile of the other party when the dispute concerns the specific performance of a business-related contract. It is open to the parties to restrict the possible awards that the arbitrator can make. If this restriction requires a straight choice between the position of one party or the position of the other, then it is known as pendulum arbitration or final offer arbitration.[10] It is designed to encourage the parties to moderate their initial positions so as to make it more likely they receive a favourable decision. To ensure effective arbitration and to increase the general credibility of the arbitral process, arbitrators will sometimes sit as a panel, usually consisting of three arbitrators. Often the three consist of an expert in the legal area within which the dispute falls (such as contract law in the case of a dispute over the terms and conditions of a contract), an expert in the industry within which the dispute falls (such as the construction industry, in the case of a dispute between a homeowner and his general contractor), and an experienced arbitrator.

Therefore, it is obvious that Arbitration is a growing field with a lot of potential in solving disputes in a speedy manner.

b) **Mediation:** Mediation is a process of alternative dispute resolution in which a neutral third party, the mediator, assists two or more parties in order to help them negotiate an agreement, with concrete effects, on a matter of common interest; lato sensu is any activity in which an agreement on whatever matter is researched by an impartial third party, usually a professional, in the common interest of the parties.[11]

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[9] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ban.asp.

[10] Dr. Md. Akhtaruzzaman, 2011, "Concept and Laws on Alternative Dispute Resolution and Legal Aid, Law's Empire Publishing, Dhaka.

[11] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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5.2 Types of Disputes resolved by mediation

i. Aviation Banking and finance
ii. Boundary Disputes Broker Liability
iii. Business Disputes Charities
iv. Clinical & Medical Negligence Competition
v. Commercial agencies Commercial contracts
vi. Construction & Development Corporate finance
vii. Distribution agreements Employment
viii. Energy Engineering & Manufacturing Disputes
ix. Environmental issues Financial Services
x. Franchises Group/Class actions
xi. Information Technology Insolvency and Bankruptcy
xii. Insurance & Reinsurance Intellectual Property, Trade Mark and Copyright
xiii. Landlord & Tenant Leasing & Supply Contracts
xiv. Lender Liability Libel & Defamation
xv. Maritime & Shipping Multiparty actions
xvi. Neighbor Disputes Nuisance
xvii. Oil & Gas Contracts Partnership Disputes
xviii. Passing-off Actions Pensions
xix. Personal Injury Pollution Claims
xx. Product Liability Personal Indemnity
xxi. Property & Real Estate Publishing, Television & Broadcasting Rights
xxii. Railway Industry, Transport Regulatory Disputes
xxiii. Securities & Shares Shareholder's Disputes[12]

Stages of Mediation: Mediation commonly includes the following aspects or stages:

- a controversy, dispute or difference of positions between people, or a need for decision making or problem-solving;
- decision-making remaining in the parties rather than being made by the neutral;
- the willingness of the parties to negotiate a positive solution to their problem and to accept a discussion about respective interests and objectives;
- the intent to achieve a positive result through the facilitative help of an independent and neutral third person.[13]

The typical mediation has no formal compulsory elements, although some common elements are usually found:

- Each party having a chance to tell his or her story;
- Identification of issues, usually by the mediator;
- The clarification and detailed specification of the respective interests and objectives
- the conversion of respective subjective evaluations into more objective values,

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[12] Dale Bagshaw and Elisabeth Porter, *Mediation in the Asia-Pacific region transforming conflicts and building peace*, Routledge, 2009, London.
[13] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

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- Identification of options;
- Discussion and analysis of the possible effects of various solutions;
- the adjustment and the refining of the accessory aspects,
- memorializing the agreements into a written draft[14]

Due to the particular character of this activity, each mediator uses a method of his or her own (a mediator's methods are not ordinarily governed by law), that might eventually be very different from the above scheme. Also, many matters do not legally require a particular form for the final agreement, while others expressly require a precisely determined form. Most countries respect a Mediator's confidentiality. Mediation differ the most from other adversarial resolution processes by virtue of its simplicity, informality, flexibility and economy.

Mediation in Business and Commerce: The eldest branch of mediation applies to business and commerce, and still this one is the widest field of application, with reference to the number of mediators in these activities and to the economical range of total exchanged values.[15] The mediator in business or in commerce helps the parties to achieve the final goal of respectively buying/selling (a generical contreposition that includes all the possible varieties of the exchange of goods or rights) something at satisfactory conditions (typically in the aim of producing a synallagmatic contract), harmonically bringing the separate elements of the treaty to a respectively balanced equilibrium.[16]

The mediator, in the ordinary practice, usually cares of finding a positive agreement between (or among) the parties looking at the main pact as well as at the accessory pacts too, thus finding a composition of all the related aspects that might combine in the best possible way all the desiderata of his clients. The subfields include specialized branches that are very well commonly known: in finance, in insurances, in ship-brokering, in real estate and in some other particular markets, mediators have an own

[14] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[15] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

[16] John Bolton, *The mediation handbook: A practical guide for lawyers on the art of mediation*, Chusid, Melbourne.

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name and usually obey to special laws.[17] Generally the mediator cannot practice commerce in the genre of goods in which he is a specialized mediator.

c) **Conciliation:** Conciliation is an alternative dispute resolution process whereby the parties to a dispute (including future interest disputes) agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award. Conciliation differs from mediation in that the main goal is to conciliate, most of the time by seeking concessions. In mediation, the mediator tries to guide the discussion in a way that optimizes parties needs, takes feelings into account and reframes representations. In conciliation the parties seldom, if ever, actually face each other across the table in the presence of the conciliator. (This latter difference can be regarded as one of species to genus.[18] Most of the practicing mediators refers to the practice of meeting with the parties separately as "caucusing" and would regard conciliation as a specific type or form of mediation. "Shuttle diplomacy" -- that relies on exclusively on caucusing. All the other features of conciliation are found in mediation as well.) If the conciliator is successful in negotiating an understanding between the parties, said understanding is almost always committed to writing (usually with the assistance of legal counsel) and signed by the parties, at which time it becomes a legally binding contract and falls under contract law.[19]

A conciliator assists each of the parties to independently develop a list of all of their objectives (the outcomes which they desire to obtain from the conciliation). The conciliator then has each of the parties separately prioritize their own list from most to least important. She then goes back and forth between the parties and encourages them to "give" on the objectives one at a time, starting with the least important and working toward the most important for each party in turn. The

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[17] Boulle, Laurence, *Mediation: Principles, process, practice*, Butterworths 1996.
[18] Goldberg, Stephen B. 2003, *Dispute resolution: Negotiation, mediation, and other processes*, 4th edn, Aspen Publishers, New York.
[19] Greenhouse, Carol J. 1985, 'Mediation: A comparative approach', *Man*, vol. 20, no. 1, pp. 90-114.

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parties rarely place the same priorities on all objectives, and usually have some objectives which are not on the list compiled by parties on the other side. Thus the conciliator can quickly build a string of successes and help the parties create an atmosphere of trust which the conciliator can continue to develop.

d) **Expert Determination:** Expert determination is a historically accepted form of dispute resolution invoked when there isn't a formulated dispute in which the parties have defined positions that need to be subjected to arbitration, but rather both parties are in agreement that there is a need for an evaluation, e.g. in a preceding contract. The practice itself is millennia old and well established where complex legal institutions either have not developed, or are unavailable, such as tribal societies and criminal organisations.[20] The first mention that distinguishes specifically against the practice of arbitration, and introduces the formula as an expert and not as an arbitrator.

e) **Negotiation:** Negotiation is the process whereby interested parties resolve disputes, agree upon courses of action, bargain for individual or collective advantage, and/or attempt to craft outcomes which serve their mutual interests.[21] It is usually regarded as a form of alternative dispute resolution given this definition; one can see negotiation occurring in almost all walks of life, from parenting to the courtroom. In the advocacy approach, a skilled negotiator usually serves as advocate for one party to the negotiation and attempts to obtain the most favorable outcomes possible for that party.[22] In this process the negotiator attempts to determine the minimum outcome(s) the other party is (or parties are) willing to accept, then adjusts her demands accordingly. A "successful" negotiation in the advocacy approach is when the negotiator is able to obtain all or most of the outcomes his party desires, but without driving the other party to permanent break off negotiations.

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[20] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

[21] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

[22] Dr. Md. Akhtaruzzaman, 2011, "Concept and Laws on Alternative Dispute Resolution and Legal Aid, Law's Empire Publishing, Dhaka.

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Traditional negotiating is sometimes called win-lose because of the hard-ball style of the negotiators whose motive is to get as much as they can for their side. In the Seventies, practitioners and researchers began to develop win-win approaches to negotiation. This approach, referred to as Principled Negotiation, is also sometimes called mutual gains bargaining. The mutual gains approach has been effectively applied in environmental situations as well as labor relations where the parties (e.g. management and a labor union) frame the negotiation as problem solving.

f) **Early Neutral Evaluation (ENE):** A court-based ADR process applied to civil cases, ENE brings parties and their lawyers together early in the pre-trial phase to present summaries of their cases and receive a non-binding assessment by an experienced, neutral attorney with expertise in the substance of the dispute, or by a magistrate judge. The evaluator may also provide case planning guidance and settlement assistance in some courts. It is purely used as a settlement device and resembles evaluative mediation.[23]

g) **Fact-finding:** A process by which a third party renders binding or advisory opinions regarding facts relevant to a dispute. The third party neutral may be an expert on technical or legal questions may be representatives designated by the parties to work together, or may be appointed by the court.

h) **Med-Arb, or Mediation-Arbitration:** An example of multi-step ADR, parties agree to mediate their dispute with the understanding that any issues not settled by mediation will be resolved, will be resolved by arbitration, using the same individual to act as both mediator and arbitrator. Having the same individual acting in both roles, however may have a chilling effect on the parties participating fully in mediation. In Co-Med-Arb, different individuals serve as neutrals in the arbitration and mediation sessions, although they may both participate in the parties' initial exchange of information. In Med-Arb, the neutral first acts as arbitrator, writing up an award and placing it in a sealed

[23] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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envelope. The neutral then proceeds to the mediation stage, and if the case is settled in mediation, the envelope is never opened.[24]

i) **Judge hosted settlement conference:** In this court-based ADR process, the settlement judge presides over a meeting of the parties in an effort to help them reach a settlement. Judges have played a variety of roles in these conferences, articulating opinions about the merits of the case, facilitating the trading of settlement offers, and sometimes acting as the mediator.[25]

j) **Mini-trial:** A voluntary process in which cases are heard by a panel of high level principals from the disputing sides with full settlement authority; a neutral may or may not oversee this stage. First, parties have a summary hearing, each side presenting the essence of their case. Each party can thereby learn the strengths and weaknesses of their own case, as well as that of other parties. Secondly, the panel of party representatives attempt to resolve the dispute by negotiation. The neutral presider may offer her opinion about the likely outcome in court.[26]

k) **Private Judging:** A private or court-connected process in which the parties empowered a private individual to hear and issue a binding, principled decision in their case. The process may agreed upon by a contract between the parties, or authorized by statute.

l) **Lok Adalat:** The advent of Legal Services Authorities Act, 1987 gave a statutory status to Lok Adalats, pursuant to the constitutional mandate in Article 39-A of the Constitution of India. It contains various provisions for settlement of disputes through Lok Adalat. It is an Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not

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[24] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ban.asp.

[25] Sarfaraz Ahmed Khan (1 January 2006). *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism.* APH Publishing

[26] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.[27]

There is a Central Authority called the "National Legal Services Authority". Its patron is the Chief Justice of India. Its Executive Chairman is the senior most Judge of the Supreme Court of India.[28]

So far as the State Legal Services Authorities are concerned, it is headed by a Patron-in-Chief who is none other than the Chief Justice of the High Court. In almost all the State Authorities, except perhaps one or two, a sitting Judge of the High Court functions as the Executive Chairman .[29]

Experience with Lok Adalat

For the last about a decade or so, the emphasis seems to have shifted from tribunalizing justice to reducing the adversarial role that litigants play. It is for this reason that greater interest has been shown in alternative dispute resolution systems including the Lok Adalat, and now the Permanent Lok Adalat.

There is no doubt that these Lok Adalats have done a considerable amount of good work. But they also confirm that the earlier system of setting up Tribunals has not really solved the existing problems. In a recent International Conference on Lok Adalat as a Mechanism of ADR held in New Delhi in February 2003, the papers presented by some of the State Legal Services Authorities made a specific mention of the fact that a large number of motor accident claims cases had been resolved through the Lok Adalat system. In fact, conference papers from Orissa and Tamil Nadu also stated that some cases relating to the Debt Recovery Tribunal constituted under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 had been referred to and resolved by the Lok Adalat.[30] It must be remembered that the Debt Recovery

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[27] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.
[28] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ban.asp.
[29] Michael Charles Pryles (1 January 2006). *Dispute Resolution in Asia*. Kluwer Law International.
[30] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

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Tribunal is of fairly recent vintage, and the conference papers point to the existence of the virus afflicting other Tribunals having infected this Tribunal as well. Surely, this is a little disconcerting.

What is the answer to the growing malaise? The Supreme Court explains In L. Chandra Kumar that,

"However, to draw an inference that their [the Tribunal's] unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct."[31]

5.3 ADR within Legal Framework in India

5.3.1 The Code of Criminal Procedure I860:

Plea bargaining in India: Plea bargaining, in a wider sense, includes the processes by which a prosecutor and a criminal defendant negotiate an agreement, where the defendant pleads guilty to a lesser offense or to a particular charge in exchange for some concession by the prosecutor, such as a more lenient sentence or a dismissal of other charges.

Plea bargaining is thus an agreement by which the accused changes his plea from not guilty to guilty in return for an offer by the prosecution or when the judge has informally let it be known that he will minimize the sentence if the accused pleads guilty. It is an instrument of criminal procedure, which reduces enforcement costs for both parties and allows the prosecutor to concentrate on more meritorious cases. It is generally seen in these days that most of the accused charged with commission of crimes punishable under certain penal sections are offered plea bargain because of the fact that it gives an opportunity to the accused to reduce his/her punishment by honestly accepting his own guilt.[32]

Plea bargaining may be either charge bargaining either multiple or unique, or fact bargaining or sentence bargaining. In multiple charges, some charges are dropped in return for a plea guilty to one of them. In a unique charge, a serious charge is dropped in exchange for a plea of guilty to a less serious charge. In fact bargaining, a

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[31] L. Chandra Kumar vs. Union of India

[32] Dale Bagshaw and Elisabeth Porter, *Mediation in the Asia-Pacific region transforming conflicts and building peace*, Routledge, 2009, London.

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prosecutor agrees not to contest an accused version of the facts or agrees not to reveal aggravating factual circumstances to the court. There is an agreement for a selective presentation of facts in return for a plea of guilty. In sentence bargaining, ordinarily the judges opt for imposing sentences not severe than those recommended by prosecutors or else afford accused an opportunity to withdraw their guilty pleas.[33]

Plea-bargaining gradually became a widespread practice and it was estimated that 90% of all criminal convictions in the United States were through guilty pleas. In 1970, the constitutional validity of plea bargaining was upheld in Bra v. United States, 397 US 742 (1970) where it was stated that it was not unconstitutional to extent a benefit to a defendant who in turn extends a benefit to the state. One year later, in Santobello v. New York 404 US 257 (1971) 261 the United States Supreme Court formally accepted that plea bargaining was essential for the administration of justice.

Disputes are an inescapable fact of life, and the crises they engender are pretty much shared by all of us. When we're stuck in a dispute, we have four basic needs: (1) to bring our thoughts and feelings under control, (2) to understand the process for resolving the darn thing, (3) to save time and money, and (4) to figure out and follow through with a plan for reaching a fair result.[34]

Benefit of plea bargaining can not be ignored. When we look into the conceptual aspect of plea bargaining, the notion comes in our mind is that, well now the back logging in courts will be reduced and justice can be delivered quickly and efficiently. But when we check the reason as to why the criminals go for plea bargaining, then it comes to the fact that because they are able to reduce their punishment, which if they would not do quickly will make them stay in arrest for more time through litigation. Moreover, it is presumed that when an accused pleads guilty, the punishment of the accused gets reduced. Also the benefit which the guilty gets by plea bargaining is the reduction of the costs and time consuming trial of his case. It is also presumed that the accused gains responsibility in his favor to enter the correctional system in a frame of

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[33] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[34] Crowley, Thomas E: Settle it O ut of Court: How to Resolve Business and Personal, Disputes Using Mediation, Arbitration, and Negotiation, Published by the Author, 1994.

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mind that may afford hope for rehabilitation over a shorter period of time.[35] The object of 'Plea Bargaining' is to reduce the risk of undesirable orders for either side. Another reason for introducing the concept of 'Plea Bargaining' is the fact that most of the criminal courts are over burdened and hence unable to dispose of the cases on merits.

Criminal trial can take day, weeks, months and sometimes years while guilty pleas can be arranged in minutes. However, by observing the hoard of criminal cases in the courts Plea Bargaining galvanized in the real life as prescriptive process not as coercion. The motto behind this is only to fasten the judgment process, which ultimately reduces the burden of courts and decrease the number of inmates in the jail. Nevertheless, some cons are also associated with it. Well, on this account, I would like to say it that everything on this earth (either living or non-living) has pros and cons then there is only difference of degree.

Plea-bargaining means pre-trial negotiations between the accused the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution. The disposal of cases by method of 'plea bargaining' is an alternative method to deal with the huge arrears of criminal cases.[36] It is really a measure and a redress, as the same has been brought on statute, it has also added new dimensions in the realm of judicial reforms. The 154th report of the Law Commission recommended that plea bargaining should be included as a separate chapter in the Indian criminal jurisprudence. In the 12th Law Commission Report the conception of idea behind incorporating the idea of plea-bargaining was mentioned wherein it was stated that there needs to be some remedial legislative measures to reduce the delays in the disposal of criminal trials and appeals and also to alleviate the sufferings of under trial prisoners awaiting the commencement of trials.[37]

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[35] Eadie, William F. and Nelson, Paul E. 2001, *The Language of Conflict resolution,* Sage Publications, Thousand Oaks.

[36] Palanithurai, Ganapathy, *Dynamics of new panchayet raj system in India*, Concept publishing company, New Delhi.

[37] Dr. Md. Akhtaruzzaman, 2011, "Concept and Laws on Alternative Dispute Resolution and Legal Aid, Law's Empire Publishing, Dhaka.

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The NDA government formed a committee, headed by the former Chief Justice of the Karnataka and Kerala High Courts, where Justice V.S. Malimath came up with some suggestions to tackle the ever-growing number of criminal cases. In its report, the Mali math Committee recommended that a system of plea bargaining be introduced in the Indian Criminal Justice System to facilitate the earlier disposal of criminal cases and to reduce the burden of the courts. Accordingly, the draft Criminal Law (Amendment) Bill, 2003 was introduced in the parliament. The statement of objects and reasons, inter alia, mentions that, the disposal of criminal trials in the courts takes considerable time and that in many cases trial do not commence for as long as 3 to 5 years after the accused was remitted to judicial custody. Though it could not be recognized by the criminal jurisprudence, it is seen as an alternative method to deal with the huge arrears of criminal cases. The bill attracted enormous public debate.[38] Critics say that it should not be recognized, as it would go against the public policy under our criminal justice system.

Plea Bargaining was introduced in India by the Criminal Law (Amendment) Act, 2005 by the Parliament in the winter session of 2005, which amended the Code of Criminal Procedure and introduced a new chapter XXI A in the code containing sections 265A to 265L which came into effect from July 5, 2006. It was due to the inspiration that has been gained from America which made Indian to experiment the concept of plea bargaining in the country.[39]

Section 265 A. (1) This Chapter (XXIA)[40] shall apply in respect of an accused against whom –

a. The report has been forwarded by the officer in charge of the police station under section 173 alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force; or

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[38] Boulle, Laurence, *Mediation: Principles, process, practice*, Butterworths 1996.

[39] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

[40] New Chapter XXIA, containing sections 265A to 265L, inserted by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006) s. 4 (w.e.f.5-7-2006), vide Nottn. No.SO 990(e) dt. 3-7-2006.

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b. A Magistrate has been taken cognizance of an offence on complaint, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complainant and witnesses under section 200, issued the process under section 204.[41]

(2) For the purposes of sub-section (1), the Central Government shall, by notification, determine the offences under the law for the time being in force which shall be the offences affecting the socio-economic condition of the country.

265B. (1) A person accused of an offence may file application for plea-bargaining in the Court in which such offence is pending for trial.

(2) The application under sub-section (1) shall contain a brief description of the case relating to which the application is filed including he offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a Court in a case in which he had been charged with the same offence.[42]

(3) After receiving the application under sub-section (1), the Court shall is sue notice to the Public Prosecutor or the complainant of the case, as the case may be, and to the accused to appear on the date fixed for the case.

(4) When the Public Prosecutor or the complainant of the case, as the case may be, and the accused appear on the date fixed under sub-section (3), the Court shall examine the accused in camera, where the other party in the case shall not be present, to satisfy itself that the accused has filed the application voluntarily and where –

(a) the Court is satisfied that the application has been filed by the accused voluntarily, it shall provide time to the Public Prosecutor or the complainant of the case, as the case may be, and the accused to work out a mutually satisfactory disposition of

[41] Michael Charles Pryles (1 January 2006). *Dispute Resolution in Asia*. Kluwer Law International.

[42] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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the case which may include giving to the victim by the accused the compensation and other expenses during the case and thereafter fix the date for further hearing of the case;[43]

(b) the Court finds that the application has been filed involuntarily by the accused or he has previously been convicted by a Court in a case in which he had been charged with the same offence, it shall proceed further in accordance with the provisions of this Code from the stage such application has been filed under sub-section (1).[44]

265C. In working out a mutually satisfactory disposition under clause (a) of sub-section (4) of section 265B, the Court shall follow the following procedure, namely:-

a. in a case instituted on a police report, the Court shall issue notice to the Public Prosecutor, the police officer who has investigated the case, the accused and the victim of the case to participate in the meeting to work out a satisfactory disposition of the case:

   Provided that throughout such process of working out a satisfactory disposition of the case, it shall be the duty of the Court to ensure that the entire process is completed voluntarily by the parties participating in the meeting:

   Provided further that the accused may, if he so desired, participate in such meeting with his pleader, if any, engaged in the case.[45]

b. in a case instituted otherwise than on police report, the Court shall issue notice to the accused and the victim of the case to participate in a meeting to work out a satisfactory disposition of the case:

   Provided that it shall be the duty of the Court to ensure, throughout such process of working out a satisfactory disposition of the case, that it is completed voluntarily by the parties participating in the meeting:

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[43] Sarfaraz Ahmed Khan (1 January 2006). *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism.* APH Publishing

[44] ibid

[45] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

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Provided further that if the victim of the case or the accused, as the case may be, so desires, he may participate in such meeting with his pleader engaged in the case.[46]

265D. Where in a meeting under section 265C, a satisfactory disposition of he case has been worked out, the Court shall prepare a report of such disposition which shall be signed by the presiding officer of the Court and all other persons who participated in the meeting and if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of section 265B has been filed in such case.

265E. Where a satisfactory disposition of the case has been worked out under section 265D, the Court shall dispose of the case in the following manner, namely:-

(a) the Court shall award the compensation to the victim in accordance with the disposition under section 265D and hear the parties on the quantum of the punishment, releasing of he accused on probation of good conduct or after admonition under section 360 or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958) or any other law for the time being in force and follow the procedure specified in he succeeding clauses for imposing the punishment on the accused;[47]

(b) after hearing the parties under clause (a), if the court is of the view that section 360 or the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force are attracted in the case of the accused. It may be released the accused on probation or provide the benefit of any such law, as the case may be;

(c) after hearing the parties under clause (b), if the Court finds that minimum punishment has been provided under the law for the offence committed by the accused, it may sentence the accused to half of such minimum punishment;[48]

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[46] ibid
[47] Albert Fiadjoe (4 March 2013). *Alternative Dispute Resolution: A Developing World Perspective*. Routledge.
[48] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

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(d) in case after hearing the parties under clause (b), the Court finds that the offence committed by the accused is not covered under clause (b) or clause (c), then, it may sentence the accused to one-fourth of the punishment provided or extendable, as the case may be, for such offence.

265F. The Court shall deliver its judgment in terms of section 265E in the open Court and the presiding officer of the Court shall sign the same.

265G. The judgment delivered by the Court under section 265G shall be final and no appeal (except the special leave petition under article 136 and writ petition under articles226 and 227 of the Constitution) shall lie in any Court against such judgment.

265H. A Court shall have, for the purposes of discharging its functions under this Chapter, all the powers vested in respect of bail, trial of offences and other matters relating to the disposal of a casein such Court under this Code.[49]

265I. The provisions of section 428 shall apply, for setting off the period of detention undergone by the accused against the sentence of imprisonment imposed under this Chapter, in the same manner as they apply in respect of the imprisonment under other provisions of this Code.

265J. The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other provisions of this Code and nothing in such other provisions shall be construed to constrain the meaning of any provision of this Chapter.[50]

Explanation–For the purposes of this Chapter, the expression "Public Prosecutor" has the meaning assigned to it under clause (u) of section 2 and includes an Assistant Public Prosecutor appointed under section 25.

265K. Notwithstanding anything contained in any law for he time being in force, the statements or facts stated by an accused in an application for plea bargaining filed

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[49] Arnab Kumar Hazra; Bibek Debroy; Rajiv Gandhi Institute for Contemporary Studies (1 January 2007). *Judicial reforms in India: issues and aspects*. Academic Foundation.

[50] Boulle, Laurence. *Mediation: Principles, process, practice*, Butterworths 1996.

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under section 265B shall not be used for any other purpose except for the purpose of his chapter.

265L. Nothing in this Chapter shall apply to any juvenile or child as defined in sub-clause (k) of section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000).[51]

Comment: The provisions of this Chapter can be invoked by the accused in the cases, where in police case charge sheet/completion report has been filed against the accused that an offence, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force appears to have been committed by such an accused; or where in a complaint case a Magistrate has taken cognizance of an offence, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complainant and witnesses under Section 200, has issued the process either under Section 200 or under Section 204.[52] The provisions of this Chapter shall not apply where such offence affect the socio-economic condition of the country or where such offence has been committed against a woman, or a child below the age of fourteen years (S. 265-L), where the accused is a previous convict of such an offence (S. 265B) or where the accused is a habitual offender.

What are such economic offences shall be determined by the Central Government by issuance of notification. As laid by section 265B an accused charged of an offence referred to in the preceding section intending to avail the benefit/concession of plea-bargaining, may file application for the purpose in the Court in which such offence is pending for trial. Such an application shall contain a brief description of the case relating to which the application is filed including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused starting therein that he

[51] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.
[52] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

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has voluntarily preferred, and that he has not previously been convicted by a Court in a case in which he had been charged with the same offence.[53]

The legislature has formulated guidelines intended to make sure that the process of plea bargaining, by the accused as per its application, results in genuine terms of settlement on the basis of which the accused may get the benefit of plea bargaining. The issue of notice by the Court to the Public Prosecutor, the police officer who has investigated the case, the accused and the victim, is a mandatory requirement of the section. Duty has been cast upon the Court, to satisfy itself that the parties are voluntarily participating in the process of working out a satisfactory disposition of the case. The victim or the accused may, if they desire, seek assistance of their respective pleaders to of working out a satisfactory disposition of the case. Report of the mutually satisfactory disposition to be submitted before the Court.[54]

Section 265D gives the guidelines as to where a mutually satisfactory disposition is worked out between the parties; a report of the same is to be submitted before the court. The report is to be signed by the presiding officer of the court and all the parties who participated in the meeting.[55] If no such disposition has been worked out, then the Court has to record such observation and proceed further with the case from the stage when the application for plea bargaining was filed. Section 265K protects the accused against self incrimination. Any statement made by he accused in his application of plea bargaining cannot be caused for any other purpose except plea bargaining.[56]

[53] Dale Bagshaw and Elisabeth Porter, *Mediation in the Asia-Pacific region transforming conflicts and building peace*, Routledge, 2009, London.

[54] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ban.asp.

[55] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.
Folberg, Jay and Taylor, Alison 1984, *Mediation: A comprehensive guide to resolving conflicts without litigation*, Jossey-Bass, San Francisco.

[56] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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5.3.2 The Code of Civil Procedure, 1898

S-89. Settlement of disputes out side the court[57]-(1).Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and the give them to the parties, for their observations of the parties, the court may reformulate the terms of a possible settlement an refer the same for

(a) arbitration;
(b) conciliation;
(c) judicial settlement including settlement through Lok Adalat; or
(d) mediation;[58]

(2) Where a dispute has been referred

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act,1996 (26 of 1996) shall apply as if the proceedings for arbitration of conciliation were referred for settlement under the provisions of that Act.[59]

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section(1) of section 20 of the Legal Service Authority Act,1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under follow such procedure as may be prescribed.[60]

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[57] Ins, by the CPC (Amendment) Act, 1999, s. 7 (46 of 1999) (w. e. f.) 1-7-2002) vide Notfn. S. O.603(E) dt 6-6 2002;earlier s. 89 repealed by the Arbitration Act. 1940 9(10 of 1940) which had reference to arbitration, the procedure relating to which was embodied in the second schedule to the C. P. Code. There being now an independent enactment relating to arbitration, the law has been consolidated in that Act.

[58] Erll, Astrid and Rigney, Ann 2009, *Mediation, remediation, and the dynamics of cultural memory*, Walter de Gruyter, Berlin.

[59] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[60] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ban.asp.

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Comment-Section 89 of the Code of Civil procedure was earlier repeated after the coming into force of the Indian Arbitration Act, 1940 and has again been inserted by the Amendment Act, 1999 with effect from 1 July 2002. The object of the newly inserted S- 89 is to promote alternative methods of dispute resolution which may not be found by any specific procedure and further resolves the dispute expeditiously. It provides that where it appears to the court that there elements of settlement which may be acceptable to the parties, shall formulate the terms settlement give them to the parties for their observations and after receiving the observation the court may formulate the terms of possible settlement and refer the same for; arbitration, conciliation, judicial settlement including settlement through Lok Adalat; or mediation.

It further provides that where the dispute is referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply and where it has been referred for judicial settlement to any suitable institution or a person, or to the Lok Adalat, the provisions of Legal Services Authorities Act, 1987 shall apply. However, the section does not indicate as to whether the reference by the court to the alternative method of dispute resolution is mandatory or discretionary nor does it set out the stage for such reference. Further, while formulating the terms of the settlement the parties have submitted their observation on the terms of settlement; the court may have to express some opinion on the merits of the case. The case may be the desirable for the trial court particularly in a situation where the matter is not settled and refer back to the court for trial.[61]

5.4 Settlement of Disputes Outside of the court

Section 20 of the Legal Services Authorities Act, 1987 provides that a matter can be referred to Lok Adalat:(1) with the consent of the parties (11)on an application of one of the parties (111)where the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat. However, no case shall be referred to the Lok Adalat, on an application of one of the parties by the court, without giving a reasonable opportunity of being heard to the parties. The Legal services Authorities

[61] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

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Act, 1987 is amended by Act 37 of 2002, which comes into effect from 1 June, 2002, consequent to which sections 22A-22E have been inserted. It would be interesting to see how the amendments in this Act, affect section 89 of the CPC.

Along with the insertion of section1A, 1B and 1C the said amendment of the Code by inserting rules provide that after recording the admissions and denials, the courts shall direct the parties to the suit to opt for either mode of settlements outside the court as specified in sub-section (1) of section 89 on the option of the parties. The court shall fix the date of appearance before such forum or authorities as may be opted by the parties. It is mandatory for the parties to appear before the designated forum or authority for conciliation of the suit. Further, where the presiding officer of the forum or the authority is satisfied that it will not be proper in the interest of justice to proceed with the matter further, then it shall refer the matter once again to the court and direct the parties to appear before the court on the date fixed by it.[62]

Reading the amended section 89, and the insertions in Order X, it appears that the following conditions should be satisfied before matter could be referred to an Alternative Dispute Redressal namely (i) existence of elements of settlement in the opinion of the court; (ii) the parties must share the opinion of the court; (iii) formulation of the terms of settlement by the court; (iv) the court should invite the observation of the parties on the terns of settlement; (v) observations of the patties must be received by the court; (vi) if need be, reformulate the terms of settlement and refer the dame for Alternative Dispute Redressal contemplated under section 89.[63]

5.5 Report of the Law Commission

The Law commission in its 163rd report was of the opinion that the proposed section 89(as it then was) may modified to provide as under:

a. After the Settlement of the issues in the every suit (when both the parties would have also file their basic documents as required by the proposal provisions relating to the filing of documents along with the pleadings), the suit shall be

[62] Goldberg, Stephen B. 2003, *Dispute resolution: Negotiation, mediation, and other processes*, 4th edn, Aspen Publishers, New York.

[63] Dr. Md. Akhtaruzzaman, 2011, "Concept and Laws on Alternative Dispute Resolution and Legal Aid, Law's Empire Publishing, Dhaka.

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referred to a board of conciliators to explore whether there existed elements of settlements which were acceptable to the parties and if it appeared to the board that such elements of settlement did exist, they shall refer the suit for arbitration, judicial settlement or settlement through Lok Adalat. The method of conciliation could be tried by the board itself if found feasible. Such reference could be made either after reformulating the terms of possible settlement, if the board found the same feasible and advisable or without such reformulation, as the case may be.[64]

b. The presiding officer of the principal Civil Court in every city and town shall constitute, in consultation with his senior colleagues; a board of conciliators consisting of retired judicial officers and senior lawyers of known integrity and competence.[65]

c. A time-limits should be prescribed within which the board of conciliators shall complete its work that is either refer the suit to arbitration/judicial settlement or settlement through LoK Adalat or bring about a settlement through conciliation. If It found that such a course was advisable or report to the court that it could not find any elements of settlement which might be acceptable to the parties and that, therefore, any reference of the suit to arbitration/conciliation/judicial settlement or settlement through LoK Adalat was not warranted or advisable. This period could range between four months to one year, as may be specified by each court.

d. To delete the alternative mode of mediation mentioned under clause (2) of subsection 1 of the proposed section 89. Mediation by a court could be resorted to at any stage of the proceedings and it should not be stipulated as a matter of law either at the stage of the issues or at any subsequent stage. Such a course is always open to the court and there is no reason to define or codify it. Accordingly, clause (d) in sub-section 2 of section 89 might be deleted.[66]

Meaning of Formulation of the Terms of Settlement – As can be seen from section 89, its first part uses the word shall when it stipulates that the court shall formulate terms of settlement, The use of the word may in later part of section 89 only relates to

[64] Sarfaraz Ahmed Khan (1 January 2006). *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism.* APH Publishing

[65] Michael Charles Pryles (1 January 2006). *Dispute Resolution in Asia.* Kluwer Law International.

[66] Dale Bagshaw and Elisabeth Porter, *Mediation in the Asia-Pacific region transforming conflicts and building peace*, Routledge, 2009, London.

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the aspect of reformulating the terms of a possible settlement. The intention of the legislature behind enacting section 89 is that, where it appears to the court that there exists elements of a settlement which may be acceptable to the parties. At the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four alternative dispute resolution methods mentioned in the section and if the parties do not agree, the court shall refer them to one or the other of the modes. Section 89 uses both the word shall and may whereas Order X.[67]

Rule 1A uses the word shall but on harmonious reading of these provisions, it becomes clear that the use of the word 'may in section 89 only govern the aspect of reformulation of the terms of a possible settlement and its reference to one of the alternative dispute resolution methods. There is no conflict. It is evident that what is referred to one of the alternative dispute resolution modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of section 89.

5.6 Element of Compromise–Discretion of the Court

If a defendant appears in a suit and offers to compromise the claim raised by the plaintiff, one can say that an element of compromise exists. But if the plaintiff, reacting to such offer, right away rejects the offer of compromise and if he wants a decision in the suit on merits, the element of compromise can no longer be said to exist/survive. In such a situation, if the court makes no further effort to make the parties reach an amicable settlement of their dispute, the court cannot be said to have failed to exercise its discretion under section 89. In that situation, the court which is in seizing of the matter, is the best judge of the matter and even if the revisional court happens to think that the trial court should have pursued the offer of compromise, notwithstanding the resistance offered, the revisional court will be slow to interfere, for, it is trite that if two equally reasonable views are possible, the revisional court will be slow to substitute its views in place of the views of the trial court[68].

[67] Albert Fiadjoe (4 March 2013). *Alternative Dispute Resolution: A Developing World Perspective*. Routledge.
[68] WB State Electricity Board v Shanti Conductor Pvt.Ltd. AIR 2004 Gau 70, 2003(2) Gauhati LR 76.

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However, no Court can compel any unwilling party to submit to arbitration and get the dispute settled. It is only when all the parties agree to get their dispute settled and express their intention in this regard before the court, that the Civil Court can formulate the terms of settlement and refer the dispute to arbitration[69].

A Division Bench of the Kerala High Court in a suit for partition of properties within family, held that for settlement of dispute outside court, it is open to court to identify and segregate issues which can be settled in Alternative Dispute Resolution Mechanisms (ADRs) and which are to be adjudicated by the Court. Those segregated issues can be referred for settlement in one of the ADR mechanisms. Even if there is no agreement among defendants on all the issues referred for ADR by settlement, some of he defendants may satisfy the plaintiff and thus enter into a compromise[70].

5.7 Reference to Arbitration or Conciliation

In Salem Advocate Bar Association v Union of India[71], the Supreme Court has dealt with various aspects arbitration and conciliation and it will be pertinent for our study to have a look at those aspects of law explained by the court (Para 57 to 64 of the judgment in the above case are relevant for the purpose). One of the modes to which a dispute can be referred is arbitration. Section 89(2) provides that where a dispute has been referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of the 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to arbitration where there is arbitration agreement. As held in P Anand Gajapathi Raju v PVG Raju[72], the 1996 Act governs a case where arbitration was agreed upon before or pending a suit by all the parties.

The 1996 Act, however, does not contemplate a situation as in S- 89 of the Code where the court asks the parties to choose arbitration as their option. Of course, the parties have to agree for arbitration. Section 82 of he 1996 Act enables the High Court to make rules consistent with the Act with respect to proceedings before the Court

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[69] BOC India Ltd v Instant Sales Pvt. Ltd AIR 2007 Cal 275, 2007 (2) Cal LJ 395.
[70] Ararammal Parkum, AB Ammalo v Panangadan Vachali Saubhadra 2008(3) Ker LT 233, 2008(2) Ker LJ 508 (DB).
[71] AIR 2005 SC 3353, (2005) 6 SCC 344.
[72] P Anand Gajapathi Raju v PVG Raju AIR 2000 SC 1886, (2000) 4 SCC 539.

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under that Act. Section 84 enables the Central Government to make rules for carrying out the provisions of the Act. The procedure for option to arbitration among four alternative dispute resolution methods is not contemplated by the 1996 Act, and, therefore s. 82 or 84 has no applicability where parties agree to go for arbitration under S- 89 of the Code.[73]

For the purposes of S- 89 and Order X, rules 1A, 1B and 1C, the relevant sections in Part X of the Code enable the High Court to frame rules. If reference is make to arbitration under S- 89 of the Code, the 1996 Act would apply only from the stage after reference and not before the stage of reference when options under S- 89 are given by the court and chosen by the parties. The 1996 Act does not deal with a situation where after suit was filed, the court requires a party to choose one or the other alternative dispute resolution methods including conciliation. Thus, for conciliation as well rules can be made under Part X of the Code for the purposes of procedure for opting for conciliation and up to the stage of reference to conciliation. Thus, there is no impediment in contemplated in S- 89 up to stage of reference to alternative dispute resolution.

The language of section 89 unmistakably conveys that the Legislature has reckoned arbitration also as one of the four methods of alternative dispute resolution available to courts. The language of section 89 also disabuses any confusion as to whether it is a method of settlement. Taking note of the language of section 89, it can be seen to convey that all the four methods of alternative dispute resolution contemplated by section 89 are methods of settlement[74]. It was further held in the above case that depending upon the nature of the case, its facts, the contentions and the possible resolution; it is open to the court to come to the conclusion that even if the parties do not agree, they can be referred to one or the other modes of dispute resolution[75]. In a case it was held that where there was no clause with regard to appointment of

[73] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.
[74] Afcons Infrastructure Ltd v Cherian Varkey Construction Co 9P0 Ltd 2007 (1) Ker LT 196, 2007(1) Ker LJ 333.
[75] Ibid.

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arbitrator in the agreement between parties to a dispute, resort can be taken to alternative dispute resolution mechanism as contemplated by section 89 of the Code.[76]

In a case from Madhya Pradesh, a decree for restitution of suit properties in terms of arbitral award was passed. During the pendency of a writ petition challenging the decree of restitution, the parties agree to settle their dispute and the court appointed a conciliator. It was held that, since the parties had entered into a settlement in the terms of the provisions contained in Order 23 CPC and while invoking the provisions contained in section 89 CPC, providing for Special Proceedings and had finally resolved their dispute amicably. It would be the interest of justice to affirm the terms of the settlement arrived at amongst the parties[77].

5.8 Reference to Mediation – Section 89(2) (D)

The question of cl. clause (d) of section 89(2) of the Code is whether the terms of compromise are to be finalized by, or before the mediator or by or before the court. It is evident that all the four alternatives, namely, arbitration, conciliation, judicial settlement including settlement through Lok Adalat and mediation are meant to be the actions of persons or institutions outside the court and not before the court, Order X, Rule-1C speaks of the conciliation forum referring back the dispute to the court. In fact, the court is now involved in the actual mediation/conciliation. Clause (d) of S-89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing the parties, effect the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Further, in this view, there is no question of the court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at.[78]

The judge who makes the reference only considers the limited grounds to expect that there will be settlement and on that ground he cannot be treated as being disqualified

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[76] Ramola Construction Co v Executive officer, Nagar Panchayat Mani-ki Reti 2007(!) UC 345, 2006(64) All LR 341

[77] Ashok Kumar Bansal v Smt Sushila Devi Bansal AIR 2010 MP 145, 2010 (1) MPLJ 612 (DB) (Gwalior Bench.

[78] Dr. Md. Akhtaruzzaman, 2011, "Concept and Laws on Alternative Dispute Resolution and Legal Aid, Law's Empire Publishing, Dhaka.

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from trying the suit afterwards if no settlement is arrived at between the parties[79]. In a recent decision, the Supreme Court ruled that family and business disputes should be resolved through mediation/arbitration and lawyers should advise their clients and get the dispute settled through mediation. Thus, in a dispute between brothers, the Court directed the same to be referred for mediation[80].

5.9 Expenses for conciliation/Mediation

The question also is about the payment made and expenses incurred where the court compulsorily refers a matter for conciliation/mediation. Considering large number of responses received by the committee to the draft rules, it was suggested that in the event of such compulsory reference to conciliation/mediation procedures if expenditure on it is borne by the Government, it may encourage parties to come forward and make attempts at conciliation or mediation. On the other hand, if the parties feel that they have to incur extra expenditure for resorting to such alternative dispute resolution modes, it is likely to act as a deterrent for adopting these methods. The Central Government directed by Supreme Court to examine it and it agreed that it should request the Planning Commission and Finance Commission to make specific financial allocation for the judiciary for including the expenses involved in implementing the scheme[81].

Panel

With a view o enable the court to refer the parties to conciliation/mediation, where parties are unable to reach a consensus on an agreed name, it was ruled by the Supreme Court that there should be a panel of well trained conciliation/mediator to which it may be possible for the court to make reference. It was further observed that it would be necessary for the High Courts and District Courts to take appropriate steps in the direction of preparing the requisite panels[82].

[79] Salem Advocate Bar Association v Union of India AIR 2005 SC 3353, (2005) 6 SCC 344.
[80] BS Krishna Murthy v BS Nagaraj AIR 2011 SC 794, (2011) 1 JT 247.
[81] Salem Advocate Bar Association v Union of India AIR 2005 SC 3353, (2005) 6 SCC 344 (see para 62. P. 3369).
[82] Ibid para 63 at p 3370 (of AIR).

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5.10 Family court–Applicability

In the Salem Advocate Bar Association' case, the Supreme Court also made observations about the applicability of the alternative dispute resolution mechanism to disputes arising under the Family Courts Act, 1984. The said Act applies to all proceedings before it under the CPC. The ADR rules made under the code can be applied to supplement the rules made under the Family Courts Act, 1984 and provide for alternative dispute resolution in so far as conciliation/mediation is concerned.[83]

It was hold by the Kerala High Court that attempt for alternative rederessal is not only statutory obligation of Court but it is their duty to public also. Being judicial officers, they have expertise in peace making. It observed that one case settled is ten cases avoided because in settlement, peace purchased and both parties part as friends. In a recent decision, the Bombay High Court has held that section 89 of the code applies to Family Courts since it is a Civil Court under section 10(1) of the Family courts Act, 1984. Section 89 of the code enjoins upon the court to follow the resolution of dispute by an alternative mode, including the mode of mediation[84].

5.11 Section 89 and Section 8 of Arbitration and Conciliation Act, 1996

It has been held by the Supreme Court that section 89 of the Code cannot be resorted to for interpreting section 8 of the Arbitration and Conciliation Act, 1996 as it stands on a different footing and it can be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the conditions contemplated in section 89 of the Code and even if the application under section 8 of the 1996 Act was rejected, the court is required to follow the procedure prescribed under section 89 of the Code[85].

In relation to alternative dispute resolution method, arbitration contemplated under sections 89(1) and 89(2) is not a reference under S-8 of the Arbitration and Conciliation Act 1996 and that is why the words as it has been used in section 89(2)(a) of the Code. Sections 89(1) (a) and 89(2)(a) refer to reference of a dispute for

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[83] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.
[84] Rakesh Harsukhbhai Parekh v State of Maharashtra AIR 2011 Bom 34, 2010 (4) ALL MR 915.
[85] Sukanya Holdings Pvt Ltd v Joyesh H Pandya AIR 2003 SC 2252, (2003) % SCC 531.

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arbitration and does not specifically refer to any reference to Arbitrator. If the High Court were to make a reference only for arbitration without specifying any Arbitrator, it would necessarily require the parties to move the Chief Justice to get the Arbitrator appointed contributing to further delay in the matter. Therefore, the power for reference for arbitration and conciliation which appears in section 89(1)(a) and (b) and 89(2)(a) must certainly be interpreted to inhere in it the power and the jurisdiction of the court to refer to a specified arbitration[86].

The institution of Lok Adalat literally means People's Court. Lok stands for people and the Adalat for the court. The concept of Lok Adalat is not quite new in Indian legal system. It has a long rooted tradition in India's history of ADR methods being practiced in the society at grass roots level. In ancient Indian villages, panchayat was the authority where disputes were submitted to be resolved and the methods of mediation, negotiation or arbitral processes, known as decision of "Nyaya-Panchayat," were the mechanisms used to be practiced there. Modern lok adalats are greatly influenced by the philosophy of ancient panchayat system.

By virtue of the constitutional mandate in Article 39-A of the Constitution of India, the Legal Services Authorities Act 1987 gives a statutory status to Lok Adalats, containing special provisions for the informal settlement of disputes. This Act provides for the constitution of legal services authorities offering free and competent legal pre-litigation services. To ensure the opportunities for all to seek remedies for their disputes so that justice are not denied to individuals for economic or other reasons, and to organize and institute the Lok Adalats to secure the equal opportunity in the operation of the legal system while promoting justice, are the fundamental purpose of the Act.[87]

Justice S. M. Dharamadhikari has called Lok Adalat as indianization, humanization and spiritualization of justice dispensation on following accounts:

i. Indianization of justice dispensation—Based on customs and traditions found in villages and societies of India

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[86] Ibid.

[87] Dale Bagshaw and Elisabeth Porter, *Mediation in the Asia-Pacific region transforming conflicts and building peace*, Routledge, 2009, London.

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ii. Humanization of justice dispensation—More and more participation of human beings involved with large consideration to human aspects in the course
iii. Spiritualization of justice dispensation—Process to uplift society by educating its members to do justice to each other

5.12 Institution of Lok Adalat

Lok Adalats may be organized at such intervals and places, and for exercising such jurisdiction and for such areas as State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may think fit. Gujarat was the first state to organize Lok Adalats in India in 1982. At Una in Junagarh district of Gujarat, the first Lok Adalat was organized on 14th March, 1982. The first Lok Adalat was held at Shimla on August 25th, 1990. It took 406 matters and successfully disposed 181 cases.[88]

Since recent years, however, the trend goes towards the establishment of Permanent Lok Adalat courts.

Under Chapter VI of the Legal Services Authorities Act, 1987, if the parties do not arrive at any compromise or settlement, the unsettled case is either returned to the Court of law or the parties are advised to seek remedy in a court of law, which causes unnecessary delay in dispensation of justice. In order to get rid of this deficiency, Chapter VI A was introduced in the Legal Services Authorities Act, 1987, by Act No.37/2002 with effect from 11-06-2002 providing for a Permanent Lok Adalat to deal with pre-litigation, conciliation and settlement of disputes relating to Public Utility Services. In this manner, the basic requirement of party compromise may be eroded by enhanced powers of the mock trial judge to decide on the dispute matter.[89]

5.13 Composition of Lok Adalat

Every Lok Adalat organized for an area shall consist of such number of serving or retired judicial officers; and other persons. It is presided over by a sitting or retired judicial officer or other person of respect and legal knowledge as the chairman, along with two other members, usually a lawyer and a social worker. The parties are not

[88] Boulle, Laurence, *Mediation: Principles, process, practice*, Butterworths 1996.
[89] Atickus Samad, M. ADR & Legal Aid. National Law Publications.

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required to pay any court fee. When any case filed in the regular court, the fee paid will be refunde if the dispute is settled at the Lok Adalat. The procedural laws and the Evidence Act are not strictly followed assessing the merits of the claim by the Lok Adalat.[90]

5.13.1 Jurisdiction

Lok Adalat has jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of any case pending before; or any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organized.

(a) Any case pending before any court

(b) Any case not brought before any court[91]

There have been barriers in the way to implement a socio-economic legislation like The Legal Services Authorities Act, 1987 and its complementary Rules enacted by state governments. Lok Adalats became popular to the poor millions of Indian society for its easy access and effective mechanisms. In recent times, Lok Adalat successfully settles many commercial disputes. Thus the Lok Adalats become the flagship of the Indian judiciary for dispensation of justice to the poor in recent years.

The National Commission for Women (NCW) has evolved the concept of Parivarik Mohila Lok Adalat (PMLA), which in turn supplements the efforts of the District Legal Service Authority (DLSA) for speedy disposal of the matters pending in various courts related to marriage and family affairs.[92]

Its objective is to provide speedy and cost free quick dispensation of justice to women. The PMLA generates awareness among the public regarding conciliatory mode of dispute settlement. Gearing up the process of organizing the Lok Adalats and

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[90] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[91] Eadie, William F. and Nelson, Paul E. 2001, *The Language of Conflict resolution,* Sage Publications, Thousand Oaks.

[92] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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encouraging the public to settle their disputes outside the formal set-up, the PMLA also contributes to empower women to participate in justice delivery mechanism.

5.13.2 Benefits of Lok Adalat

a) Cases are amicably settled by the parties in a harmonious atmosphere.

b) It saves time, effort and expenses.

c) Long pending disputes in the courts can be settled through the Lok Adalat expeditiously.

d) Copies of decisions of the Lok Adalat are given to the parties free of cost.

e) The decision of the Lok Adalt is final and there is no appeal against the same.[93]

5.13.3 Lok Adalat–Refund of Court-Fee

On a careful reading of the provisions it can been seen that when a matter is referred to Lok Adalat by a Civil court, the provisions contained in the Legal Services Authorities Act, 1987 shall govern the parties in the matter of resolving the dispute and also in the matte of refund of court-fees. There is a specific provision in the Legal Services Authorities Act, 1987 which provides for refund of the court-fee when the matter is settled by the Lok Adalat and as per section 16 of the Court Fees Act, 1870 the entire court-fee paid on the plaint is liable to be refunded and the court which has referred the matter shall issue a certificate to the plaintiff to receive the amount from the Collector. [94]

In the CPC (Amendment) Act, 2002, there is no provision for directing refund of court-fee. Even in the CPC (Amendment) Act, 1999, section 34 inserted a new section 16 in the Court Fees Act, 1870, in which refund of court-fee is provided only in a case where the court refers the parties to the suit to any one of the modes of settlement of dispute referred to in section 89 of the Code. But no such provision has been made when the appeal is held not maintainable. Therefore, in a case where the right of appeal which was available prior to 1 July 2002 was taken away by the CPC

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[93] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[94] Vasudevan VA v State of Kerala AIR 2004 Ker 43, 2003(3) Ker LT 993.

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(Amendment) Act, 2002 without making any provision for the refund, it was held that refund of court-fee is not permissible when the appeal is held not maintainable[95].

5.14 Section 89 and Order 19, Rules 1A, 1B and 1C of CPC in India

Order X rules 1-A to 1-C do not specifically refer to the manner in which the powers of the court under section 89 to refer any of the four methods of alternative dispute resolution is to be exercised. But it cannot detract against the power of the court to invoke the jurisdiction under section 89 of the Code. If the substantive provision in the Code confers a power in the courts to make a reference, it would be improper and impermissible to argue against such provision in the statute with the help of he rules framed or not framed[96].

A careful reading of rules 1-A to 1-C of Order 10 must leave one with the unmistakable impression that the rule making authority had not considered the possibility of parties not agreeing for any one of the four methods available under section 89. The rules do not contemplate the procedure that is to be followed by the courts in the event of disagreement between parties. Order 10, rules 1-A to 1-C do not cover the entire gamut of possibilities, which may arise under section 89. It would, therefore, be myopic to come to any conclusion on the basis of 10, rules 1-A to 1-C about the power of he court to make a reference in the latter eventuality whether the parties do not agree for any of the four courses[97].

5.15 Order X of CPC in India

R.1A. Direction of the court to opt for any one mode of alternative dispute resolution[98]. –After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

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[95] Food Corporation of India v Munnilal Singh AIR 2003 MP 66, 2003(2) MPLJ 290.

[96] Afcons Infrastructure Ltd v Cherian Varkey Construction Co (p) Ltd 2007(1) KerLT 196, 2007(1) Ker LJ 333.

[97] Ibid.

[98] R. 1A. R. 1B and R. 1C ins. By the CPC (Amendment) Act, 1999) s.20 (46 of 1999) (w.e.f. 1-7-2002) vide Notfn. S. O. 603(E), dt. 6-6-2002.

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R. 1B Appearance before the conciliatory forum or authority. – Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

R. 1C. Appearance before the court consequent to the failure of efforts of conciliation[99].–Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by its.

Comment: The newly added rule 1A enables the court to explore the possibility of alternative methods of dispute resolution as provided in s. 89 of the Code which are conciliation, mediation, arbitration, judicial settlement or settlement through Lok Adalat. And the court is under a mandate to ask the parties to ask for alternative mode of settlement outside the court and this should be done after recording the admission and denials. While rule 1A is intended to effectuate the provisions in the amended section 89, rules 1B and 1C state the obvious consequential steps to rule 1A.

According to the Repeal and Savings clause section 32(2) (e) of Act 46 of 1999, the newly introduced section 89 and rules 1-A, 1-B and 1-C of Order 10 do not have retrospective effect and as such suits in which issue have been settled before the commencement of the amended provisions, will be dealt with as if the amendments had not come into force. Thus, in a suit relating to termination of contract, issues were framed as early as in 1993, it was held that the order rejecting the prayer for settlement outside court in terms of section 89 and Order X, rule 1-A, which came into force on 1-7-2002, is proper.[100]

Where the defendant filed an application for reference for the dispute to arbitrator and the prayer was reused on the ground that under section 11 of the Arbitration and Conciliation Act, 1996 the appointment of arbitrator is to be made by the Chief Justice, it was held that the order was not proper, because in view of Order X, rule 1-A

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[99] Ibid.
[100] 1 Basheer v. Kerala State Housing Board AIR 2005 Ker 64, 2005(!) Ker LT 300, @005(!) Civil Court C 558.

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and section 89 of the Code, it is imperative for the Court to take steps for settlement when parties were agreeable to settle the matter before Arbitrator[101].

Rules 1-A of Order X came up for interpretation before a three-Judge Bench of the Supreme Court in Salem Advocate Bar Association vs. Union of India[102], wherein it was held that the use of he word may in the later part of section 89 of the Code is not in conflict with word shall used in rule 1-A of Order X. It was observed that on harmonious reading of section 89 and Order X, rule 1-A it becomes clear that the use of the word may in section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of the ADR methods.

Considering the importance of the above decision it will be pertinent to refer to the further observations made in the above case. It was observed that regarding the Alternative Dispute Resolution (ADR), neither the Arbitration and Conciliation Act, 1996 nor the Legal Services Authority Act, 1987 contemplate situation where Court asks parties to choose one of the ADR methods under rule 1-A. Both the above mentioned Acts apply only from the stage where reference is made under s. 89 of CPC and he Procedure for option to ADR is also not contemplated in the said Act. In view of this, the Supreme Court directed the High Courts to frame rules under Part X of CPC covering the manner in which option to one of the ADR can be made[103].

A single Judge of Kerala High Court, while dealing with the Alternative Disputes Resolution Scheme under the Code, has considered to provisions of Order.X, rules 1-A, 1-B and 1-C in the light of the provisions of s. 89 of CPC. It has been held that compulsory reference to arbitration against volition and without consent of parties is permissible even through rules 1-A to 1-C does not speak about the same. If the substantive provisions in the Code confer a power in the courts to make a reference, it would be improper and impermissible to argue against such provision in the statute with the help of the rules framed or not framed[104].

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[101] Rajasthan State Road Transport Corporation v. Nand Lal Saraswat AIR 2005 Raj 112, 2005(@) Arbi LR 102, 2005(2). WLC 682.

[102] AIR 2005 SC 3353, (2005) 6 SCC 344.

[103] AIR 2005 SC 3353, 6 SCC 344.

[104] Afcons Infrastructure Ltd. V Cherian Varkey Constraction Co (p) Ltd, Kochi AIR 2007 (1) Ker LT 196, 2007 (1) Ker LJ 333.

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5.16 Arbitration Act

The Arbitration Act 1940 dealt with three kinds of arbitrations.

(i) Arbitration without intervention of court (Chapter II), i.e., when there was a arbitration agreement and the parties had initiated the arbitration proceedings, without assistance from Court.

(ii) Arbitration with the intervention of court where there was no suit pending (Chapter III), i.e., when there was an arbitration agreement and direction was sought by one of the parties form the court to refer the dispute to arbitration, presumably because the other party denied the arbitration agreement or refused to cooperate.

(iii) Arbitration in suits (Chapter IV) i.e. when there was no arbitration agreement and one of the parties had filed a suit against the other party and during the proceedings, the parties agreed to have the subject matter of the dispute referred to arbitration.[105]

Comment: In all the three cases, the arbitration proceedings were more or less the same. When arbitration had been initiated without assistance of court, it did not mean that arbitration was conducted without intervention of the court or that the court had no authority to intervene at any stage during the arbitration proceedings. Arbitration may be initiated and the award made and complied with, without the assistance or intervention of the court. However, if it became necessary during the course of arbitration proceedings to seek the assistance of the court, any party could do so. Under the Arbitration Act, 1940, a party could invoke the jurisdiction of the court for the following purposes:-[106]

(i) to appoint an arbitrator (in certain circumstances).

(ii) to set aside the appointment of a sole arbitrator made by any party (in certain circumstances).

(iii) to remove an arbitrator (in certain circumstances).

(iv) to revoke the authority of an arbitrator or to revoke a reference (in certain cases).

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[105] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

[106] Goldberg, Stephen B. 2003, *Dispute resolution: Negotiation, mediation, and other processes*, 4th edn, Aspen Publishers, New York.

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(v) to obtain an order that the arbitration agreement should have no effect (in certain cases).
(vi) to pronounce opinion, when a special case was stated by the arbitrator.
(vii) to have the award filed in court, after it was pronounced, in order to obtain a decree in terms of the award.
(viii) to pronounce judgment according to the award and pass a decree.
(ix) to modify or correct an award.
(x) to merit an award for reconsideration.
(xi) to extend the time for submission of an award.
(xii) to set aside an award.
(xiii) to pass interim orders after award was filed to prevent rights of parties being defeated.
(xiv) to supersede the arbitration reference when the award became void or it was set aside.
(xv) to pass an order that a provision making an award a condition precedent to bringing an action in court should not apply under certain circumstances.[107]

The powers of the court in certain matters mentioned above do not find a place in the new law because it limits to the minimum the intervention of court. An arbitrator has no power to issue summons and commissions for the examination of witnesses and summons to produce documents. When during the course of the arbitration proceedings it becomes necessary to summon witnesses or documents it can be done only through the assistance of court. Any person refusing to give evidence or produce documents before the arbitrator on he orders of the court will be liable to punishment as it such defaults had been committed before the court. Section 27 provides that the arbitral tribunal or a party with the approval of the arbitral tribunal may apply to the court for assistance in taking evidence and the court may give such assistance within its competence and according to its rules on taking evidence.[108]

The court had power (for the purpose of arbitration proceedings) to pass orders for the preservation, interim custody or sale of any goods, and to order inspection of any property or thing which was the subject matter of the reference. It could authorize (for any of the aforesaid purposes) any person to enter upon any land or building in the possession of any party or authorize any samples to be taken or any observation to be

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[107] Sarfaraz Ahmed Khan (1 January 2006). *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism*. APH Publishing

[108] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence (section 43). The court had also power to issue interim injunctions or appoint a receiver, secure the amount in difference in the reference or appoint a guardian or a minor or person of unsound mind for the purpose of arbitration proceedings. In case the above powers were vested in the arbitrator by the arbitration agreement, the arbitrator himself could exercise such powers.[109]

The new law deals with a variety of provisions as to relief under Sections 9 and 17. Section 9 empowers parties to apply to court for interim measures of protection before or during arbitral proceedings. Section 17 empowers the arbitral tribunal to order a party to take interim measures of protection on a request being made to it. The court could modify or correct an award (a) by striking out of it something not referred to arbitration (b) by amending imperfections in form or correct any obvious error which could be amended without affecting the decision of the case, or (c) where the award contained a clerical mistake or an error arising from an accidental slip or omission (S.15). Combined effect of sections 33 to 36 of the new law is as under :-[110]

(i) On application made to the arbitrator within 30 days of making of the award, the arbitrator can

(a) Correct clerical errors etc. in the award; or

(b) Interpret the award.

Court has no power, as such, under the new law to "modify" an award but it can set it aside on specified grounds, under the relevant provisions of the new law. Subject to the above provisions, the award is final.

[109] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ban.asp.

[110] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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CHAPTER-VI

ADR IN PAKISTAN AND ACCESS TO JUSTICE

Chapter VI will give a brief introduction to the legal systems of Pakistan. The administrations of justice system in this country, which the research has selected for the work on ADR, will shortly be discussed. Pakistan follows the adversarial legal system embedded in their long colonial rule for nearly two centuries. Consequently the defects and the inherent in adversarial system will also be discussed in this chapter.

Alternative Dispute Resolution (ADR) is in one form or another, as old as the country itself. In fact, parties in Pakistan present/refer to resolve their disputes for years to Panchayats or committee of honorable elders of the community.[1] However, this type of particular dispute resolution has been most often associated with marital and other family matters. The focus on this chapter would be on the ADR related to community based, family matter, commercial activities primarily on international investment and trade in Pakistan. The length of explanation under each research tool should not be an indicator of its relevance. Depending on how specific you may want to be, each source has its advantages and drawbacks. Moreover, this is only a beginning-a snapshot of the tools that are available for your use.[2]

Chapter VI will give a brief introduction to the legal systems of Pakistan. The administrations of justice system in this country which the research has selected for the work on ADR, will shortly be discussed. Pakistan follows the adversarial legal system embedded in their long colonial rule for nearly two centuries. Consequently the defects and the inherent in adversarial system will also he discussed in this chapter.

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[1] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[2] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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6.1 The Setting: Pakistan

What may pass as ADR mechanisms today had roots in Pakistan's colonial past. At the informal level, the jirga and panchayat are two examples of forums used as alternatives to formal court resolution of disputes. However, these two forums, based upon the egalitarian spirit present in the communities, and stripped of their better qualities and chosen by the British Laws to establish court-like forums for enforcing harsh laws to suppress their subjects.[3] Therefore, the jirga and panchayat in their colonial formulation were no more than indigenous, democratic, dispute-resolution forums known to Pakistan in earlier times[4].

At the formal level, the only ADR method evolved by the British was arbitration. However, this was a forum of restricted application as its use was confined mostly to the business community that utilized it to settle disputes relating to mercantile transactions.

The post-independence period saw a continuation of this practice, albeit with a lot of controversy attached to it. This controversy revolves around the rationale behind the formation/retention of, for instance, the jirga (as constituted under suppressive colonial laws). The colonial powers believed that the people residing in certain areas of the country were potential criminals posing a threat to them and that an iron hand should be used to deal with them. Hence, the need for special laws and forums in which to try them, in the Pakistani context, therefore, one has to distinguish between what constitutes ADR mechanisms with the brief to expedite the process of justice on the one hand, and what have emerged as parallel judicial forums applying special laws and confined to certain areas of the country on the other. The methods include the panchayat, jirga, arbitration, conciliation through arbitration councils under 'The Muslim Family Laws Ordinance, 1961" (MFLO) and institution of the Wafaqi Mohtasib (Ombudsman).[5]

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[3] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[4] Salman Ravala, ADR in Pakistan: Published in May/June 2008. www.hg.org/firms-pakistan.html and http://www.ibanet.org. http:.chinadaily.com.cn/English/doc/2004-12/26/content403376.htm

[5] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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From earlier days of colonization to independence and thereafter, a nexus existed between Tribal chiefs and the colonial British administrators, including the present civil bureaucracy (local Police); which is still going on. The judiciary as an institution has never been developed in Pakistan and particularly in tribal or semi-tribal areas largely because of the colonial administrative system itself; and moreover the mechanism of parallel judicial authorities of tribal chiefs arbitrating local customs was kept intact. The executive district magistrate, who was primarily a revenue collector, had judicial jurisdiction over criminal matters as well.[6] Prominent laws which conferred widespread powers on colonizing administrators were Frontier Crimes Regulation enacted in 1901 and other laws during colonization period. 10 PLD 1957 Quetta 1, PLD 1957 Peshawar 100, PLD 1991 Quetta 5 (Confirmed in PLD 1993 SC 341), 2004 P.Cr.L.J 1523 (Karachi).

System of Panchayat had taken birth as a statutory and elected body that enjoyed the mandate of village development at the rural level. This statutory recognition was extended by the colonial rulers in early 1888 in the presidency of Madras, when the Village Counts Act of 1888 was passed. In 1907, The Royal Commission on Decentralization recommended the setting up of panchayats in the backdrop of its useful functions in settling criminal and civil cases of petty nature at the village level. The constitution of Islamic Republic of Pakistan was adopted in 1973. Since then it has undergone seventeen amendments. Up till now none of rulers, either military or civilian, has abolished the FCR in designated areas. Under Article 246 of the Constitution of Pakistan, 1973 the FATA includes seven districts or Agencies i.e. South Waziristan Agency, North Waziristan Agency, Khurrum Agency, Arakzai Agency, Khyber Agency, Mohmand Agency and Bajur Agency.[7]

With close to sixty years of independence, Pakistan has had bestowed upon it numerous titles. Internationally, on the one hand, it has been called the most delinquent of delinquent nations (JJ and on the other, a misunderstood but still effective country. Regionally, Pakistan has a "hostile relationship with most of its

[6] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka
[7] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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neighbors, and is characterized by weak and uneven economic growth, political chaos, and sectarian violence". "Pakistan has oscillated between unstable democracy and benign 3iithoriBarianism". However, although there has been no "matured democracy and despite its Islamic identity, unlike its neighbors, China and Iran, Pakistan has not undergone either religious authoritarianism or communism. It does very well in many areas and arguably can still emerge as a successful State".[8]

Most scholars and practitioners interested in studying international issues recognize the strategic importance of Pakistan. However, the crucial role Pakistan plays in the world today is not a new development. In the 1950s and 1960s, Pakistan was a member of two American sponsored alliances. In 1980s, Pakistan was a vital player in evicting the Soviets from Afghanistan. Today, Pakistan is an essential ally in the War on Terror, Furthermore, it is a gem for foreign in vestments. Pakistan is arguably one of the most active economies in whole of Asia. Its relationship with China is seen as a potential for making money for investors, both domestic and international. Additionally, investors and international decision makers, not just from China, but from the rest of the world arc recognizing the importance of Pakistan's location in relation to their proposed investments in the Central Asian energy sector.[9]

6.2 Different Types of ADR in Pakistan

The Government of Pakistan has been made an attempt to integrate and develop relationship between the formal and informal justice systems. A number of legislations have been promulgated at the Federal and Provincial levels. The Local Government has also initiated to strengthen informal justice system. The Local Government Ordinance, 2001 (LGO) is the best example. It provides a basic framework for resolution of disputes amicably through Musalihat Anjuman (MA). The MA is envisaged under the LGO at the provincial levels which selects panel of non-elected persons from the community through Insaf Committees (ICs) at union council level, who are publicly known as persons of integrity, good judgment and

[8] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/Reports/ ban.asp.

[9] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48

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command respect. Moreover, under section 104 of the LGO, cases may be referred to MA by any court where proceedings are pending. Earlier conciliation Committees were constituted for rederessal of petty issues at the union council level.[10]

This study informs that police and courts in interior of Sindh refer cases of criminal nature (compoundable) to the decision-maker of informal justice system where heinous offences like murder, injuries and theft, pending in formal courts are usually privately resolved through mediation by decision-makers of informal justice system and the parties simply file compromise application in courts. Some times in non-compoundable offences, the prosecution witnesses do not support the prosecution case, which results in acquittal of accused from the charge.[11]

In urban areas tenancy/rent matters and family matters are normally resolved in the courts without considering legal intricacies involved in the case as the legislations in family courts permit the presiding officer to make attempt to reconcile the dispute during pre and post trial. Similarly, in rent matters the appellate court has been given powers under the Sindh Rented Premises Ordinance, 1979 to mediate the dispute between the parties and motivate them to reach a settlement. It is a common practice in dispute of civil nature that the parties during pendency of the action continue to explore settlement through informal justice system and on settlement file either a compromise or withdrawal application.

6.2.1 Jirga

The dispute resolution forum of the Pukhtuns and Baloch (is) known as the jirga[12]. Contrary to popular belief, the jirga does not have a monolithic, uniform identity but is functioning in different forms under different sets of laws, both statutory and customary. The jirga, like the panchayat in Punjab and Sindh, was used by the British in modified form to enforce law and order in certain parts of the NWFP and Baluchistan (under 'the Frontier Crimes Regulations). The traditional jirga, nevertheless, continues to exist parallel to that constituted by the British. Yet another

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[10] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.
[11] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka
[12] Definition of Jirga in Dictionary 'Ghyathul-lughat' 1871, p. 119.

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category of jirga, constituted under certain special laws, is a post-independence development applicable to the provincially administered tribal areas of the NWFP and Baluchistan.

A particularly lucid description of the jirga, given by James W. Spain, is: A jirga in its simplest form is merely an assembly. Practically all community business, both public and private, is subject to its jurisdiction. In its operation, it is probably the closest thing to Athenian democracy that has existed since the original. It exercises executive, judicial, and legislative functions, and yet frequently acts as an instrument for arbitration or conciliation.[13]

In an important jirga, each kundi, khel, and tribe must be represented. There are no elections and no credentials committees. Representatives are usually chosen on the spur of the moment, almost always on the basis of age, shrewdness, and reliability. The jirga is essentially a roundtable conference. There is no chairman or presiding officer. Everyone whose interest may be affected has a right to speak. Decisions must be unanimous and solemnized by a prayer. If this cannot be achieved, the jirga breaks up. A jirga may meet under the shade of a solitary tree by the side of a dusty road in Waziristan, or on the spacious green lawns of the Government House in Peshawar.[14]

There is seldom any voting in a jirga. The sanctity accorded the jirga is indicated by the fact that very rarely does it break up into a fight. A subtle point, which is frequently obscured by the semi-judicial role of jirga, is that the body's function is to settle peacefully an existing situation more than to judge right or wrong, determine guilt, or pass sentence. The parties appear as equals. The function of the jirga is to determine whether what was done was rightly done, and if not, what the party acted against is entitled to do to square accounts. In working out the proper settlement, the jirga members take into account the requirements of Pukhtunwali, the circumstances in the particular situation, and the character of the individuals concerned. They are also guided by the generally accepted scale of monetary compensation, which an

[13] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48

[14] Khair, S 1998 2004, 'Alternative dispute resolution: How it works in Bangladesh', The Dhaka University Studies, Part F, vol. 15, no. 1, pp. 59-92.

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injured party can honorably accept, if he so chooses, instead of retaliation in kind. Decisions are usually very simple. When complex disputes over property or inter-tribal feuds are involved, settlement is more complicated, and recourse is usually Shariat.[15]

Upon attaining independence, Pakistan inherited, in addition to settled areas and princely states, some tribal or frontier districts that had never been made part of the mainstream of the British Empire. These were areas considered to be a threat by the colonial powers. Therefore, special laws were promulgated for the tribal or frontier districts the purpose of which was 'the suppression of crime'. This law, called 'the Frontier Crimes Regulation' (FCR), came to be known as the 'black law' due to its extremely harsh, inhumane and discriminatory provisions.[16]

This legal system was designed by the British to work through a class of local notables who not only enjoyed social influence and status within the society but were also loyal to the British. The British objective was to look as though they were carrying out a policy of non-interference in the centuries old system of riwaj (customary law); the real objective, however, was to keep people away from a universally recognized judicial system so that they were denied the basic human rights of equality before the law and equal protection of the law. The rulers, therefore, nominated members of the jirga, which formed part of the dispute resolution mechanism to which the deputy commissioner was empowered to refer cases under the FCR. Because of this difference, it is important to distinguish a jirga constituted under the FCR from the traditional jirga applying customary laws of the area.[17]

Unfortunately, the FCR was retained and applied to the tribal areas even after independence and emerged as the first parallel judicial system in Pakistan. It is based on the premise of suppression of crime by infliction of the severest possible punishment. The administration is neither its aim nor purpose. The FCR denies the

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[15] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[16] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48

[17] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems." Asia Law House, Hyderabad.

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accused the due process of law. The entire procedure is based on a system of inquiry conducted by the jirga rather than presenting of evidence, examination and cross-examination of witnesses, etc. Engaging of counsel is not permitted. Appeals to the superior judiciary (i.e., the Supreme Court and High Court), which are constitutionally guaranteed rights of every citizen of Pakistan, are denied to persons subject to the FCR. The most tragic part of the enforcement mechanism under the FCR is that an institution as important and revered as the jirga has been corrupted and distorted to suit the rulers-first alien and now our own. The provisions of the FCR have been challenged at different times in the superior courts of the country.[18]

In Baluchistan, special laws have been promulgated alongside the ordinary laws of the land. They are 'the Civil Procedure (Special provisions) Ordinance I of 1968' and '(the) Criminal Law (Special Provisions) Ordinance II of 1968'. Historically, Baluchistan's different regions have had several laws applicable simultaneously, such as: Baluchistan agency laws, forest laws, civil and criminal justice laws and the FCR which mainly held the field.

In Pakistan, nowadays Jirga is not only used as a customary practice to legitimize honor crimes or harmful traditional practices like Vani, but also used as a mode of reconciliation, mediation or arbitration mainly for perceived communal harmony known as Restorative Justice. Local feudal lords or tribal chiefs in most cases are the members of parliament and sitting ministers in both the provincial and the federal governments they are the linchpin of this system.[19] Jirga is practiced under various denominations in Pakistan, which are called Fasilo in Sindh, Panchayat in Punjab, Jirga in Baluchistan, North West Frontier Province and FATA. However, through subsequent amendments in the Frontier Crimes Regulation (FCR), Jirga by law has been cofined to the Federal and Provincial Administered Tribal areas in NWFP and some areas in Balouchistan12; but Jirgas are running defacto in other areas, through

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[18] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/ Reports/ban.asp.

[19] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.

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passive and active support of elements involved in criminal justice system of the state.[20]

Interestingly, under article 247(7) of Constitution of Pakistan which specifies that the jurisdiction of the High Court and Supreme Court do not extend to the designated Federal and Provincial Administered Tribal Areas, which have their own legal and judicial regime based on tribal adjudication. Despite the legislation of banning the System of Sardari (Abolition) Act, 1976, that prohibited the Jirga outside the designated areas, they were taking place as an alternate avenue. While Jirga is a formal gathering as already mentioned, now incorporates civil bureaucrats and the local police chiefs due to official patronage particularly for resolving tribal feuds; so it is a more informal institution but still maintains differential treatment where women are still prohibited in all situations be it victims, witnesses or participants. In cases of compensation and evidence, it interacts with the principles of criminal justice system.

There are various types of Jirgas that exist in the contemporary tribes. Most notable among these are:

i) Sarkari Jirga Established under the Frontier Crimes Regulation (FCR) 1901, the magistrate, the political agent or his assistant can designate a group of elders to try a criminal or a civil case. The Frontier Crimes Regulation (FRC) authorizes settlement of quarrels by this Jirga that arise out of blood-feuds, relating to women, wealth and land and all other questions affecting the Pakhtoon honor and way of life. This Jirga can inflict a maximum penalty of up to fourteen-year imprisonment. This Jirga formulated in case a dispute arises between two individuals or families. The Jirga members were chosen from both the parties to arrive at a just settlement acceptable to both sides.

ii) The Qaumi or Ulasi Jirga is an assembly of the elders comprising each household of a certain village or community. It convened to discuss matters such as collective property, rights and distribution of irrigation water, or common concerns, like selection of a site for a school, etc.

[20] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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iii) Shakhsi Jirga: This Jirga formulated in case a dispute arises between two individuals or families. The Jirga members are chosen from both the parties to arrive at a just settlement acceptable to both sides.[21]

6.2.2 The Panchayat

The institution of panchayat at the village level has existed since time immemorial in India. Though the panchayat system, as we know it today (abolished in Pakistan by the 'Basic Democracies Order 1959' but retained in India), has no direct connection with the system of rural self-government which existed in ancient and medieval times. Yet much of the inspiration and faith people have in it today is derived from the panchayat system as it flourished in the past. The panchayat of twentieth century Indo-Pakistan, which emerged as a statutory and elected body responsible for the development of the village, evolved in the later part of the nineteenth century. This development was largely a result of the introduction of the policy of local self-government by the British, which initiated the transitional phase of the village from a self-contained social unit to one with a more urbanized character of social organization. Colonial rulers realized the usefulness of these bodies and gave them statutory recognition as early as 1888 in the state of Madras when 'The Village Courts Act 1888' was passed.[22]

The village community was an important feature of the older socio-economic system. It has been defined as 'a body of proprietors, who own a greater part of the village lands as a common possession held themselves responsible jointly for payment of revenue. The members of the proprietary body were often united by real or fictitious common descent; for this reason strangers were not admitted to the brotherhood. The landlords formed a democracy among themselves that ruled its dependent priests, artisans and menials with oligarchic authority. All the community's business was performed by the headmen, assisted by a committee of elders called panchayat. The panchayat was a communal body for settling only the social and religious disputes arising in the village. It 'has had no legal powers but it has been in its power to inflict

[21] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

[22] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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on recalcitrant members of the community the punishment of social excommunication and on the menials and artisans various inconveniences.'[23]

At the time of Independence, we inherited the institution of panchayats in the provinces of Punjab and Sindh. The Report of 'the Law Reform Commission 1958-59' expressed mixed views regarding the efficacy and success of this institution. This report echoed the thinking in the official circles that panchayats should be scrapped and replaced by a uniform system of local government. Therefore, all provincial enactments dealing with village panchayats were repealed by 'The Basic Democracies Order, 1959', and a uniform system was introduced in the country under 'The Conciliation Courts ordinance (XLIV of) 1961'.[24]

Earlier the panchayats would only perform as arbitration committees. Subsequently The Panchayat Act of 1912 extended their civil powers. The jurisdiction of Panchayats was limited under the Act to suits where both parties agreed to take their cases to the panchayats, proved ineffective leading to the passing of the Punjab Village Panchayat Act of 1922 (Punjab Act III of 1922) to restore the old authority of the panchayat. This Act was further amended in 1939, with the strategies to act as a judicial body for the decision of petty civil and criminal cases; as an administrative body for the performance of certain duties with regard to sanitation; and as a legislative body, and was given the right to impose taxes and to pass general orders, requiring the inhabitants of the area to abide by certain rules to improve the general standard of life within the jurisdiction of the panchayat.[25]

The panchayat at the village level meets as and when required in order to settle disputes or attend to communal issues. The disputes and communal issues range from disagreements over water, women, boundaries, and the division of crops with laborers during harvest, to campaigns to secure electricity supply for the village. Furthermore,

[23] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.

[24] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48

[25] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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with the active role played by the media in highlighting the curse of the panchayat system, especially against womenfolk and children, serves to drive the last nail in the coffin of the century-old panchayat system.

The panchayat system has lost credibility now a days and the awareness regarding formal judicial system has increased manifold. Also, since the panchayat system still follows the old tradition of supporting the influential and the wealthy from among the community, therefore, the faith of the masses is diminishing with every passing day particularly in the case of a woman either in capacity of accused or victim. Masses are not in favor of any further continuity in a system that perpetuates class distinctions/ discrimination. Easy money, changing social mores, and higher mobility of population are other factors that have contributed to the loss of credibility of the panchayat system.[26]

Today, the trend of approaching the regular courts instead of trying one's luck at the panchayat is becoming popular. The panchayats, as a matter of fact, are considered to be the hub of oppressors, and cases like Mukhtaran Mai have enough evidence to prove that women are most vulnerable to the situation at the rural level. Factors such as class disparity and keeping women at a disadvantage have put the panchayat system on the verge of collapse, and both the media and the human rights activists have established the point that panchayats cannot act as substitutes for judicial forums. Women, interestingly, were total strangers to the panchayat composition and they seldom impress upon the panchayat decisions by virtue of their powers of persuasion and influence.[27]

6.3 Decision by consensus or third party decision

In the interior of Sindh the informal system is known as Faislo or Sulah. Each party nominates two or more Musheers (Advisors). They are also Naikmards (Notables) of their vicinity or tribe. Each party explains their case to them. The Faislo is arranged at

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[26] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.

[27] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48

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the Otaq (place) of another Notable known as Sarpench/Ameen who is selected by the parties with their consent. If Sarpench/Ameen is not agreed by consensus, the victims have an edge in opting for the Sarpench/Ameen. The Musheers of each party discuss the case of their parties with each other and endeavor to reach at some conclusion acceptable to both the parties. Sometimes both the Musheers succeed in winning the consensus which is normally called Sullah (settlement) and in case they fail to reach at some conclusion the fifth man who is headman of Faislo (decision) intervenes and takes decision after hearing the parties and their Musheers. There is no mechanism for appeal.[28]

The Shi'a Imami Ismaili Muslims, generally known as the Ismailis, belong to the Shi'a branch of Islam of which the Sunnis comprise the other. The Ismailis live in over 30 countries of the world, mainly in South and Central Asia, Africa, Europe and North America. Islam, like Judaism and Christianity, is a monotheistic faith whose most fundamental principle is the belief in the Supreme Being– God, or Allah in Arabic–who is unique and without equal or partners. His Highness Aga Khan IV, who from the 1970s extended the practice to other regions including the United States, Canada and several European countries as well as East and South Asia, the Gulf, Syria, Iran and Afghanistan after a process of consultations within each respective constituency.[29] In 1986, he promulgated a single constitution that, for the first time, brought under one aegis, the social governance of the worldwide Ismaili community, with built-in flexibility to account for the diverse circumstances of different regions. While the Constitution serves primarily the social governance needs of the Ismaili Community, its provisions for encouraging amicable resolution of disputes, through impartial conciliation, mediation and arbitration are, being increasingly used.

These bodies, known as the Conciliation and Arbitration Boards (CABs), operate today in Afghanistan, Canada, France, India, Iran, Kenya, Madagascar, Pakistan,

[28]Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/ Reports/ban.asp.

[29] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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Portugal, Syria, Tanzania, Uganda, the United Kingdom and the USA and are recognized as having jurisdiction over matters of Ismaili personal law.[30]

In Aga Khan Community there is a structured mechanism of Arbitration and Mediation. The mediators/arbitrators are appointed by His Highness the Aga Khan. The mediators/arbitrators after being selected have to undergo training program to be able to mediate and arbitrate proceedings. A person is appointed in a particular territory for resolving the disputes. Normally 75% disputes are mutually resolved in the forum. There is no forum of appeal. The parties, who do not agree or reach at consent decision, opt for formal justice system prevailing in a particular jurisdiction. The arbitrators/mediators acts voluntarily and the facility is free for the parties.[31]

In NWFP a number of studies have been carried out on restorative system, particularly Jirga system. There are different type of assemblies known as Jirga (assembly) for a localized dispute and for larger dispute or inter tribe dispute loya Jirga (grand assembly) are held. The parties opt for the relevant one keeping in view the nature of dispute. Normally in NWFP the parties reach at decisions with consensus.

Procedural aspects of informal justice systems: Who/how to bring complaints-
Most of the times, both the parties approach the Sardar/Notable to resolve their dispute and some time one of the parties approach a Sardar/Notable who subsequently calls the other party. Sometimes, in Sindh, the courts also refer the parties to the Notables/Saliseens/Sardars/ Wadero/Pirs/Syed or Shah for amicable settlement of the dispute. In Sindh, dispute between two tribes are also referred by a police officer to Sardars of third tribe. In NWFP and Baluchistan other organs of civil administration refer the disputes to non-institutionalized informal justice system. Due to pronouncement of judicial verdicts on Jirgas and negative propaganda of Media, the officials who commonly refer a dispute to a Jirga/Faislo, avoid disclosing their names. They even do not name the notables/Sardars to whom, the disputes are referred to. During judicial proceedings the parties normally make adjournment applications

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[30] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.
[31] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

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mentioning reason that their compromise talks are going on and mutual decision is expected.[32]

Gender issues: While discussing and deciding a dispute wherein a woman is a party in any capacity, she is given special treatment.[33] She is normally not called in Jirga/Faislo however her Musheers and family members represent her and plead on her behalf. In case she is a victim and during dispute received injury, the offender shall pay double amount of compensation to her as compared to compensation paid for the injury to a man. Similarly, if in any circumstances the life of a woman is in danger, she is given shelter by a Notable of the community. This sometimes causes defamation to the Sardar, however, due to the role of human rights activist, NGOs and media this practice has been stopped. Now, in rare cases where a woman seeks shelter from her Sardar, she is allowed to stay in the Haveli with her fellow tribe female. Most of the persons interviewed during study expressed that 'women are not allowed to attend the Punchayat to defend them or to express their view point relating to dispute'28. However under formal justice system women cases are proceeded on priority basis and they are given opportunity to be heard.[34]

Types of decisions or outcome of these processes: Under the informal justice system decisions are made by awarding compensation to the aggrieved person. According to practitioners of the informal justice system, punitive measures in the form of imprisonment or detention are not awarded. However, such claim is not substantiated by the judiciary as large number of habeas corpus petitions are filed in the courts25. Women are given due importance, for example in Sindh compensation for murder of a female is fixed at Rs. 8,00,000/- which is double the amount as compared to the compensation for the murder of a male person. A juvenile offender is dealt in different manner. Though he is also given the same punishment in shape of compensation but the amount is paid by his family members and in case they cannot pay (the amount of

[32] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/ Reports/ban.asp.

[33] Habiba, Umme. 2002, 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48

[34] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.

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compensation), co-villagers or caste fellow contribute and pay to the victim. Sometimes minor offenders are dealt with leniently.[35]

According to Faiz Rasool "In urban areas where Punchayat system effectively works, wrong doer/accused is not convicted but different types of punishment are awarded which include payment of fine, transfer of land, hand of a girl (BAZZO) 26 from family and in case the accused is from very low social status and there is no female in his family than the accused is asked to undertake for giving hand of baby girl which is yet to be born and for this they use the words 'PAIT DAINA'."

6.4 ADR within Legal Framework

As discussed above, laws related to ADR are implicitly mentioned in the Constitution of Pakistan. Explicit mention of ADR methods and mechanisms is made in the following domestic laws of Pakistan:

6.4.1 The Constitution of Pakistan

The Pakistan Constitution has been amended many times, including, most recently in November 2007. Although is no explicit mention of ADR in the Constitution of Pakistan, a reference to commercial and financial activities can be pinpointed in the Constitution, which may however implicitly, lead to a view that Pakistan practiced certain methods of ADR. A quick review of the Constitution reveals that articles 153-154 deal with the Council of Common Interest, article 156 deals with the National Economic Council, article 160 deals with the National Finance Commission, and article 184 of the Constitution gives rise to original jurisdiction to the Supreme Court of Pakistan in "any dispute between any two or more Governments."[36]

6.5 The Small Claims and Minor Offences Courts Ordinance of 2002

The Small Claims and Minor Offences Court Ordinance is a law intended to establish of Small Claims and Minor Offences, where the value of the small claims suit is less 300,000 ($1600) and the punishment for minor offences is less than three years. Purpose of the law is to "provide legal cover to amicable modes of settling disputes

[35] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

[36] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/ Reports/ban.asp.

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parties easily and expeditiously." You can quickly read the law on the website indicated above, to see that this law encourages "amicable settlement" which includes arbitration, mediation and conciliation-all forms of ADR.

The Small Claims and Minor Offences Ordinance was promulgated on 19th June, 2002 and this law was to come into force on such date as the Federal Government may, by notification in the Official Gazette, fix in this behalf. This notification was published in the Official Gazette dated 5th July 2004 enforcing the Ordinance i.e. 15th July 2004, paving the way for decision of cases as envisaged in this Ordinance.[37] This Ordinance has taken place of the Provincial Small Causes Courts Act of 1887 which has been repealed by this Ordinance. The Small Causes Court could take cognizance of the suits of a civil nature the value of which did not exceed Twenty Five Thousand Rupees and which was not a suit specified in the 2nd Schedule of the Provincial Small Causes Courts Act 1887. So a suit which is not specified in the 2nd Schedule and the value of which did not exceed Twenty Five ; Thousand Rupees was to be filed with the Court of Small Causes, and the basis for cognizance was the value claimed in the suit. This position has not continued under the Small Claims and Minor Offences Courts Ordinance, 2002 as section 5 of this Ordinance provides a different standard for calculating the value of the suit/claim in respect of some of the suits mentioned in the schedule. Section-5 reads as follows:

Jurisdiction:-The court shall have exclusive jurisdiction to:- (a) try all suits and claims arising there from, specified in Part I of the Schedule to this Ordinance, the subject matter of which does not exceed one hundred thousand rupees in value for the purposes, of jurisdiction:

Provided that the High Court may, by notification in the Official Gazette, vary such value from time to time; and
(b) try offences specified in Part II of the Schedule to this Ordinance.

So, now the exclusive jurisdiction of the Small Causes Court extends to all suits and claims specified in Part-I of the Schedule to the Ordinance, where the subject matter

[37] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48

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of the suit and claim do not exceed one hundred thousand rupees in value for the purpose of jurisdiction. All such claims fall within the ambit of the Ordinance, 2002. The implication of the words "the suit and claim arising there-from (in the specified suits), the subject matter of which does not exceed one hundred thousand rupees in value for the purpose of jurisdiction" is to be understood by reading these words in the context of the Suits Valuation Act, 1887, which provides for the method of calculating the value of the various suits including the suits specified in Schedule-1 of the Ordinance 2002. The suits in which the value is to be determined as per the method given in the Suits Valuation Act and the value so determined will be different from the value of the subject matter which may be listed as under:-

i. Suits for specific performance or rescission of a contract in writing.
ii. Suit for recovery of movable property or value thereof when the subject matter has no market value.
iii. Suit for separate possession of joint immovable property through partition or otherwise.
iv. Suit for redemption of mortgage property.

In these suits irrespective of the value of the subject matter, the value for the purpose of jurisdiction calculated on the basis of the provisions of the Suits Valuation Act is usually assessed at a figure much less than One Hundred Thousand Rupees. The purpose of the Ordinance of expeditious disposal of specified suits of the value of Rs. 1.00 Lac will stands frustrated and invalidated in view of the complexities arising in the wake of the method of determining and calculating the jurisdictional value. This provision will defeat the very objective of expeditious disposal of the suit and is thus, destructive of the scheme contemplated in the Ordinance. This situation can be corrected by the High Court in exercise of the power conferred on it in the proviso to clause (a) of subsection (1) of section 5 of the Ordinance. The High Court should issue a notification in the official gazette varying the method of valuation by providing that the suits of a civil nature of which the value does not exceed Rs. 1.00 lac shall be cognizable by Court of Small Causes.

Reference at this stage may be made to the civil procedure laid down in England for decision of claims/suits of civil nature under Lord Woolfs Civil Reforms. These rules contemplate allocation of cases to the following management tracks:-

(a) The Small Claims Track

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(b) The Fast Track

(c) The Multi-Track

Rule 26.6 sets out the normal scope of each track. Part 27 makes provision for the Small Claims Track. Part 28 makes provisions for the Fast Track and Part 29 makes provisions for the Multi-Track. The gist of the provisions pertaining to each track may be given as under:

6.6 Scope of each track

26.6.-(1) The small claims track is the normal track for -

(a) any claim for personal injuries where -

(i) the financial value of the claim is not more than £5,000; and
(ii) the financial value of any claim for damages for personal injuries is not more than £1,000;

(b) any claim which includes a claim by a tenant of residential premises against his landlord where -

(i) the tenant is seeking an order requiring the landlord to carry out repairs of other work to the premises (whether or not the tenant is also seeking some other remedy);

(ii) the cost of the repairs or other work to the premises is estimated to be not more than £1,000; and

(iii) the financial value of any other claim for damages is not more than £1,000.

Rule 2.3 defines “claim for personal injuries” as proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death.

(2) For the purposes of paragraph (1) “damages for personal injuries” means damages claimed as compensation for pain, suffering and loss of amenity and does not include any other damages which are claimed.

(3) Subject to paragraph (1), the small claims track is the normal track for any claim which has a financial value of not more than £5000.

(Rule 26.7(4) provides that the court will not allocate to the small claims track certain claims, in respect of harassment or unlawful eviction.)

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(4) Subject to paragraph (5), the fast track is the normal track, for any claim -

(a) for which the small claims track is not the normal track; and

(b) which has a financial value of not more than £15,000.

(5) The fast track is the normal track for the claims referred to in paragraph (4) only if the court considers that—

(a) the trial is likely to last for no longer than one day; and

(b) oral expert evidence at trial will be limited to-

(i) one expert per party in relation to any expert field; and

(ii) expert evidence in two expert fields.

(6): The multi-track is the normal track for any claim for which the small claims track or the fast track is not the normal track.

6.7 Matters relevant to allocation to a track:

Section 268.-(1) When deciding the track for a claim, the matters to which the court shall have regard include—

(a) the financial value, if any, of the claim;

(b) the nature of the remedy sought;

(c) the likely complexity of the facts, law or evidence;

(d) the number of parties or likely parties;

(e) the value of any counterclaim or other Part 20 claim and the complexity of any matters relating to it;

(f) the amount of oral evidence which may be required;

(g) the importance of the claim to persons who are not parties to the proceedings;

(h) the views expressed by the parties; and (i) the circumstances of the parties

(2) It is for the court to assess the financial value of a claim and in doing so it will disregard-

i) any amount not in dispute;

ii) any claim for interest;

iii) costs; and

iv) any contributory negligence.

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(3) **Where-**

i) two or more claimants have started a claim against the same defendant using the same claim from; and

ii) each claimant has a claim against the defendant separate from the other claimants, the court will consider the claim of each claimant separately when it assesses financial value under paragraph (1)

An intelligent reading of these Practice Directions indicates that the small claim track is intended to provide proportionate procedure by which most straightforward claim with a financial value of not more than £5000 can be decided without need for the formalities of traditional trial and without incurring legal cost.[38] The cases generally suitable for this track include consumer disputes, accident claims, dispute about ownership of goods and some other disputes between the Landlord and tenant other than those for possession. A case involving a disputed allegation of dishonesty will not usually be suitable for the small claims track as court will not normally allow more than one day for the hearing of such a claim.[39]

6.7.1 Fast Track

A claim for which the normal track is the fast track, the court will allocate the claim to the fast track unless it believes that it cannot be dealt with justly on that track. The relevant consideration in this respect or the limits likely to be placed on disclosure the extent to which evidence including the expert evidence may be necessary and whether the trial is likely to last more than a day.

It will be appreciated that the financial value of the claim pertaining to each track has been given clearly thus the notional value of the claim as per discretion of a suitor or the claimant as is provided in the Suits Valuation Act has been nullified. The provision of section 5, the jurisdiction clause should, therefore, be changed and instead Court of Small Causes is to take cognizance of the suits of civil nature of the value of Rupees One Hundred Thousand, so that dispute as to the jurisdiction value

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[38] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.

[39] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/ Reports/ban.asp.

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does not arise hindering in the speedy judicious decision of the case. This can be done without formally amending the Act as mentioned above by the High Court. [40]

The second thing necessary for operationalization of this Ordinance is issuance of a list of persons authorised to act as Salis for effecting amicable settlement. Section-15 of the Ordinance provides that the Chief Justice of High Court shall, in consultation with District Judge, the President of Bar Association of the District or Sub-Division concerned, prepare a list of persons to act as Salis for effecting amicable "settlement", which shall be maintained in the Court. Without such lists the procedure contemplated in the Ordinance cannot be put into operational. This list obviously is to include Lawyers and Retired Judges and other professionals like Engineers, Architectures, Trade Mark Experts, and Surveyors. All these stakeholders, for being brought on the panel, should be made to undergo training for which die services of the Provincial Judicial Academy can be usefully employed. A course for guidance and training for all these stakeholders has been designed by the Academy and can be conducted on short notice.[41]

The provisions contained in sections 18 and 19 of the Ordinance need to be reconciled as the conceptual conflict is apparent therein. Section 18 provides that if a settlement in the suit or complaint is reached between the parties, the Salis shall prepare a Deed of Settlement containing terms of such settlement, signed by the parties and submit it to the Court on the day fixed by the Court together with a certificate that the settlement between the parties was voluntary. It is further provided that the Salis shall make an Award and submit it in the Court on or before the date fixed.

This provision is in conflict with provision of subsection (1) of section 18 as it provides for preparing a Deed of Settlement containing their agreement, arrived at by the parties and signed by them. Such a Consensus Deed cannot be called Award, as this Deed is not a decision given by the Salis. ; Even section 18 does not provide for

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[40] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi

[41] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

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giving of a decision by the Salis to be termed and named as an Award. As such there is no occasion to call such settlement as an Award.[42]

It will be appreciated that providing for an opportunity to raise objection to that consensus settlement and agreement under section 19 of the Ordinance is neither required nor necessary. There is no occasion for inclusion of section 19 i.e. calling objection of the parties to the signed settlement. Section 19 should, therefore, be deleted. The Court should, on receipt of the settlement; grant a decree in accordance with the settlement arrived at by the parties as is provided in section 14(2) of the Ordinance. As section 14 contemplates of resolution of the claim through conciliation, arbitration, mediation or any other means by reference to Salis or any other person, normally called 'Neutral' in the Alternate Dispute Resolution (ADR) process, it will be appropriated to amend section 18 to provide that the decision recorded by the Salish (Arbitrator), shall be submitted to the Court on the date fixed for the purpose and the same shall be made rule of the Court and executed promptly.

Any settlement arrived at by the parties due to facilitation of a Conciliator or Mediator on submission to the Court, should conclude the dispute and decree is to follow in terms of the settlement.[43]

The distinctive feature of the Small Claims and Minor Offences Courts Ordinance, 2002 is that whereas Provincial Small Causes Courts Act 1887 provided for decision of the specified disputes of civil nature (a limited number of suits) by the Small Causes Courts, the Ordinance 2002 has extended the number of Causes and Claims for decision by the Court itself or by employing the Alternate Dispute Resolution Process through negotiation, conciliation, evaluation, mediation and arbitration in civil causes of the value of Rupees One Hundred Thousand.

The other distinctive feature is that a Civil Judge of the seniority of Senior Civil Judge having the reputation of competence and effectiveness in applying Civil Procedure Code used to be appointed as Judge Small Cause Court under the Provincial Small

[42] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

[43] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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Cause Courts Act, 1887 whereas vide notification dated 24 November 2005 Government of Punjab in consultation with the Chief Justice Lahore High Court under the Small Claims and Minor Offences Courts Ordinance 2002, has declared all Courts of Senior Civil Judges, Civil Judges-cum-Judicial Magistrates in the District Head Quarters and Sub-Divisional Head Quarters as Courts of Small Claims and Minor Offences.[44]

So this Notification virtually empowers all Civil Judges of third, second and first class, including the Civil Judges on Probation (almost 229 Civil Judges selected by the High Court itself in relaxation of the Rules providing for selection by the Punjab Public Service Commission are being appointed shortly) to function as Court of Small Claims and Minor Offences, and so the distinction of relying on experienced Civil Judges to deal with Small Claims and Minor Offences has been done away with.[45]

If wisdom achieved through experience was considered essential for almost one hundred years for exercising powers and functions of a Judge of the Court of Small Cause, what reasons prompted the Authorities to do away with the aforesaid scheme and requisite wisdom and experience. Moreover, if all the Civil Judges-cum-Magistrates (from 3rd to 1st'class) are to perform powers and functions of the Court of Small Claims and Minor Offences, what is the need of the Ordinance as jurisdiction already vests in the Civil Judges even of 3rd class to deal with and decide the cases of civil nature of the value of one lac rupees. (High Court Notification dated 21-3-2000)

It appears that this aspect was not considered by the Authorities while issuing the Notification establishing and declaring the Courts of Small Claims and Minor Offences would anyone of them pay heed to these concerns and would like to stabilize the system for effective application of the Ordinance.

In the same year 2002 Civil Procedure Code 1908, was amended vide Code of Civil Procedure (Amendment) Ordinance, 2002, 27-7-2002 to add section 89-A, which

[44] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/ Reports/ban.asp.

[45] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48

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reads:- "89-A. Alternate dispute resolution. The Court may, where it considers, having regard to the facts and circumstances of the case, with the object of securing expeditious disposal of a case, in or in relation to a suit, adopt with the consent of the parties alternate dispute resolution method, including mediation and conciliation."[46]

Here, in all cases of civil nature of whatever value resolution of the case (suit) may be obtained by resorting; to any of the ADR processes. However, this process has not been utilized by the Civil Courts as the necessary infrastructure has not been provided. The necessary guidance through promulgation of Rules and instructions is lacking. In other jurisdictions, elaborate guidance is available in the Rules framed by High Courts/Supreme Court in England, USA, Australia and other countries. The rules prescribe the nature of the suits to be allocated to proper and appropriate type of ADR Process, which type of dispute should be referred for Conciliation, Mediation, Evaluation and Arbitration; the process to be adopted by Conciliator and other Neutrals.[47] The Rules also provide Standards of Conduct of Neutrals (the 'Neutrals' the terms is used for Conciliators, Evaluators, Mediators, Arbitrators). As Rules have not yet been prescribed and promulgated, the Civil Courts have not been able to implement the ADR Process made part of the Civil Procedure;

The ADR process was also introduced in the Local Government System by promulgating on 14th June, 2006, Punjab Local Government Musalihat Anjuman (Constitution & Functions) Rules 2006 under section 191 read with section 88(n) of the Punjab Local Government Ordinance 2001. A dispute may be brought before the Musalihat Anjuman for ensuring informal, cost-free and simplified resolution of the dispute. The term 'Dispute' has been defined to mean: quarrel, disagreement, amongst the individuals whether of civil or criminal nature and includes the disputes mentioned in the Schedule appended to the Rules. The disputes mentioned in the Schedule are: -

a. Domestic violence
b. Matrimonial disputes

[46] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.

[47] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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c. Child abuse, vagrancy and compelling children, females and Disabled persons to beg.

d. Exclusion of females from inheritance

e. Marriage to Quran, Watta Satta (exchange marriage), Walwar, Swara, Wani (giving women in marriage to settle dispute).

f. Zhagh (asserting ownership over women of the enemy tribe).

g. Forced marriage & human trafficking.

h. Forced labour.

i. Public insult, assault and degradation of females.

j. Sexual harassment.

k. Dowry disputes arising after divorce.

l. Disputes relating to water courses.

The Insaf Committee of each Union Council is to compile and maintain a list of suitable persons eligible under the Ordinance for selection of Musaleh who may be a Retired Civil Servant or a person having legal experience. One woman at least must be brought on this list. This process is also awaiting to be put into operation, Neither the law makers nor the authorities responsible for enforcement of the laws recognize the need to provide necessary infrastructure to operationalize the ADR Process. No thought is being given to educate and train the persons of requisite qualifications to put into practice the different modes of ADR. The panels of qualified Conciliators, Evaluators, Mediators and Arbitrators have to be approved and maintained. With the qualified Neutrals, the objective of amicable dispute resolution can be successfully achieved.[48]

The suggestions made above need serious consideration of the Ministry of Law and the Chief Justices of the High Courts in case operationalization of the Ordinance is to be achieved and the objective of speedy and just decision of the case of civil nature of the value of One Hundred Thousand Rupees is to be materialized. The Ordinance, as it

[48] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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presently stands, cannot be implemented whatever may be the directions and demands of National Judicial Policy.[49]

6.8 Sections 102-106 of the SBNP Local Government Ordinance of 2001;

Sections 102-106 under Chapter XI of the SBNP Local Government Ordinance of 2001 encourage "amicable settlement of disputes through mediation, conciliation, and arbitration." Given that, this is provincial law (equivalent of state law in the US); it goes to show that Pakistan has resolved to the use ADR methods, even at a local level.

6.9 The Code of Criminal Procedure of 1898 (summary trial provisions);

Section **260. Power to try summarily.** (1) Notwithstanding anything contained in this Code:

(b) any Magistrate of the first class specially empowered in this behalf by the Provincial Government, and

(c) any Bench of Magistrate invested with the powers of a Magistrate of the first class and especially empowered in this behalf by the Provincial Government, may, if he or they think fit, try in a summary way all or any of the following offence:

- (a) offences not punishable with death, transportation or imprisonment for term exceeding six months;
- (b) offences relating to weights and measures under sections 264, 265 and 266 of the Pakistan Penal Code;
- (c) hurt, under section 323 of the same Code;
- (d) theft under sections 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed two thousand five hundred rupees
- (e) dishonest misappropriation of property under section 403 of the same Code, where the value of the property misappropriated does not exceed (two thousand five hundred rupees)

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[49] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/ Reports/ban.asp.

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(f) receiving or retaining stolen property under section 411 of the same Code, where the value of such property does not exceed [two thousand five hundred rupees]

(g) assisting in the concealment or disposal of stolen property under S. 414 of the same code, where the value of such property does not exceed two thousand and five hundred rupees

(h) mischief, under section 427, of the same Code;

(i) house-trespass, under section 448, and offences under sections 451, 453, 454, 456 and 457 of the same Code.

(j) insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, under section 506, of the same Code:

(jj) offence of personating at an election under section 171 F of the same Code;

(k) abetment of any of the forgoing offences;

(l) an attempt to commit any of the foregoing offences, when such attempt is an offence;

(m) offences under section 20 of the Cattle-trespass Act 1871:

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that ft should be tried summarily, the Magistrate or Bench shall recall any witnesses who may have been examined and proceed to-near the case in manner provided by this Code.

261. Power to invest Bench of Magistrates invested with less power. The Provincial Government may on the recommendation of the High Court confer on any Bench of Magistrate invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences:

(a) offences against the Pakistan Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 330, 336,341, 352, 426. 447, and 504;

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(b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month with or without fine:

(c) abetment of any of the foregoing offences:

(d) an attempt to commit any of the foregoing offences, when such attempt is an offence.

262. Procedure prescribed in Chapter XX applicable. (1) In trials under this Chapter, the procedure prescribed in Chapter XX shall be followed except as hereinafter mentioned.

(2) Limit of imprisonment. No sentence of Imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

6.10 Plea Bargaining in Pakistan

Bargaining as a legal provision was introduced in Pakistan by the National Accountability Ordinance 1999, an anti-corruption law. Special feature of this plea bargain is that the accused applies for it accepting his guilt and offers to return the proceeds of corruption as determined by investigators/prosecutors.[50] After endorsement by the Chairman National Accountability Bureau the request is presented before the court which decides whether it should Plea Bargain as a form be accepted or not. In case the request for plea bargain is accepted by the court, the accused stands convicted. He is disqualified to take part in elections, hold any public office, obtain a loan from any bank and is dismissed from service if he is a government official.[51]

There is no mention of ADR tools or mechanisms in Code of Civil Procedure 1898. The summary trial provisions in Chapter XXII only require the expeditious resolution of a dispute.

Plea bargaining, in a wider sense, includes the processes by which a prosecutor and a criminal defendant negotiate an agreement, where the defendant pleads guilty to a

[50] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[51] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

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lesser offense or to a particular charge in exchange for some concession by the prosecutor, such as a more lenient sentence or a dismissal of other charges.

Plea bargaining is thus an agreement by which the accused changes his plea from not guilty to guilty in return for an offer by the prosecution or when the judge has informally let it be known that he will minimize the sentence if the accused pleads guilty. It is an instrument of criminal procedure which reduces enforcement costs for both parties and allows the prosecutor to concentrate on more meritorious cases. It is generally seen in these days that most of the accused charged with commission of crimes punishable under certain penal sections are offered plea bargain because of the fact that it gives an opportunity to the accused to reduce his/her punishment by honestly accepting his own guilt.[52]

Plea bargaining may be either charge bargaining either multiple or unique, or fact bargaining or sentence bargaining. In multiple charges some charges are dropped in return for a plea guilty to one of them. In a unique charge, a serious charge is dropped in exchange for a plea of guilty to a less serious charge. In fact bargaining, a prosecutor agrees not to contest an accused version of the facts or agrees not to reveal aggravating factual circumstances to the court. There is an agreement for a selective presentation of facts in return for a plea of guilty. In sentence bargaining, ordinarily the judges opt for imposing sentences not severe than those recommended by prosecutors or else afford accused an opportunity to withdraw their guilty pleas.[53]

Plea-bargaining gradually became a widespread practice and it was estimated that 90% of all criminal convictions in the United States were through guilty pleas. In 1970, the constitutional validity of plea bargaining was upheld in Bra v. United States, 397 US 742 (1970) where it was stated that it was not unconstitutional to extent a benefit to a defendant who in turn extends a benefit to the state. One year later, in Santobello v. New York 404 US 257 (1971) 261 the United States Supreme Court formally accepted that plea bargaining was essential for the administration of justice.

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[52] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

[53] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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Disputes are an inescapable fact of life, and the crises they engender are pretty much shared by all of us. When we're stuck in a dispute, we have four basic needs: (1) to bring our thoughts and feelings under control, (2) to understand the process for resolving the darn thing, (3) to save time and money, and (4) to figure out and follow through with a plan for reaching a fair result.[54]

Benefit of plea bargaining can not be ignored. When we look into the conceptual aspect of plea bargaining, the notion comes in our mind is that, well now the back logging in courts will be reduced and justice can be delivered quickly and efficiently. But when we check the reason as to why the criminals go for plea bargaining, then it comes to the fact that because they are able to reduce their punishment, which if they would not do quickly will make them stay in arrest for more time through litigation. Moreover, it is presumed that when an accused pleads guilty, the punishment of the accused gets reduced. Also the benefit which the guilty gets by plea bargaining is the reduction of the costs and time consuming trial of his case. It is also presumed that the accused gains responsibility in his favor to enter the correctional system in a frame of mind that may afford hope for rehabilitation over a shorter period of time.[55] The object of 'Plea Bargaining' is to reduce the risk of undesirable orders for either side.

Another reason for introducing the concept of 'Plea Bargaining' is the fact that most of the criminal courts are over burdened and hence unable to dispose of the cases on merits. Criminal trial can take day, weeks, months and sometimes years while guilty pleas can be arranged in minutes. However, by observing the hoard of criminal cases in the courts Plea Bargaining galvanized in the real life as prescriptive process not as coercion. The motto behind this is only to fasten the judgment process, which ultimately reduces the burden of courts and decrease the number of inmates in the jail. Nevertheless, some cons are also associated with it. Well, on this account, I would like

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[54] Crowley, Thomas E: Settle it O ut of Court: How to Resolve Business and Personal, Disputes Using Mediation, Arbitration, and Negotiation, Published by the Author, 1994.

[55] Khair, S 1998 2004, 'Alternative dispute resolution: How it works in Bangladesh', The Dhaka University Studies, Part F, vol. 15, no. 1, pp. 59-92.

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to say it that everything on this earth (either living or non-living) has pros and cons then there is only difference of degree.[56]

6.11 The Arbitration Act of 1940

The basic idea of arbitration is the settlement of differences by a forum (tribunal), chosen by the parties themselves. The law of arbitration today is of British origin, though arbitration was practiced in Hindu and Muslim India. Prior to the enactment of 'the Arbitration Act, 1940', the mechanism for arbitration was provided by 'the Arbitration Act, 1899' and the Second Schedule to the Code of Civil Procedure. These earlier mechanism were repealed by 'the Arbitration Act, 1940', which provided for settlement of disputes by arbitration with or without the intervention of the courts.[57]

a. **Arbitration Procedures:** For arbitration, it is necessary that the parties to the dispute agree to take the dispute or difference, as it is called, to arbitration. This agreement can take many forms: an arbitration clause in the contract (before any difference has arisen); an agreement to refer the difference to arbitration (before or even after emergence of a difference); and even a joint application by parties to a suit pending in a court to refer the difference to arbitration. With minor differences the procedure in all cases is similar.

   The arbitrator(s) may or may not be named in the arbitration agreement, but they are in any case, to be appointed with the agreement of the parties. If the parties cannot concur on the appointment of an arbitrator(s) or umpire (or if they cannot serve or if the neglect their duties) the court can, on the application of a party and after hearing the other party, appoint an arbitrator(s) or umpire. The court can also remove an arbitrator or umpire, on the motion of a party, if he is guilty of misconduct himself or in his handling of the proceedings.[58]

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[56] Ameen, N 2004, 'The Legal Aid Act, 2000: Implementation of government legal aid versus NGO legal aid', The Dhaka University Studies Part F, vol. 15, no. 2, pp. 59-82.
[57] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.
[58] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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If there is an even number of arbitrators, then it is necessary to appoint an umpire who would have to decide in case of disagreement between the arbitrators. If the umpire is neither named in the arbitration agreement nor appointed by the parties, then the arbitrators appoint an umpire within one month of their own appointment.

When a difference arises, reference to arbitration is possible with or without the intervention of the court. Both (or all) parties may refer the difference to arbitration by making a joint reference to arbitration; a unilateral reference to arbitration is not possible. Furthermore, any of the parties may approach the court regarding referring the difference to arbitration. This is an example of arbitration with the intervention of the court and a means of enforcing an arbitration agreement.[59]

It is pertinent to mention here that reference to arbitration without the intervention of the court requires the assent of both parties. If a party takes a matter for which there was an arbitration agreement to court, the proceedings before the court can be stayed and the matter referred to arbitration on an application to the court by the other party. In either case, the arbitrator(s) proceed with the arbitration and announce their award within four months of the reference unless otherwise provided by the agreement.[60]

Even if no arbitration agreement exists and the parties have already taken the dispute to court, the court can refer the matter to arbitration before a decision is made if the parties make a joint application to the court to that effect. Once the court decides a matter the doors to arbitration are closed.

The existence of an arbitration agreement and the validity of the arbitration award can be contested only by application to the court, a separate suit for the purpose has been expressly barred. This is due to the fact that such a suit would

[59]Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/ Reports/ban.asp.

[60] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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itself take a long time for disposal and the whole purpose of the arbitration agreement would then be frustrated at the instance of one of the parties.[61]

Arbitration proceedings are quasi-judicial in nature and are conducted in an impartial manner, as provided in the arbitration agreement or, in its absence, as the arbitrator(s) may decide. The arbitrator(s) may issue notices and processes for appearance and lead evidence before them. However, the law of evidence does not bind them, but compliance with the principles of natural justice is required. The arbitrator(s) or the umpire may solicit the opinion of the court on any point of law involved by stating a special case for the opinion of the court, but the opinion of the court is not binding.

The arbitrator(s) or the umpire, on reaching an award, has/have to file the award and all the records in court if any of the parties so desire. The court can then, on the application of a party, modify, correct, or even remit the award to the arbitrator(s) or umpire for reconsideration. The court, after it is satisfied as to the correctness of the award and the award has been filed in court, pronounce judgment and decree according to the award. No appeal lies from such judgment and decree.[62]

b. **Statutory Arbitration:** Numerous statutes also provide for arbitration for particular kinds of disputes arising from the operation of the statute. Such arbitration is not the result of an arbitration agreement but is treated as if an arbitration agreement existed.

c. **What cannot be referred to Arbitration:** All civil cases can be referred to arbitration, but matters that are of purely criminal nature and do not give rise to civil remedies cannot be referred to arbitration. A non-compoundable criminal offence and cases of quasi-criminal nature (where public interest is involved) can

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[61] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

[62] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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also not be referred to arbitration.[63] A compoundable criminal offence can be referred to arbitration with the permission of the court (e.g., PPC Section 420).

d. **Conciliation through Arbitration Councils Established Under the Muslim Family Laws Ordinance:** The Muslim Family Laws Ordinance 1961 (MFLO) rests on two political concepts: local responsibility and the principle of arbitration. Local officials are given a major role in adjudicating domestic disputes in their neighborhood within the spirit of the preservation of peace in that district.

An arbitration council, constituted by the chairman of the union council, is provided for under the MFLO in a dispute between spouses. In addition to the chairman, who also heads this body, two representatives sit as members, one on behalf of each spouse.[64]

But this forum has been criticized on several counts. A review of its working to date reflects the fact that it is not a popular forum. Also, the chairman, more often than not, is a person with very little general education and with no legal literacy, who is unaware of the technicalities of the law and is unable to guide the parties to a legally valid and viable settlement. Moreover, his decisions have no legal sanction, which does not reflect well on the parties.

e. **Office of the (Wafaqi Mohtasib) Ombudsman :** Prompt, efficient, and impartial resolution of disputes between citizens constitutes one of the crucial determinants of good governance. But in the heavily bureaucratized states of today, the role of government functionaries also deeply affects the life of all citizens. This in turn has led to an increasingly large number of disputes that are primarily a result of poor administration in various governments or other public departments. The institution of ombudsman was established to introduce a process of accountability that would be impartial, non-political, inexpensive and

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[63] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[64] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48

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expeditious. Ombudsman is a Swedish word meaning spokesman of the people. (In the UK, the ombudsman is known as the Parliamentary Commissioner).[65]

The institution of the ombudsman was established by a presidential ordinance called 'the Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983'. Objectives of the Wafaqi Mohtasib (Ombudsman), as spelled out in the preamble, are: Whereas it is expedient to provide for the appointment of a Wafaqi Mohtasib (Ombudsman) to diagnose, investigate, redress and rectify any injustice done to a person through maladministration.

The order defines maladministration as:

1) a decision, process, recommendation, act of omission or commission which is contrary to law, rule or regulations or is a departure from the established practice or procedure unless it is bonafide and for valid reasons; or
   - (i) is perverse, arbitrary or unreasonable, unjust, biased, oppressive or discriminatory; or
   - (ii) is based on irrelevant grounds; or
   - (iii) involves the exercise of power, or failure or refusal to do so, for corrupt or improper motive, such as, bribery, jobbery, favoritism, nepotism and administrative excess; or
2) neglect, inattention, delay, incompetence, inefficiency and ineptitude, in the administration or discharge of duties and responsibilities.

This law is largely based on the, Parliamentary Commissioner for Administration Act, 1967' of the United Kingdom but with a difference. Under the law in the UK, complaints can only be entertained when received through a Member of Parliament; complaints received directly from the public cannot be investigated by the Commissioner.

The most serious criticism is that of the ordinance which created the institution of 'Wafaqi Mohtasib' in 1983. Under this law the 'Mohtasib' has the power only to make

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[65] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/ Reports/ban.asp.

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recommendations.[66] He can investigate a case and give his recommendations but has no statutory powers to enforce those recommendations. The ultimate discretion to accept or reject the Mohtasib's recommendation against the orders of the executive rests with the chief of the executive itself-the President. Thus, what powers have been given to the 'Mohtasib' with one hand has been taken from him with the other. This lacuna in the law has been instrumental in turning the office of the President of Pakistan into a 'mega-ombudsman', with the government agencies appealing against decisions favorable to aggrieved citizens and overturning numerous major recommendations of the ombudsman.[67]

A further defect in the procedure dealing with appeals to the President against findings of the ombudsman is that in the President's secretariat there is no special wing to deal with these appeals. All of them are marked to the Ministry of Law for advice, which is an anomalous situation as this ministry is supposed to come under the jurisdiction of the ombudsman. The present arrangement, however, brings the office of the ombudsman under the jurisdiction of the Ministry of Law, violating the spirit of the institution.

The interim Constitution of 197(2) contained provisions for establishing the institution of ombudsman, but it was not retained in the 1973 Constitution. In countries where this idea originated, an ombudsman is a true representative of the people in that the Parliament elects him/her. In Pakistan, this selection has been left solely to the discretion of the President. Yet another major flaw in the law creating the ombudsman is that he/she is barred by law from entertaining complaints, which pertain to the Ministry of Defence or Foreign Affairs or matters concerning service under the government and autonomous bodies. He also cannot take up complaints against provincial governments or against the judiciary.

The ombudsman's area of operation is severely restricted. The glaring disparity between the number of cases handled by the ombudsman in Pakistan and similar

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[66] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[67] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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institutions elsewhere in the world speaks volumes about the insensitivity of our bureaucracy to the aspirations and needs of the citizen. The hard core of the bureaucracy affected by the institution of the ombudsman, and even in agencies providing public service, where the interaction of the institution has been most frequent, this healthy change is still precarious and temporary in nature. Thus, despite the passage of a decade, the status of the institution of ombudsman remains ambiguous. It is neither an autonomous body created through a resolution nor a legislative body created under an act of Parliament and linked to the legislature.[68]

The most appreciable service that the ombudsman has made to the cause of justice is that of creating a sense of awareness among the citizens that actions of government functionaries, no matter their capacity, can be questioned. The government of Pakistan has decided to expand the scope of the institution of ombudsman to include two more areas: human rights and complaints concerning revenue.

Access to courts of law is conditional upon monetary and other resources which puts them out of the reach for the vast majority of Pakistanis. The institution provides a forum for hearing grievances free of cost; were its area of operation to be expanded to other areas of public life, a strong alternate dispute resolution forum could well emerge.

f. S.89A of the Civil Procedure Code, 1908 (as amended in 2002) read with Order X Rule 1-A (deals with alternative dispute resolution method:

The High Courts under Article 202 of the Constitution of the Islamic Republic of Pakistan 1973 are empowered to make their own rules.[69] Under Chapter X, the Section 122 of the Code of Civil Procedure 1908 specifically empowers High Courts to make rules regulating their own procedure and the procedure of the civil courts. This power to be exercised by the Rule Committee constituted by the Chief Justice (Section 123).

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[68] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48

[69] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/ Reports/ban.asp.

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The rules so made shall be subject to the previous approval of the Provincial Government (Section 126) and shall be applicable from the date of publication in official gazette within local limits of the High Court which made them and shall form part of First Schedule of the said Code (Section 127).

I have prepared draft model rules for Alternative Disputes Resolution (ADR) and also draft rules for mediation and conciliation under Section 89 A of the Code of Civil Procedure, 1908. They are in two parts the first part consisting of the procedure to be followed by the parties and the court in the matter of choosing the particular method of ADR. The second part consists of draft rules of mediation and conciliation under Section 89-A of the Code of Civil Procedure, 1908. These rules shall be added under Order X by inserting a new Rule 1-B in Code of Civil Procedure, 1908.

6.12 Alternative Dispute Resolution and Mediation & Conciliation Rules, 2005

In exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 (Act No. V of 1908) and Section 89-A of the said Code, the High Court of Pakistan is hereby issuing the following Rules:

6.12.1 Alternative Dispute Resolution Rules

Rule 1: These Rules in Part I shall be called the 'Alternative Dispute Resolution Rules 2005'.

Rule 2: Procedure for directing parties to opt for alternative modes of settlement:

(a) The Court shall, after recording admissions and denials at the first hearing of the suit under Rule 1 of Order X, and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, direct the parties to opt for one of the modes of settlement of disputes outside the Court as specified in Section 89-A, if all the contesting parties are in attendance in the Court in person or by their respective pleaders, the Court may, by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit, or refer the dispute or disputes in the suit to the engaged pleaders of the parties, or to the party or parties, where no pleader or pleaders have been engaged, or to a mediator or conciliator from the panel as may

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be prepared by the District Judge under Rule 13, for undertaking efforts for settlement through mediation or conciliation.[70]

Provided that, if all the contesting parties in the suit through application or pleadings state to the Court that they are willing to try to settle the dispute or disputes in the suit through mediation, the Court shall so mediate, or make reference under this section.

2(b) When the reference under sub-rule (a) is made through pleaders, the pleaders shall, by their mutual agreement in consultation with their respective clients, appoint another pleader, not engaged by the parties in the suit, or a retired judge, or a mediator or conciliator from the panel as may be prepared by the District Judge under Rule 13, or any other person whom they may seem to be suitable, to act as a mediator or conciliator for settlement. Provided that, nothing in this sub-Section shall be deemed to prohibit appointment of more than one person to act as mediator or conciliator.

Provided further that, a person holding an office of profit in the service of the Federation of Pakistan or Province shall not be eligible for appointment as mediator or conciliator.[71]

Rule 3: Persons authorized to take decision for the Federation of Pakistan, Provincial Governments and others:

For the purpose of Rule 2, where one of the parties is the Federation of Pakistan or the Provincial Government or a District Government or a Local Government a Local Authority or a Public Sector Undertaking or a Statutory Corporation or Body or Public Authority, such parties shall be directed by the High Court to nominate a person or group of persons who will be authorized to take a final decision as to the mode of Alternative Disputes Resolution it prefers to opt for and such decision shall be communicated to the concerned court within the period specified in these Rules by the said person or group of persons so authorized.

[70] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

[71] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.

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Rule 4: Fee and procedure:

While referring a dispute or disputes in the suit for mediation or conciliation under Rule 2, the Court shall not dictate or determine the fees of the pleaders, mediator or the conciliator, and procedure to be followed by the mediator, or the conciliator and the parties, and it shall be for the pleaders, their respective clients and the mediator, or the conciliator to mutually agree on and determine the fees and the provisions of the Mediation and Conciliation Rules, 2005 in Part II shall be followed for the purpose of settlements through mediation or conciliation, and when the Court shall mediate, it shall determine the procedure to be followed, and shall not charge any fee for mediation. [72]

Rule 5: Consent of the parties and time for conclusion of Mediation and Conciliation:

(a) Within fifteen days from the date of reference under Rule 2, the parties shall inform the Court in writing as to whether they have agreed to try to settle the dispute or disputes in the suit by mediation or conciliation and whom they have appointed as mediator or conciliator, failing which the reference under Rule 2 will stand cancelled and the suit shall be proceeded with for hearing by the Court, and should the parties inform the Court about their agreement to try to settle the dispute or disputes in the suit through mediation or conciliation and appointment of mediator or conciliator as aforesaid, the mediation or the conciliation shall be concluded within 60 (sixty days from the day on which the Court is so informed, unless the court of its own motion or upon a joint prayer of the parties, extends the time for a further period of not exceeding 30 (thirty) days.

(b) The mediator or conciliator shall, without violating the confidentiality of the parties to the mediation proceeding, submit through the pleaders, to the court a report of result of the mediation or conciliation proceedings, and if the result is of compromise of the dispute or disputes in the suit, the terms of such compromise shall be reduced into writing in the form of an agreement, bearing signatures or thumb impressions of the parties as executants, and signatures of

[72] Asia Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Asian Development bank, viewed 23 April 2010, http://www.adb.org/Documents/ Reports/ban.asp.

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the pleaders and the mediator or conciliator as witnesses, 3 and the court shall, thereupon, pass an order or a decree in accordance with relevant provisions of Order XXIII of the Code.

(c) When the Court itself mediates, it shall make a report and pass order in a manner similar to that as stated in sub-rule (b).

Rule 6: Court to give guidance to parties while giving direction to opt:

(a) Before directing the parties to exercise option under clause

(b) of Rule 2, the Court shall give such guidance as it deems fit to the parties, by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their option as to the particular mode of settlement, namely:

1) that it will be to the advantage of the parties, so far as time and expense are concerned, to opt for one of these modes of settlement rather than seek a trial on the disputes arising in the suit;
2) that, where there is no relationship between the parties which requires to be preserved, it will be in the interests of the parties to seek reference of the matter to arbitration as envisaged in the Arbitration Act 1940 (Act No. X of 1940) for settlement through mediation, conciliation and arbitration by 'Musalihat Anjuman' under Section 104 Punjab Local Government Ordinance, 2001 or the Small Claims and Minors Offences Courts Ordinance, 2001.
3) that, where there is a relationship between the parties which requires to be preserved, it will be in the interests of parties to seek reference of the matter to conciliation or mediation, as envisaged in Section.89-A of the Code or reconciliation by the judge Family Court under section 10 and 12 of the Family Courts Act, 1964.

Explanation: Disputes arising in commercial matters, disputes in respect of administration, partition distribution of property amongst legal heirs and matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.

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4) that, where parties are interested in a final settlement and it will be in the interests of the parties to seek reference of the matter which may lead to a settlement through mediation, conciliation and arbitration by 'Musalihat Anjuman' under section 104 Punjab Local Government Ordinance, 2001 or the Small Claims and Minors Offences Courts Ordinance or Section.89-A and Order X rule 1-A of Civil Procedure Code
5) the difference between the different modes of settlement, namely, arbitration, conciliation and mediation as explained below: 'Arbitration' means the process by which an arbitrator appointed by parties or by the Court, as the case may be, adjudicates the disputes between the parties to the suit and passes an award by the application of the provisions of the Arbitration Act, 1940 (X of 1940) , in so far as they refer to arbitration.

'**Conciliation**' means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Punjab Local Government Ordinance, 2001 or the Small Claims and Minors Offences Courts Ordinance, 2001 or Section 89-A and Order X rule 1-A of Code, in so far as they relate to conciliation.

'**Mediation**' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation and Conciliation Rules in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing 4 misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them.[73]

Explanation:

'Mediation' and 'Conciliation' under section 89-A of Code shall mean flexible, informal, non-binding, confidential, non-adversarial and consensual dispute resolution

[73] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.

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process in which the mediator/conciliator shall facilitate compromise of disputes in the suit between the parties without directing or dictating the terms of such compromise.

Rule 7: Procedure for reference by the Court to the different modes of settlement:

1) Where all parties to the suit decide to exercise their option and agree for settlement by arbitration, they shall apply to the Court, with in fifteen days of the direction of the Court under clause (b) of Rule 2 and the Court shall, within fifteen days of the said application, refer the matter to arbitration and then the provisions of the Arbitration Act 1940 shall apply as if the proceedings were referred for settlement by way of arbitration under the provisions of that Act;
2) Where all the parties to the suit decide to exercise their option and to agree for settlement by 'Musalihat Anjuman' under section 104 Punjab Local Government Ordinance, 2001, they shall apply to the Court, within fifteen days of the direction under clause (b) of Rule 2 and the Court shall, within fifteen days of the application, transfer the matter to the 'Musalihat Anjuman' having jurisdiction in the matter and then all the other provisions of that Ordinance shall apply;
3) Where all the parties are unable to opt or agree to refer the dispute to arbitration, or 'Musalihat Anjuman', within fifteen days of the direction of the Court under clause (b) of Rule 2, they shall consider if they could agree for reference to conciliation or mediation, within the same period.
4) Where all the parties opt and agree for conciliation, they shall apply to the Court, within fifteen days of the direction under Rule 2 and the Court shall, within fifteen days of the application refer the matter to conciliation (ii) Where all the parties opt and agree for mediation, they shall apply to the Court, within fifteen days of the direction under Rule 2 and the Court shall, within fifteen days of the application, refer the matter to mediation and then the Mediation and Conciliation Rules, 2005 in Part II shall apply.
5) Where all the parties are not able to opt and agree for conciliation or mediation, one or more parties may apply to the court within fifteen days of the direction

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under clause (b) of Rule 2, seeking settlement through conciliation or mediation, as the case may be, and in that event, the Court shall, within a further period of fifteen days issue notice to the other parties to respond to the application, and

a. in case all the parties agree, the Court shall refer the matter to conciliation or mediation, as the case may be, as stated in clause (e);
b. in case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be.

Rule 8: When none of the parties apply for reference for settlement of disputes through Alternate Dispute Resolution mechanisms:

1) Where none of the parties apply for reference either to arbitration, or 'Musalihat Anjuman', or for conciliation or mediation, within fifteen days of the direction under clause (b) of Rule 2, the Court shall, within a further period of fifteen days, issue notices 5 to the parties or their representatives fixing the matter for hearing on the question of making a reference either to conciliation or mediation.
2) After hearing the parties or their representatives on the day so fixed, the Court shall, whether parties agree or not, and if there exist elements of the settlement which may be acceptable to the parties, refer the matter to:

a. Conciliation, if the Court considers that the matter is fit for conciliation
b. Mediation, if the Court considers that the matter is fit for mediation and then the provisions of the Mediation and Conciliation Rules, 2005 in Part II shall apply.

Rule 9: Appearance before the Court upon failure of attempts to settle disputes by conciliation or mediation:

Where a suit has been referred for settlement under one of the modes referred to in Section 89-A read with Rule 1-A of Order X and clauses (b) of Rule 2 and has not been settled or where it is felt that it would not be proper in the interests of justice to

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proceed further with the matter, the suit shall be referred back to the Court with a direction to the parties to appear before the Court on a specific date.

Rule 10: When the Conciliation or Mediation fails:

1) The court shall, subject to the provision of these rules, proceed with hearing of the suit from the stage at which the suit stood before the decision to mediate or conciliation or reference for mediation or conciliation, in accordance with provisions of the Code in a manner as if there had been no decision to mediate or conciliation or reference for mediation or conciliation as aforesaid.
2) The proceedings of mediation and conciliation under this section shall be confidential and any communication made, evidence adduced, admission, statement or comment made and conversation held between the parties, their pleaders, representatives and the mediator or conciliator, shall be deemed privileged and shall not be referred to and admissible in evidence in any subsequent hearing of the same suit or any other proceeding.
3) When a mediation initiative led by the court itself fails to resolve the dispute or disputes in the suit, the same court shall not hear the suit, if the court continues to be presided by the same judge who led the mediation initiative, and in that instance, the suit shall be heard by another court of competent jurisdiction.
4) Upon the reference of the matter back to the court, the court shall proceed with the suit in accordance with law.

Rule 11: Preparation of panel of mediators and conciliators

For the purpose of this section 89-A of Code, the District Judge shall, in consultation with the President of the District Bar Association, prepare a panel of mediators and conciliators (to be updated from time to time) consisting of pleaders, retired judges, persons known to be trained in the art of dispute resolution, and such other person or persons, except persons holding office of profit in the service of the Federation of Pakistan or Provincial Government, as may be deemed appropriate for the purpose, and shall inform all the Civil Courts under his administrative jurisdiction about the panel.

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Provided that, a mediator or conciliator, shall not act as a mediator or conciliator between the parties, if he had ever been engaged by either of the parties as a pleader in any suit in any Court.

Rule 12: Refund of Court Fee

Notwithstanding anything contained in the Court Fees Act, 1870 (Act No.VII of 1870), where a dispute or disputes in a suit are settled on compromise under section 89-A of Code, the Court shall issue a certificate directing refund of the court fees paid by the 6 parties in respect of the plaint or written statement, and the parties shall be entitled to such refund with 60 (sixty days of the issuance of the certificate.

Rule 13: Finality of orders and decrees

No appeal or revision shall be against any order or decree passed by the Court in pursuance of settlement between the parties under section 89-A of Code.

Rule 14: Nothing in section 89-A of Code shall be deemed to otherwise limit the option of the parties regarding withdrawal, adjustment and compromise of the suit under Order XXIII of the Code.

Rule 15: Training in alternative methods of resolution of disputes, and preparation of manual

a) The High Court shall take steps to have training courses conducted in places where the High Court and the District Courts are located, by requesting bodies recognized by the High Court or the Universities imparting legal education or retired faculty members or other persons who, according to the High Court are well-versed in the techniques of alternative methods of disputes and resolution, to conduct training courses for lawyers and judicial officers.

b) (i) The High Court shall nominate a committee of judges, faculty members including retired persons belonging to the above categories, senior members of the Bar, members of the Bar specially qualified in the techniques of alternative disputes resolution, for the purpose referred to in clause (a) and for the purpose of preparing a detailed manual of procedure for alternative dispute resolution to be used by the Courts in the Province as well as by the

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arbitrators, members of the 'Musalihat Anjuman', conciliators and mediators.

(ii) The said manual shall describe the various methods of alternative dispute resolution, the manner in which any one of the said methods is to be opted for, the suitability of any particular method for any particular type of dispute and shall specifically deal with the role of conciliators and mediators in disputes which are commercial or domestic in nature or which relate to matrimonial, maintenance and child custody matters.

c) The High Court and the District Courts shall periodically conduct seminars and workshops on the subject of alternative dispute resolution procedures throughout the Province or Federal Capital Islamabad over which the Lahore High Court has jurisdiction with a view to bring awareness of such procedures and to impart training to lawyers and judicial officers.

d) Persons who gain experience in the matter of alternative dispute resolution procedures, and in particular in regard to conciliation and mediation, shall be given preference for purposes of appointment in the matter of resolution of disputes by the said procedures.

Rule 8: Applicability to other proceedings

The provisions of these Rules may be applied to proceedings before the Courts, including Family Courts constituted under the Family Courts Act (XXXV of 1964), while dealing with matrimonial, maintenance and child custody disputes.

6.13 Sections 10 and 12 of the Family Courts Act, 1964

Section10. Pre-trial proceedings.—

1. When the written statement is filed, the Court shall fix an early date for a pre-trial hearing of the case.
2. On the date so fixed, the Court shall examine the plaint, the written statement (if any) and the precise of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties and their counsel.

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3. At the pre-trial, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible.
4. If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for recording of evidence.

Section 12. Conclusion of trial.—

1. After the close of evidence of both sides, the Family Court shall make another effort to effect a compromise or reconciliation between the parties.
2. If such compromise or reconciliation is not possible, the Family Court shall announce its judgment and give a decree.

6.14 Arbitration (International Investment Disputes) Act, 2011

In the case of New Sundaram Finance Ltd. v. NLTC India Ltd. (reported in AIR 1999 SC 565) the Supreme Court said: "The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have; therefore, to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words the provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act."

6.15 International Treaties and Conventions

Pakistan is a member of so many International Treaties and Conventions. This is because most trade organizations have arbitration and other ADR rules. Pakistan has also signed and ratified the Convention establishing the Multilateral Investment Guarantee Agency (MIGA), the International Center for Settlement of Investment Disputes (ICSID) and the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.

6.16 Multilateral Investment Guarantee Agency (MIGA)

Pakistan is a member of MIGA. MIGA is an agency of the World Bank that enhances foreign direct investment into developing countries by insuring cross-border

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investments. ADR is an important component of any international trade organization and because MIGA ensures and promotes investments into developing countries, it also provides "an umbrella of deterrence against government actions that could disrupt insured investments and helps resolve potential disputes to enhance investor confidence. To promote its goal, in 1996, MIGA began offering dispute resolution services to help governments and foreign investors find creative solutions lo their disagreements. Pakistan is a developing country that has an influx of investments. Given that it has signed and ratified the convention establishing MIGA, it has agreed to all its terms including those pertaining to ADR.

6.17 International Center for Settlement of Investment Disputes (ICSID)

Pakistan is a member of ICSID. 1CSID is also an institution of the World Bank that is facilities for conciliation and arbitration of international investment disputes. ICSID was formed via the ICSID Convention, also known as the Washington Convention. ICSID is a "'multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It was opened for signature on March 18, 1965 and entered into force on October 14. 1966. Today, ICSID is considered to be a leading international arbitration institution. ICSID is an institution, whose primary purpose is to resolve international investment disputes by using ADR methods.

As slated above, foreign direct investment in Pakistan is fairly large. Given that Pakistan has signed and ratified the Washington Convention establishing ICSID. It has agreed to all its terms. Pakistan was one of the first countries to sign the Washington Convention on July 6. 1965. It deposited its ratification of the Convention on September 15, 1966 and the Convention went into force one month after, in October 1996.

6.18 United Nation's Conventions

Pakistan has also signed and ratified the New York Convention. The New York Convention is also known as the New York Convention of 1958 and the Convention for the Recognition and Enforcement of Foreign Arbitral Awards. The United Nations Commission on International Trade Law (UNC'ITRAL) is a Commission of the UN

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established by the General Assembly on 17 December 1966 by Resolution 2205 (XXI). Thus, although the New York Convention was adopted in 1958, the Commission's essential mandate is to promote the Convention further. Furthermore, UNCITRAL serves as the International Trade Law Branch of the Office of Legal Affairs of the UN.[74] Hence, UNCITRAL under the umbrella of the UN is the biggest organizational body to prepare rules relating to ADR, namely arbitration and conciliation. UNCITRAL is generally the International Trade Law Division of the United Nations. Pakistan has signed and ratified the New York Convention. Pakistan was once again, one of the earliest signatory members to the New York Convention. It signed the Convention on 30 December, 1958 AD and ratified it on July 14, 2005, bringing it into force three months later in October 2005.Although the New York Convention is just one treaty related to ADR that Pakistan has signed and ratified, there are various other ADR related Conventions by the UN that Pakistan has overlooked in implementing. These include, but are not limited to Convention on the Limited Period in International Sales of Goods, UN Convention on Contracts for the International Sale of Goods (CISC), UN Convention on Independent Guarantee and Stand-off by Letters of Credit, UN Convention on International Bills of Exchange and International Promissory Notes, UN Convention on Assignment of Receivables in International Trade, UN Convention on Carriage of Goods by Sea.[75]

Pakistan was once again, one of the earliest signatory members to the New York Convention. It signed the Convention on December 30, 1958 and ratified it on July 14, 2005, bringing it into force three months later in October 2005.[76]

Although the New York Convention is just one treaty related to ADR that Pakistan has signed and ratified, there are various other ADR related Conventions by the UN that Pakistan has overlooked in implementing.

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[74] S.R. Myneni, 1st ed. 2004, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," Asia Law House, Hyderabad.
[75] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.
[76] Md. Atickus Samad, 2013, "A Text Book on ADR & Legal Aid", National Law Publications, Dhaka

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CHAPTER-VII

CHALLENGES

7.1 Challenges Dealing with status issues and power imbalance

Often in mediation, one party will be perceived as stronger than the other. This strength can take a number of different forms, the most obvious of which is having access to greater financial resources. Other types of power imbalance could include dominant personalities, and perceived status within an organization or society more generally. In such circumstances, the mediator needs to ensure that as far as possible both sides – the stronger and the weaker – have equal opportunity to engage in the process in an effective way, and that the mediator, in turn, engages with them on similar equal footing.[1] The primary tools at the mediator's disposal to ensure this are invariably process interventions.[2] Some examples could include:

- a decision not to hold a joint session;
- to break from joint into private sessions;
- not allowing one side to dominate through careful time management;
- ensuring that in joint meetings the conversation is controlled by you, the mediator, to ensure both have sufficient air-time; and allowing space for the weaker party to consider proposals before agreeing to anything;

In some circumstances, content interventions such as the mediator coaching the weaker party in how to frame information and offers will be appropriate. This is particularly so where a party is attending the mediation without legal representation, although the mediator will need to be careful here not to step into an advisory role.[3] A final word of warning, just as with all things in mediation, bewares of assumptions. Circumstances change the power balance. A good example of this is in situations of impending bankruptcy or insolvency, where the financially weaker party often has more power because of the situation.

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[1] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.

[2] Ameen, N 2005, 'Dispensing justice to the poor: The village court, arbitration council vis-à-vis NGO', The Dhaka University Studies Part F, vol. 16, no. 2, pp. 103-22.

[3] Hossein, Sara, Shahdeen Malik, Greg Moran and Adam Stapleton. 2007. Joint Assessment of Prospects for Harmonisation within the Justice Sector in Bangladesh . (Draft) Dhaka June 2007.

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7.2 Adjournments

The nuances of accepted civil procedure in different jurisdictions mean that in some countries adjournments are very much part of the norm in the way negotiation and litigation is conducted. Whereas mediations are usually recommended to take place over one day or in one continuous period, focusing the parties and their advisors on working with the mediator to draw out possible solutions, the process is flexible enough to allow for adjournments at the agreed request of the parties.[4]

Mediators, however, need to be careful that the break does not result in the parties reverting to earlier positional dialogue when the mediation is reconvened. To avoid this, mediators should resist parties who seek to adjourn the mediation prematurely and encourage them to trust the process and continue while the mediator feels progress is being made and settlement is still possible.

Where both the parties and the mediator have agreed an adjournment, the mediation should be reconvened as soon as possible after the initial session. It is advisable that the mediator should begin by drawing the parties together in a joint session to remind them of progress and to clarify what is likely to happen next. The process can then continue in the relevant phase.[5]

However, where the adjournment is due to a need for further information identified at the first mediation session, it may be that the next session will not take place for a few days, weeks or even months. In this scenario, ideally a new date should be identified before the mediation is adjourned and the mediator is advised to stay in touch with the parties and/or their advisers regularly, asking for updates to ensure that the mediation stays on track.[6] A word of caution here – parties will often request further information from each other, which may in fact not be needed to help achieve settlement. Remember this is not a court process and therefore evidence is not required. Therefore, wherever possible, the mediator should encourage parties to continue with

[4] Khair, S 1998 2004, 'Alternative dispute resolution: How it works in Bangladesh', The Dhaka University Studies, Part F, vol. 15, no. 1, pp. 59-92.
[5] P.C. Rao and William Sheffield, 1st ed. 1997, "Alternative dispute resolution," Universal Law Publishing Co. Pvt. Ltd., Delhi.
[6] Zahir, M 1988, Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.

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the mediation. Therefore, mediators should be alive to adjournment being used for tactical advantage by one or both of the parties and work with them to bring the process back on track.[7]

7.3 Corruption / Bribery

Although very rare, there may be instances when mediators are approached by a party with a proposal for how they might win at mediation. Given the fact that mediators do not make decisions as to the outcome, any such attempt at corruption or bribery is likely to not have been considered fully. Nevertheless, a mediator enjoys a privileged position within the process.[8] Not only is it essential that mediators be extremely careful to ensure they do not jeopardize their neutrality, any such attempt by a party should be strongly rejected on ethical grounds. The mediator/party confidentiality may be breached in the event of an ethical concern (further details below) and such an attempt may give rise to a mediator withdrawing from the mediation and informing the relevant authorities of the attempt.[9]

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[7] Habiba, Umme. 2002. 'Mediation as an A.D.R. Mechanism: Lessons Learnt and Widening the Area of A.D.R. Mechanism: Commercial Court', in BNWLA: Shawranika-2002. Dhaka: Bangladesh National Women Lawyers' Association, pp. 47-48

[8] Ameen, N 2005, 'Dispensing justice to the poor: The village court, arbitration council vis-à-vis NGO', The Dhaka University Studies Part F, vol. 16, no. 2, pp. 103-22.

[9] Alam, M Shah 2000, 'A possible way out of backlog in our judiciary', The Daily Star, 16 April.

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CHARPTER-VIII

Field Study Analysis Report (Qualitative Analysis)
&
Case Study

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Objectives Of This Field Study

The ADR mechanism has the significant values and it plays the significant role to dispensation of justice and case management. The backlog of the cases are increasing day by day. Delay and exorbitant cost are increasing, backlog of the cases are piling up so the litigants are losing their faith from the formal judicial systems and day to day they tend to informal judicial systems. In the Indian Sub continent accustomed to adversarial judicial systems in the common law culture, but the ADR mechanism is win-win situation. Therefore, The credibility and acceptability of ADR mechanism is increasing. In this field a lot of research has been done. The interviews of judges, lawyers and clients has been taken properly. The analysis seeks to find the areas that need improvement depending on the response received.

1. Level of satisfaction on client's recognition as individuals.
2. Lawyer and Judges motivation towards clients for ADR success.
3. Use of ADR sometimes flexibility with regard to cost and long timing.
4. Level of satisfaction on morale received from fellow class (judges, lawyers, and clients).
5. Level of satisfaction on personal morale.
6. Level of satisfaction on team spirit and cooperation among three classes sample for ADR use.
7. Level of satisfaction on ADR to clients by the mediation.
8. Level of satisfaction on case solution.

Methodology of the study

Sample Questionnaire

A sample questionnaire has been prepared with the aim of gathering information concerning a particular topic from various respondents. It consists of a series of questions that prompt the respondent to give answers in a specific format. It also contains both open ended and close ended questions. Open ended questions encourage the respondents to formulate their own answers while the close ended questions give the respondents different sets of answers to pick from. Sample questionnaires can be used to establish public opinion especially in this research.

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Below is a sample questionnaire that could be conducted by court related personalities (enclosed question set for judges, lawyers and clients to qualitative analysis).

The Aim of the study

The aim of this study is the followings-

1. To analyze the existing situation of ADR method
2. To find out the benefit of ADR method
3. To find out the future possibilities of ADR method
4. To find out the ever growing demand of ADR method
5. To find out how facilities the method provides the litigant.
6. To find out how the mechanism better improves
7. To find out the loopholes of ADR method

Selection Procedure: The Sampling Method and the Cluster Method

- The Cluster-Method is a sampling method which following properties, when the population is divided into N Groups, called cluster. The researcher randomly selects sample from each clusters.
- Each element of the population can be assigned to one, and only one cluster. In this topic, the related classes are judges, lawyers and clients.

This tutorial covers two types of cluster sampling methods.

- **One-stage sampling**. All of the elements within selected clusters are included in the sample.
- **Two-stage sampling**. The subsets of elements within the selected clusters are randomly selected for inclusion in the sample. This survey has been done in the cluster method, two-stage sampling. Because when I assume the sample size is constant across sampling method. Generally, provides less precision than either simple random sampling or stratified sampling. This is the main disadvantage of cluster sampling.

  Given this disadvantage, it is natural to ask why we use cluster sampling. Sometimes, the cost per sample point is less for cluster sampling than for other sampling methods. Given a fixed budget, the researcher may be able to use a

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bigger sample with cluster sampling than with the other methods. When the increased sample size is sufficient to offset the loss in precision, cluster sampling may be the best choice.

Survey Area coversthe following Districts: Dhaka, Gazipur, Norsingdi, Munshigonj, Kishoregonj, Narayangonj and Bagerhat Judge Courts

Survey Class (judge 20 persons, Lawyer 20 persons, Clients 20 persons)

Survey Time Duration (Gazipur Judge Court 3 days, Munshigonj Judge Court 3 days, Bagerhat Judge Court 6 days, Norsingdi Judge Court 2 days, Kishoregonj Judge Court 1 day, Narayangonj Judge Court 3 days and Dhaka Judge Court 6 days)

Question Analysis

Generally, the analysis survey is conducted by two means i.e. (1) Quantitative analysis and (2) Qualitative analysis the researcher has completed the field survey report by qualitative analysis. Researcher collected sample by clustered method. The Questionnaire format was opened qualitative format. Therefore, the total analysis is qualitative one. Some questionnaire fails to get answer. So that the question missing is one of the major obstacles to reach expected values.

When a question regarding the improvement of ADR was asked to the respondents like the judges, lawyers and clients gave affirmative answers. The three classes of respondents have given the same answer. Data analysis is a practice in which raw data is ordered and organized, so that useful information can be extracted from it. The process of organizing and thinking about data is the key point to understand what the data does and does not contain. There are varieties of ways in which people can approach data analysis, and it is notoriously easy to manipulate data during the analysis phase to push certain conclusions or agenda. For this reason, it is important to pay attention when data analysis is presented, and to think critically about the data and the conclusions, which were drawn.

Raw data can take a variety of forms, including measurements, survey responses, and observations. In its raw form, this information can be incredibly useful, but also

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overwhelming. Over the course of the data analysis process, the raw data is ordered in a way, which will be useful. For example, survey results may be fallied, so that people can see at a glance how many people answered the survey, and how people responded to specific questions.

The sampling questionnaire has been asked Why the defendant prefers this method majority respondent thinks that it is the best settlement process. However, it cannot be used commonly. Respondent thinks, it is a win-win situation prevails and the process is less time consuming. Other respondents think it depends upon the both respondent's interest. Finally, maximum respondent think it is a less time and cost consumes system. However, the advocate category respondent suggests them for the traditional court systems.

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Analysis of Judges Answer (Qualitative)

Q 1. Why do you prefer ADR method?

	Value	Percentage
Easy method	7	35%
Best method for settlement	6	30%
Short time method	7	35%
Total	20	

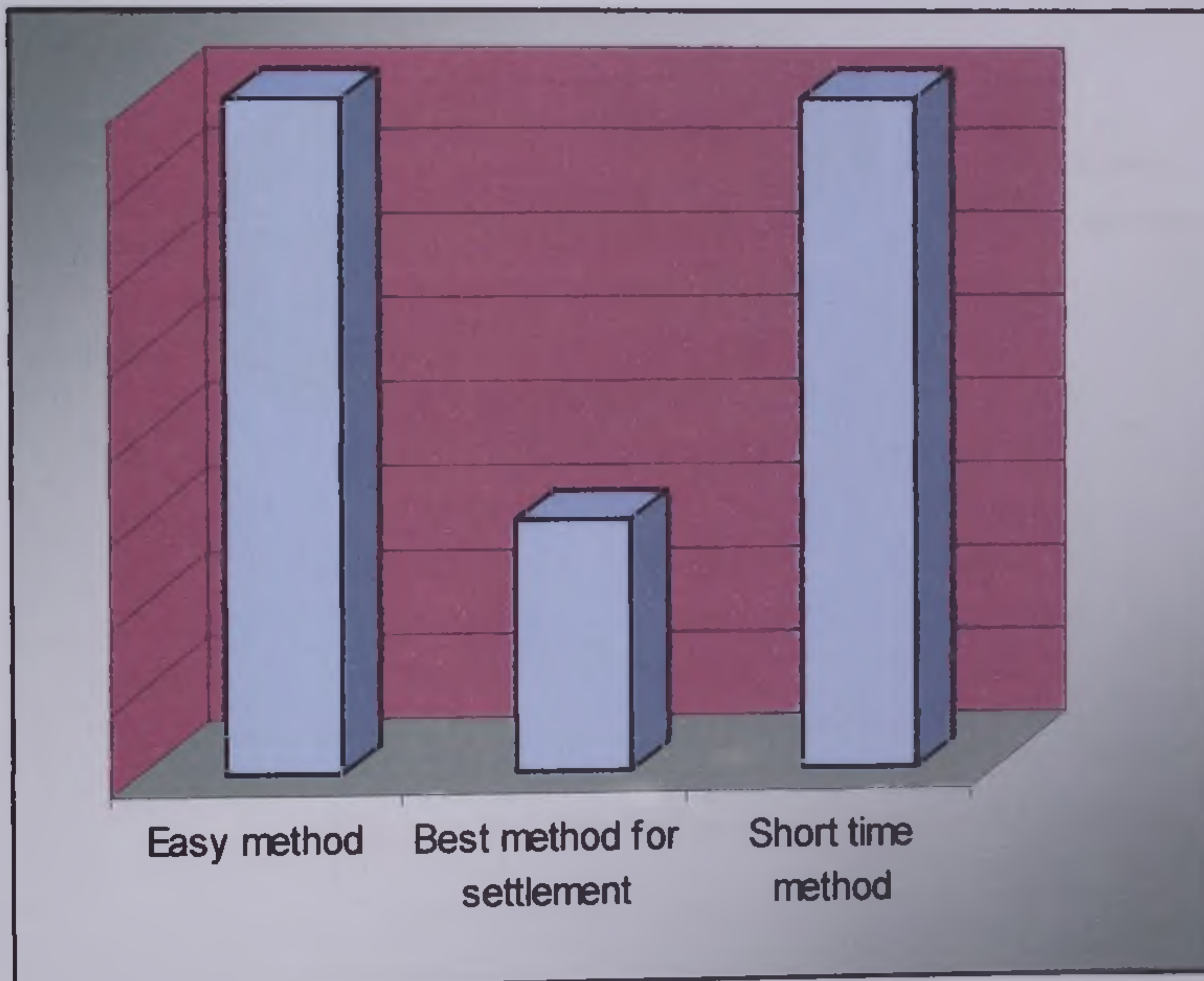

Figure-1: Preference of ADR method

Result and interpretation: The column shows that the 35% of the respondents have given the answer that the method is easy. 30% of the respondents have given the answer that the method is the best for settlement. The rest of the respondents have given the answer that method is the short time method. There are no doubts the respondent plays a vital role in the court administration and case management. The maximum number of the respondent thinks that the ADR method is the best and easiest method for any case settlement. The values of the result are expected.

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Q 2. Is ADR in common use?

	Value	Percentage
Common use	4	20%
Uncommon use	16	80%

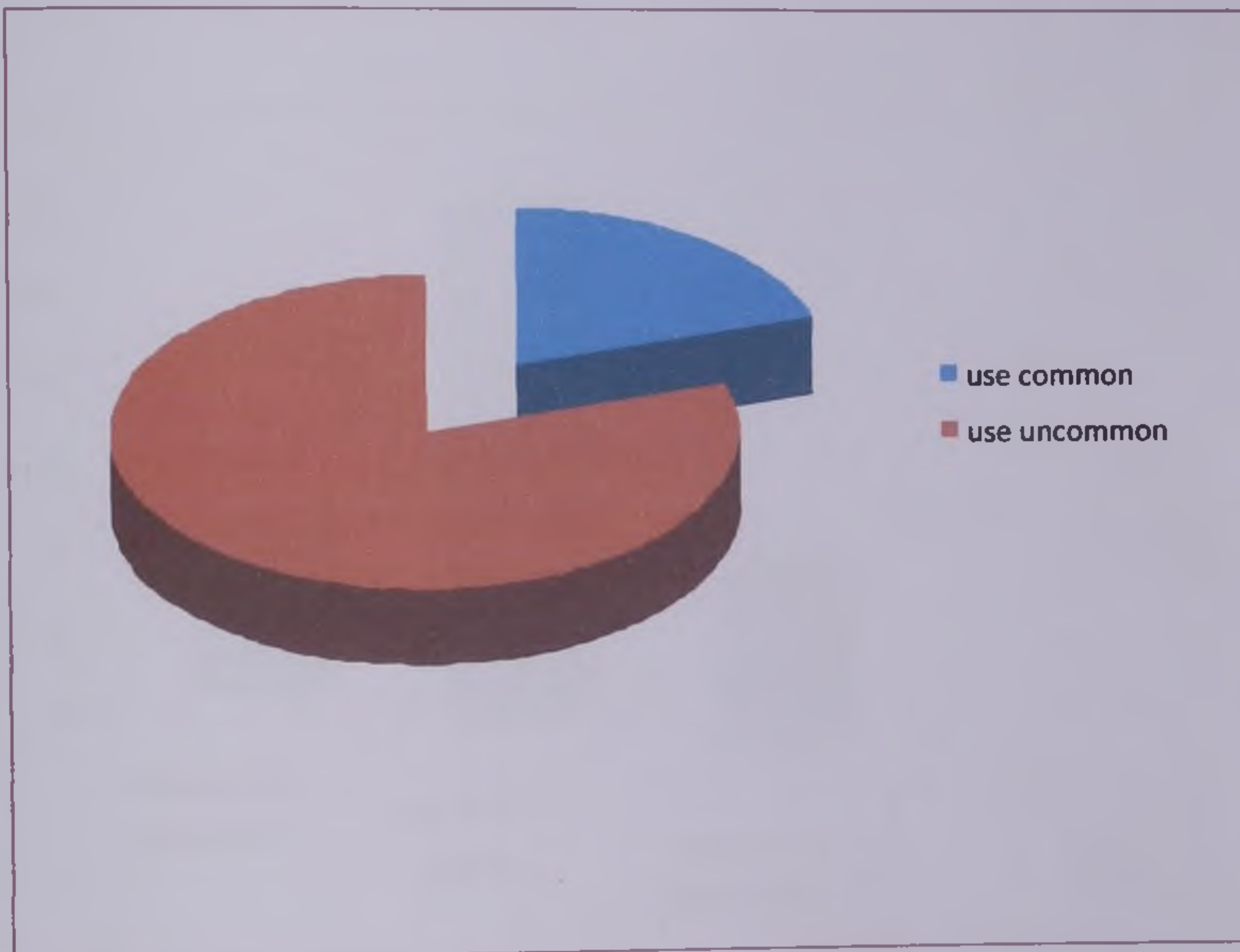

Figure-2: The systems of the use of ADR.

Result and interpretation: The column shows that the 80% of the respondents have given the answer that the method is used uncommonly. 20% of the respondents have given the answer that the method is used commonly. There are no doubts the respondent of the common users plays a vital role in the court administration and case management. The values of the result are expected.

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Q3. What is the typical cost of ADR in your jurisdiction? Please state the mediator's fees and the lawyer's fees for each party.

	Value	Percentage
Depend on advocate	4	20%
Depend on party	12	60%
Depend on mediators	4	20%

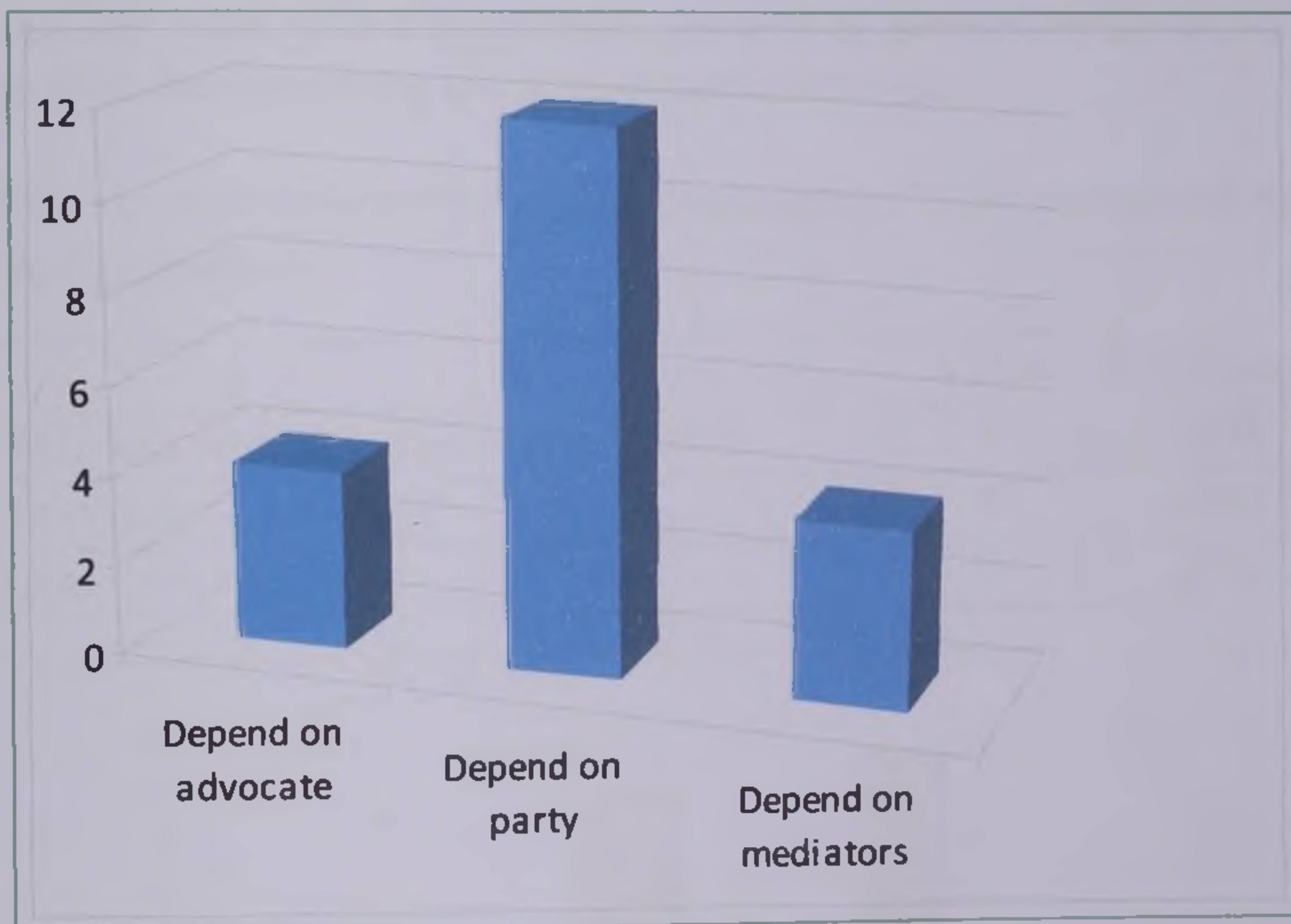

Figure-3: The cost of ADR in the jurisdiction

Result and interpretation: The column shows the 20% of the respondents have given the answer that the typical cost of the method depends on advocate. 60% of the respondents have given the answer that the typical cost of the method depend on party. Rest of the respondents have given the answer that the typical cost of the method depend on mediators. The above figure shows that the maximum typical cost of the method depends on the party.

Q 4. Is ADR encouraged by the courts in your jurisdiction?

Result and interpretation: The answer is yes or no. 8 respondent answer yes. Others answer are missing. Therefore, unable to collect the value.

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Q5. Do you recommend ADR as an alternative to court based litigation in your jurisdiction?

Result and interpretation: The maximum respondents have given the answer that yes. Therefore, it assumes that the assumption of court-based litigation is improving.

Q6. Are there sanctions, which the courts will apply if the parties refuse to consider ADR?

Result and interpretation: Majority of the respondent think they have no sanctions by the government which the courts will apply if the parties refuse to consider ADR. It is a significant obstacle of increasing use of ADR. Therefore, it needs to be increasing the government sanctions.

Q 7. What do you think are the main advantages of ADR compared with traditional court procedures?

	Value	Percentage
Win-win situation of both the parties	3	15%
Less time	8	40%
Less cost	9	45%

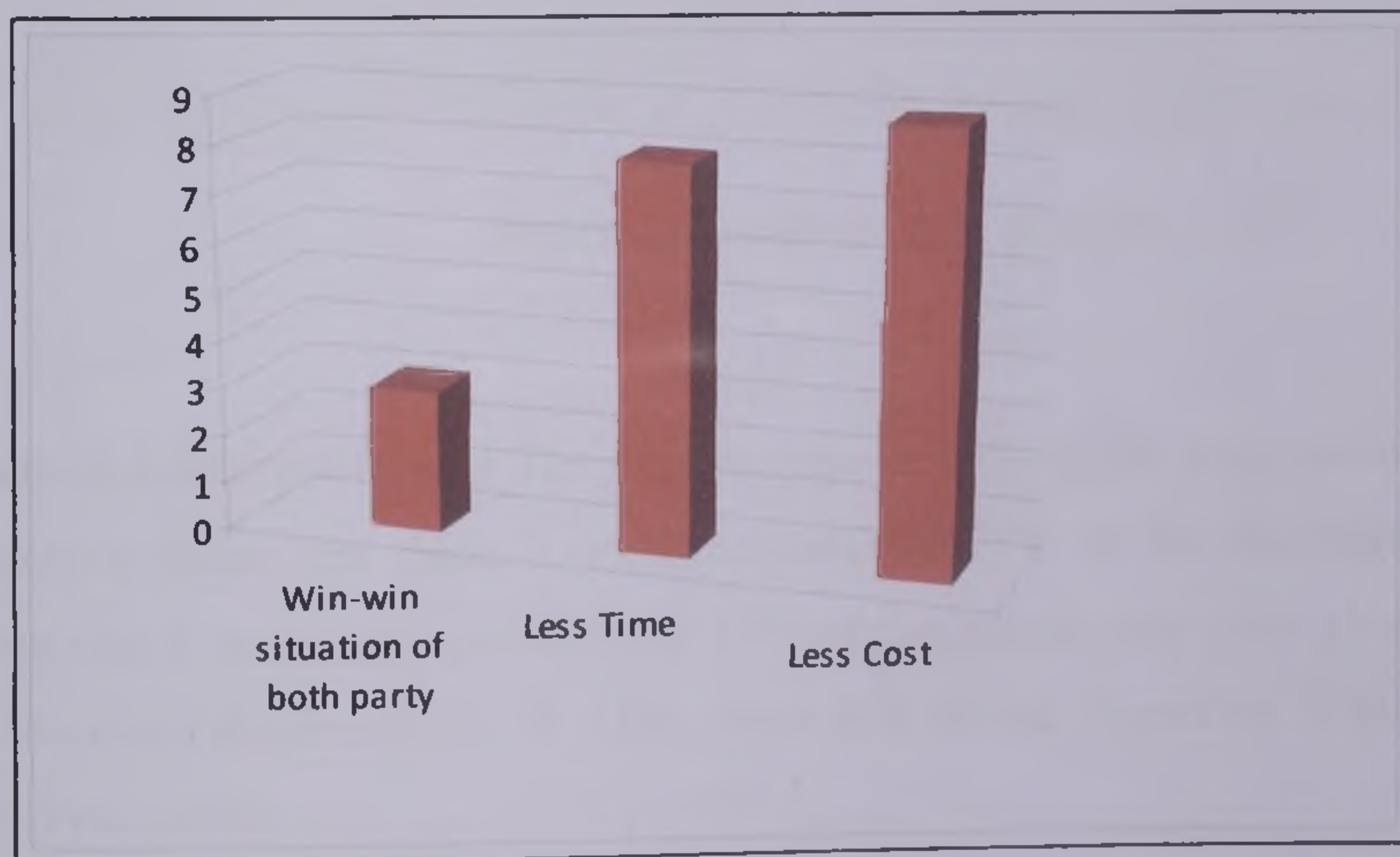

Figure-4: ADR compared with the traditional court procedure

Result and interpretation: The column shows that the 15% of the respondents have given the answer the main advantages of the method is win-win. 40% of the respondents have given the answer that the main advantages of the method is less time consuming. 45% of the respondents have given the answer the main advantages of the method is less cost. The maximum respondent think that the main advantages of the method are less cost.

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Q 8. Are there any disadvantages of ADR?

	Value	Percentage
If ADR fail	3	15%
Win-win procedure	4	20%
No disadvantage	12	60%

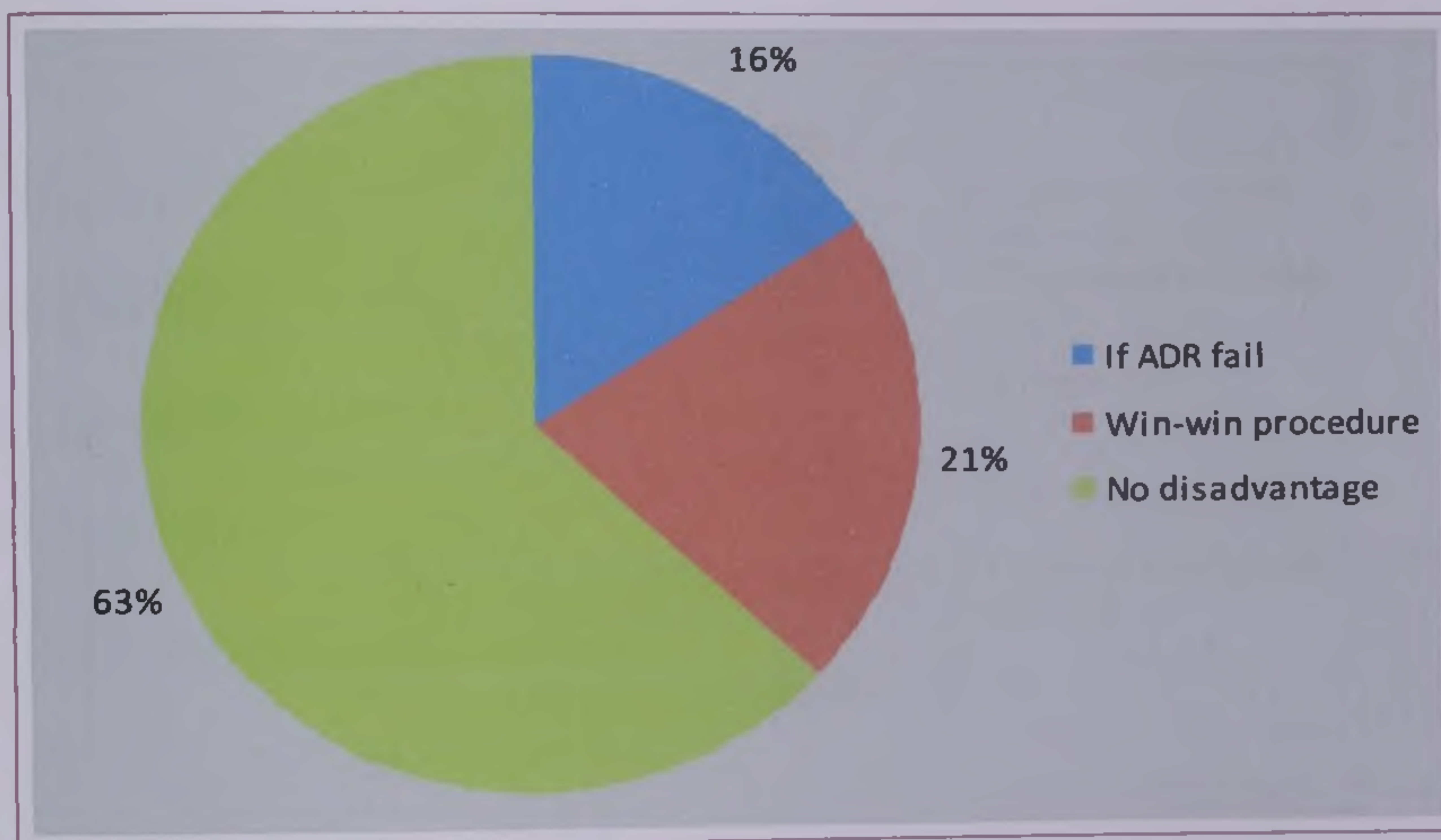

Figure-5: Disadvantages of ADR

Result and interpretation: The diagram shows 60% of the respondents have given the answer think that there is no disadvantages. 20% of the respondent given the answer that it is win-win process and 15% of the respondents have given the answer that the main disadvantages of ADR when it is failed. Therefore, it is depended on both of the parties.

Q9. Is there any other information which group members should be aware of, concerning ADR in your jurisdiction?

Result and interpretation: The majority of the respondent is 'Advocate' and some referred the solenama and others referred the other matters.

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Q10. The issues involved in the dispute are:

	Value	Percentage
a. sensitive, involving serious legal and jurisprudential debates etc.	8	40%
b. pedestrian	8	40%
c. unlikely to raise such concerns	4	20%

Figure-6: Shows the issues involving in the dispute

Result and interpretation: The column shows that 40% of the respondents have given the answer the issues are involved in the serious legal and jurisprudential debates. 40% of the respondents have given the answer that the issues are involved in the predestrain. 40% of the respondents have given the answer that the issues are unlikely to raise such concerns. The respondent of the questionnaire are the same values.

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Q11. The issues involved in the dispute are:

	Value	Percentage
a. highly technical or complex	16	80%
b. easily grasped	4	20%

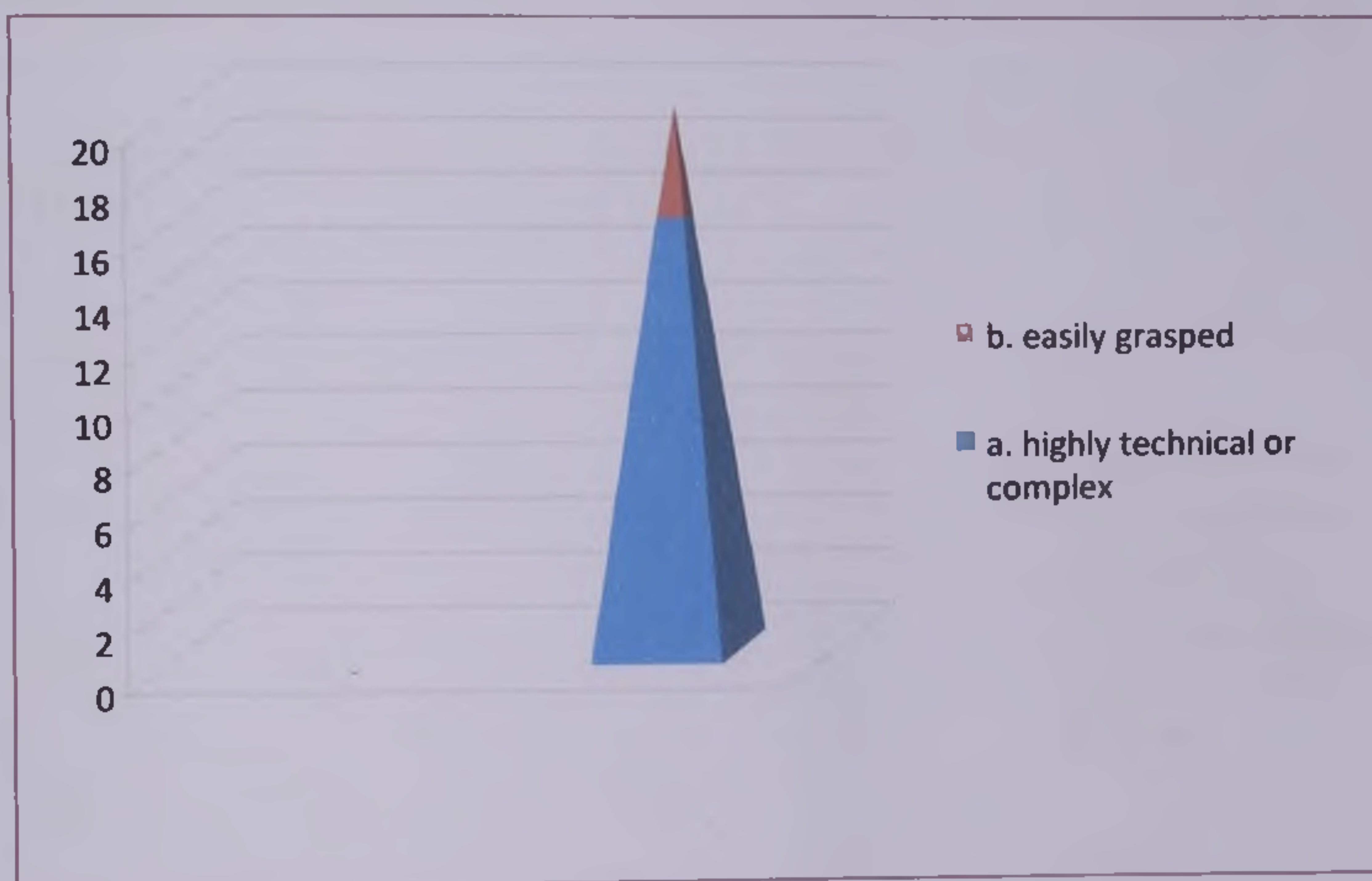

Figure-7: Issues involved in the dispute

Result and interpretation: The Cone shows that the 80% of the respondents have given the answer that the procedure is highly technical or complex. The 20% of the respondents have given the answer that the procedure is easily grasped. In the figure shows that the method is highly technical or complex.

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Q12. The central issues in the dispute are factual,

	Value	Percentage
a. but do not turn on the credibility of key witnesses	12	60%
b. and turn on the credibility of key witnesses	8	40%

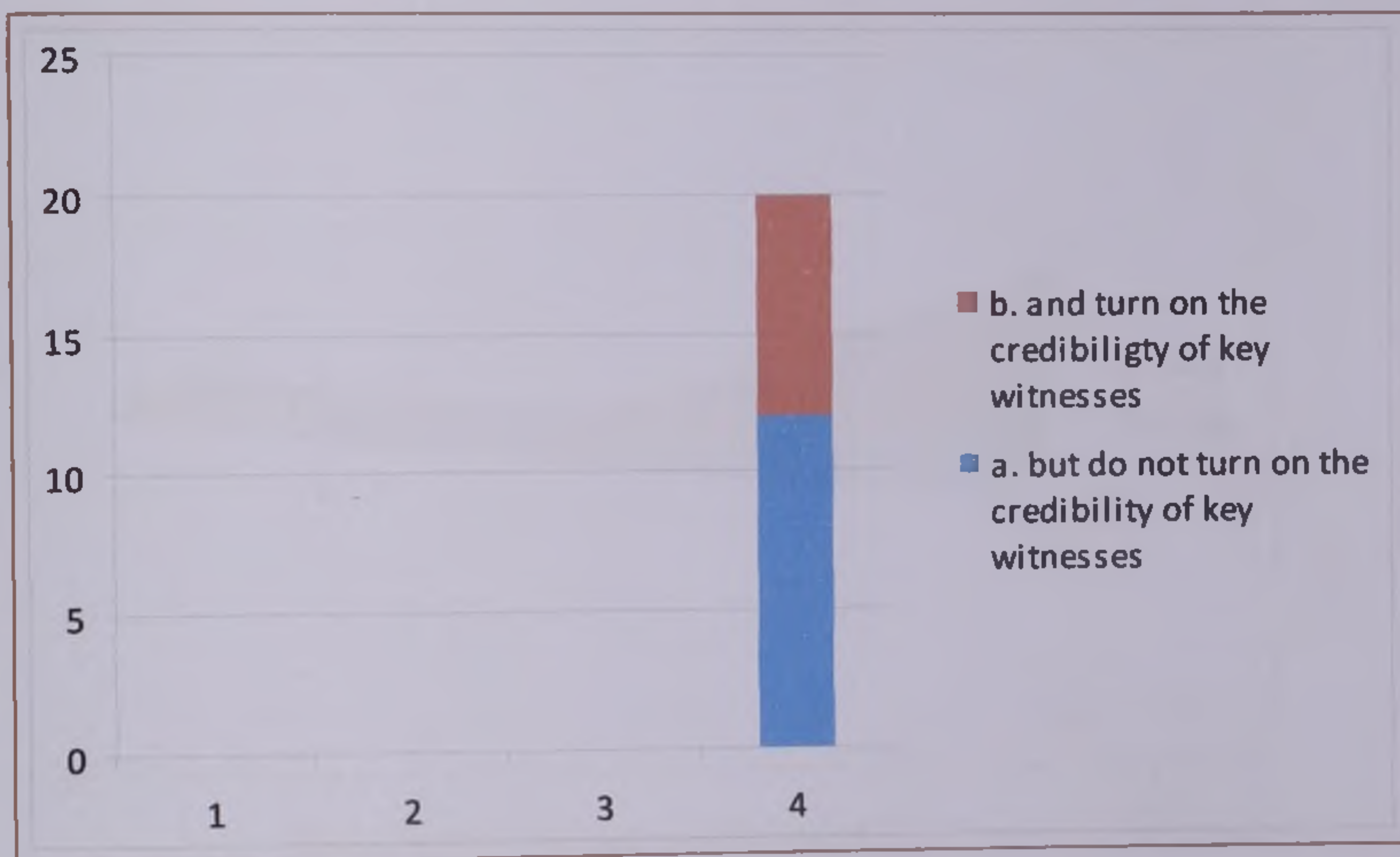

Figure-8: The figure shows the factuality of the dispute

Result and interpretation: The column shows the 60% of the respondents have given the answer that the issues in the dispute are factual but do not turn on the credibility of key witnesses and 40% of the respondents have given the answer that the issues in the dispute are factual and turn on the credibility of key witnesses. The figure shows that the central issues in the dispute are factual.

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Q13. Does either side have anything significant left to put on the table to Induce settlement?

	Value	Percentage
a. yes	8	40%
b. no	12	60%

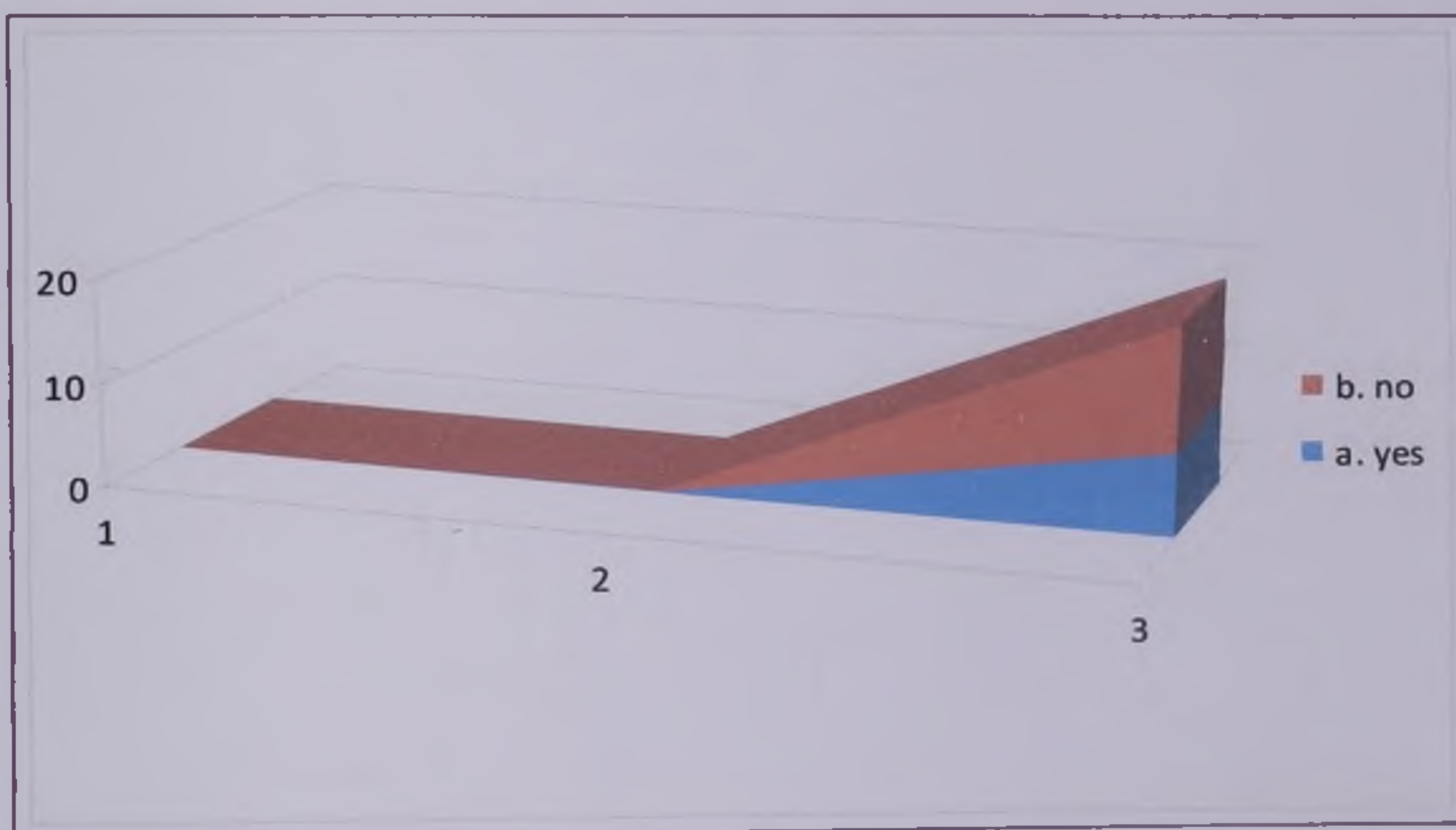

Figure-9: Induce settlement

Result and interpretation: In the area of the graph shows that the 60% of the respondents have given the answer that the questionnaire negatively and 40% of the respondents have given the answer the questionnaire positively. The figure shows that the respondents of the positive answerer are the majority of respondent induce settlement.

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Q 14. The parties wish to control the outcome of the dispute by avoiding binding adjudication and the attendant risk of loss.

	Value	Percentage
a. yes	6	30%
b. no	14	70%

Figure-10: control the out come and avoid the attendant risk of loss

Result and interpretation: The area chart shows that the 70% of the respondents have given the answer that the question negatively and 30% 0f the respondents have given the answer the question positively. The figure shows that the respondent who gave the answer negatively are the majority.

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Q15. Neither side needs a decisive legal precedent, a permanent injunction, or other court-administered remedy.

	Value	Percentage
a. yes	16	80%
b. no	4	20%

Figure-11: Other court administered remedy

Result and interpretation: The column shows that the 80% of the respondents have given the answer the question positively and 20% of the respondents have given the answer the question negatively. The figure shows that the respondent who gave the answer positively are the majority.

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Q16. The likelihood that this case can be disposed of by a prompt disparities motion is:

	Value	Percentage
a. speculative	12	60%
b. very likely	8	40%

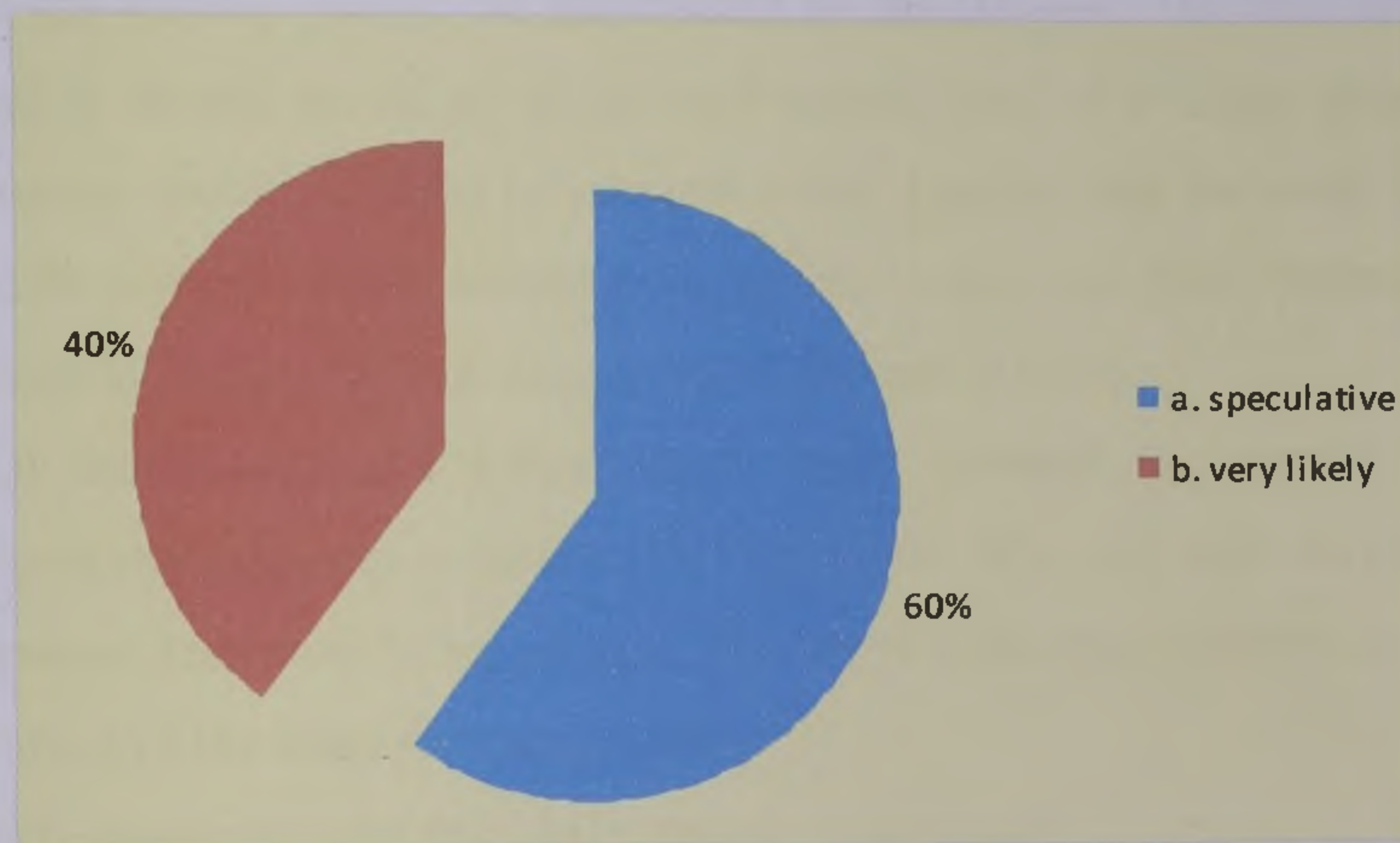

Figure-12: The prompt disparities motion

Result and interpretation: The pie chart shows that the 60% of the respondents have given the answer that the case can be disposed of by a prompt disparities motion speculative and 40% of the respondent has been given the answer the method is very likely.

Q17. Are you aware of ADR methods being used negatively? E.g., Mediation being used to the view of the other side's evidence.
Result and interpretation: Majority of the respondents have given the answer of the question is negative. Therefore, the analysis could not identify the values of the question. The second part of the question the research could not identify the answer for non cooperation of the respondent.

Which dispute method would you prefer to use?
Result and interpretation: Majority of the respondents have given the answer the mediation. Some respondent has been given the answers it depends on the litigators.

Q19. Do you think the ADR process as a whole can be improved?
Result and interpretation In the aspect of our country, the use of ADR in the civil cases are improving day by day. The existing law is yet not to permit the extensive use of ADR in the criminal cases. However, the respondent thought that if the law permits ADR process it saves and reduces huge cost, time and money. Therefore, ADR method is improving.

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Suggestions by the Judges at Different Courts in Bangladesh

- Government has recently taken initiatives regarding that-
- Awareness about merit of ADR among mass people should be increased
- Lawyer should get incentives from the Government.
- In our country parties are maintained by the lawyers. The fees should bigger, and it should be closer to as used normal fees of a larger moreover ADR process should be used in criminal cases. Landery are the main road lock to ADR process. These should be a process which can bind themselves like to renewal of their license, need to show at least 12 cases.
- All the lawyer and judges must come forward to improve the matter. Government should make the law easy mode. Who can come to contact in that process, fees must be reasonable. The lawyers can play vital role in the respect.
- Parties of the cases like this method.
- This countless cases need to be speedy disposed of.
- Awareness of mediation method of increased, so it will improve.
- The litigant public is already award about the advantage of mediation I think, in the near future, they will prefer this method of adjudication considering the time as well as the cost.
- More awareness of mass people and need more campagin.
- More advertisement, training, campaign, awareness among the mass people monitoring etc.
- More Advertisement, campaign, and awareness of the mass people.

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Analysis of Lawyers Answer (Qualitative)

Q1. Why do you prefer ADR method?

	Value	Percentage
Easy method	7	35%
Best method for settlement	6	30%
Short time method	7	35%
Total	20	

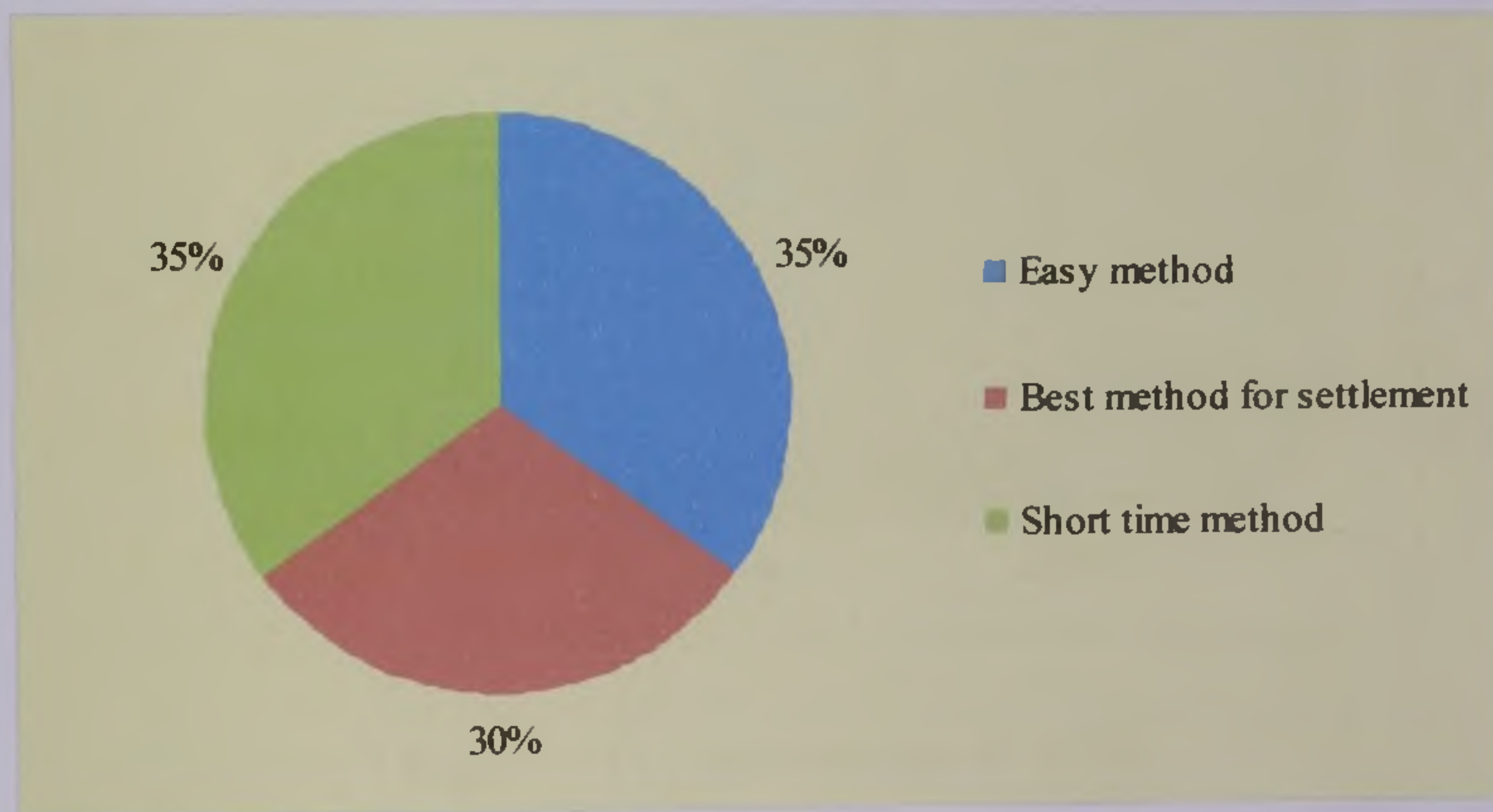

Figure-13: Preference of ADR method for lawyers

Result and interpretation: The pie chart shows the 35% respondents have given the answer that the method is easy method. 30% of the respondents have given the answer that the method is the best method for settlement. 35% of the respondents have given the answer that the method is short time method. Therefore, the respondent on behalf of easy and best method are the majority.

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Q 2. Is ADR in common use

	Value	Percentage
Yes	6	30%
No	12	60%
Others	2	10%

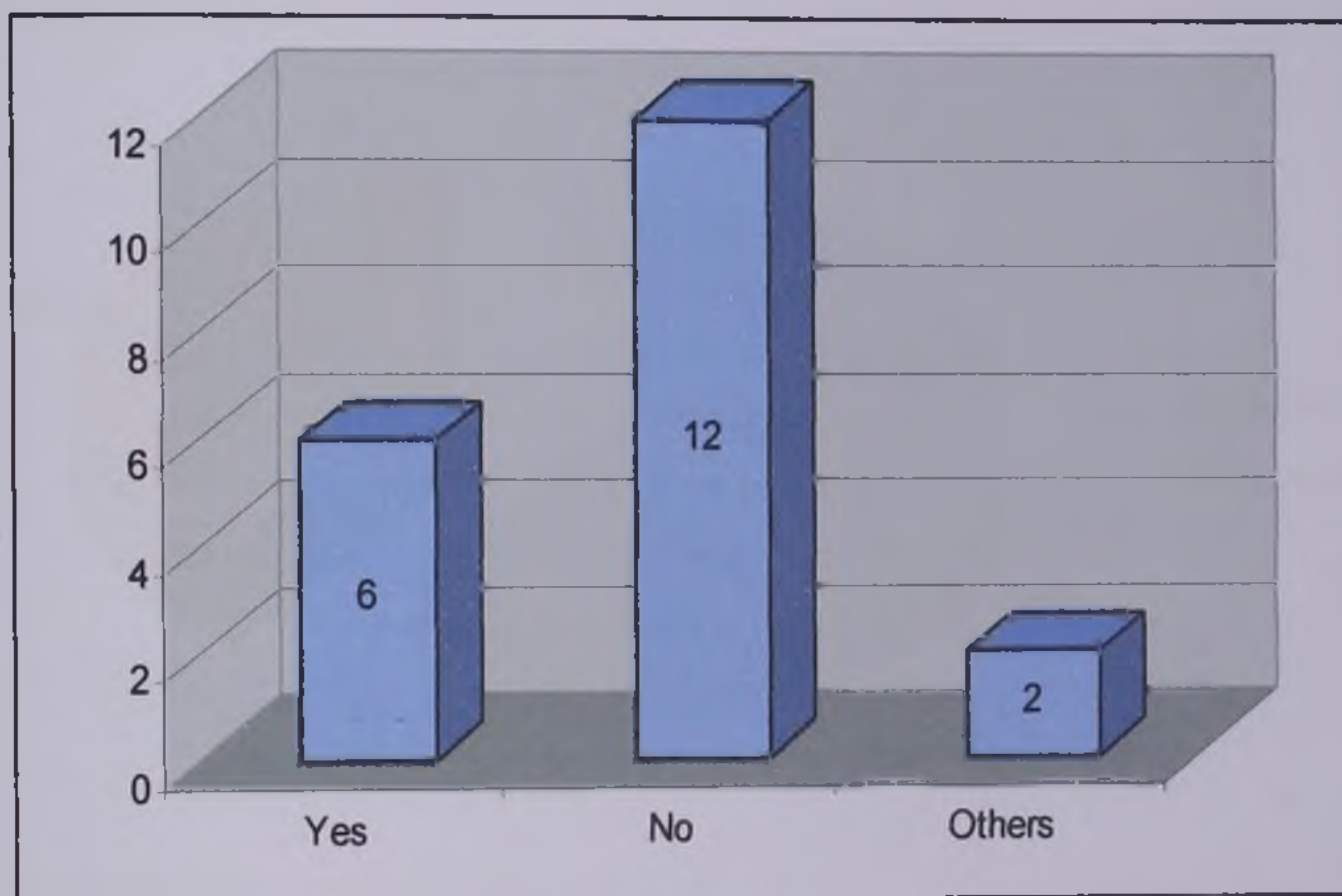

Figure-14: Common use of ADR

Result interpretation: The line chart shows that the 30% of the respondents have given the answer that they use ADR method in the commonly. 60% of the respondents have given the answer that they are not uses the ADR method. 10% of the respondents have give the answer that cannot use the ADR mechanism commonly and minority of the respondents have given answer that they used the ADR method commonly. Nevertheless, the ratio of the use of ADR is increasing day by day.

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Q 3. Is the mediator provided by the court or is the mediator found and paid for privately by the parties .

	Value	Percentage
Provided by the court	12	60%
By the parties	8	40%

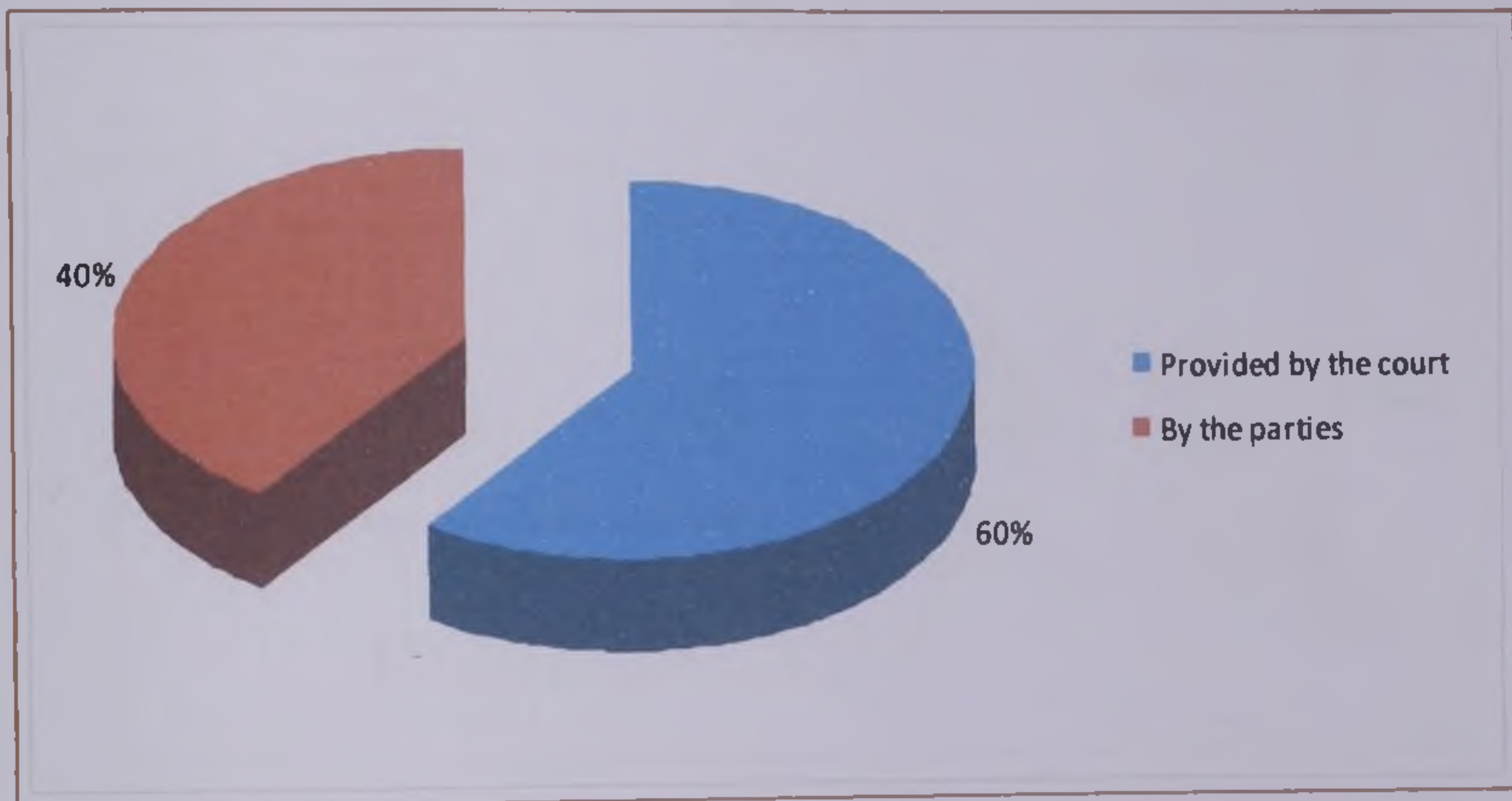

Figure-15: The system of providing the mediator

Result and interpretation: The pie chart shows that the 60% of the respondents have given the answer that the mediator is provided by the court. 40% of the respondents have given the answer that the mediator are provided by the party. Therefore, the mediators provided by the court is high.

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Q 4. How long does the ADR process usually take?

	Value	Percentage
4 to 6 months	7	35%
About 8 months	5	25%
More than 8 months	8	40%

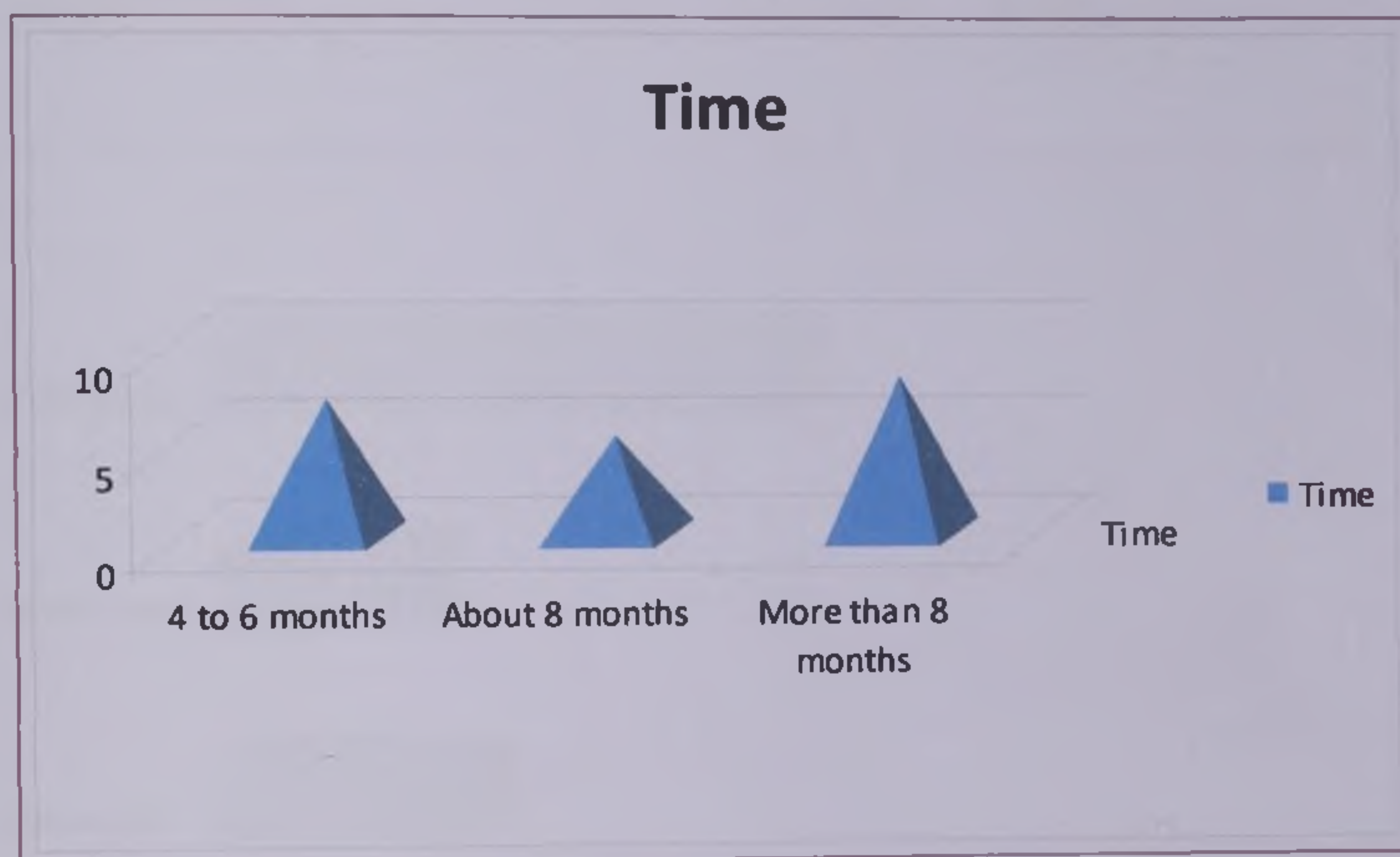

Figure-16: Duration of ADR process

Result and interpretation: The cone shows the 35% of the respondents have given the answer that ADR process usually takes 4 to 6 months. 25% of the respondents have given the answer that it takes 8 months. 40% of the respondents have given the answer that it takes more than 8 months. Therefore, whose respondent gave the answer 8 months is high.

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Q 5. How does this compare with the cost and time taken for a traditional court process?

	Value	Percentage
4 times less	5	25%
5 times less	4	20%
all the same	11	55%

Figure-17: Compare with cost

Result and interpretation: The figure shows that the 25% of the respondents have given the answer compare them with the cost of ADR mechanism to the traditional system is less 4 time.20% of the respondents have given the answer that it is 5 times less and 55% of the respondents have given the answer that it is all the same. So that the respondent whose gave the answer all the same is majority.

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Q 6. Can the parties to a ADR process agree any settlement terms they wish, or are there restrictions?

	Value	Percentage
Disagree	8	40%
Neither agree nor disagree	5	25%
Agree	7	35%

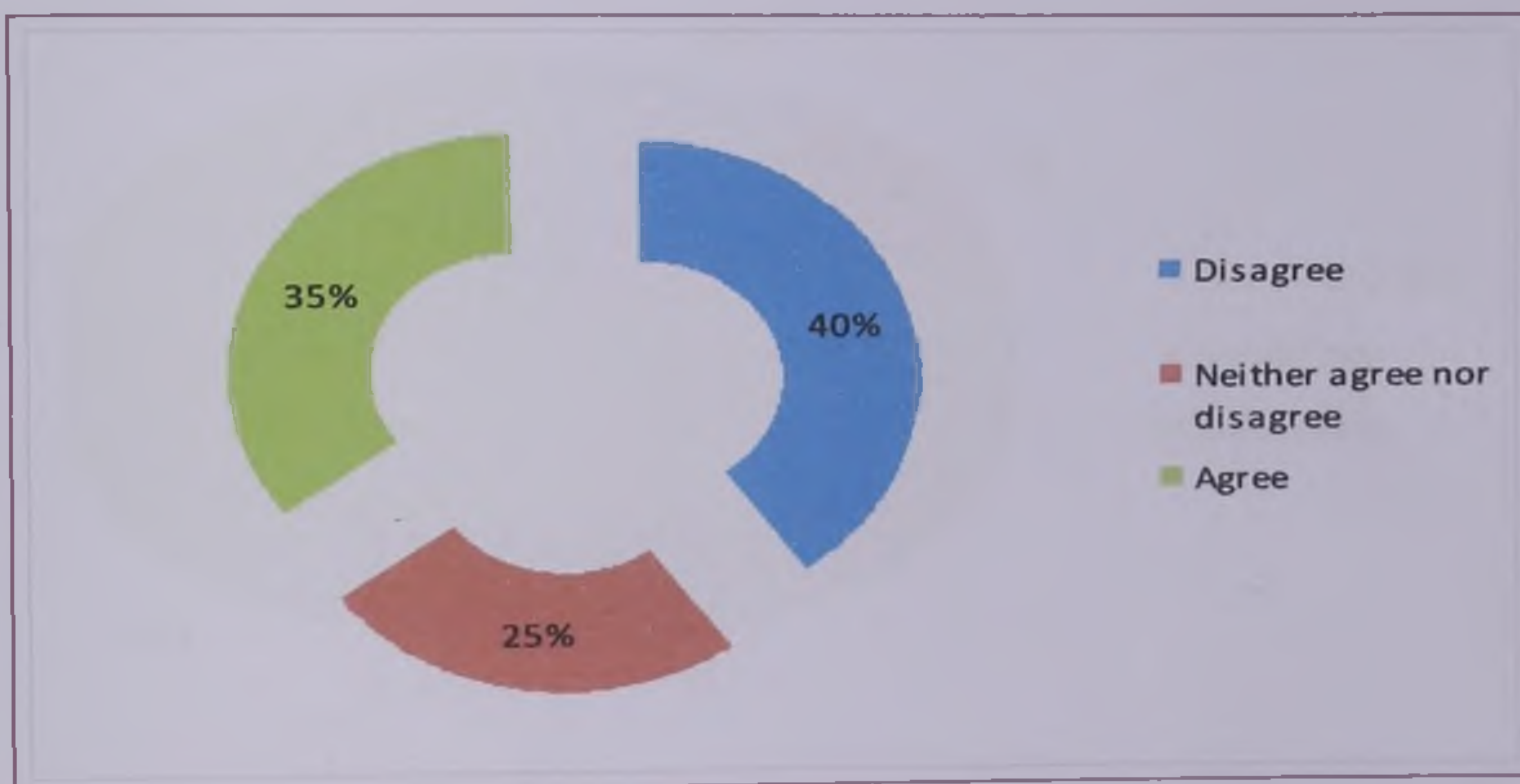

Figure-18: Settlement time

Result and interpretation: The Doughnut Chart shows that the 40% of the respondents have given the answer they disagree of the process. 25% of the respondents have given the answer that they are neither agree nor disagree. 35% of the respondents have given the answer they are agreeing with the process. So that the majority of the respondent is, agree with the process.

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Q 7. Are ADR agreements enforceable once they have been signed by the parties?

	Value	Percentage
Not enforceable	2	10%
Sometimes	3	15%
Enforceable	15	75%

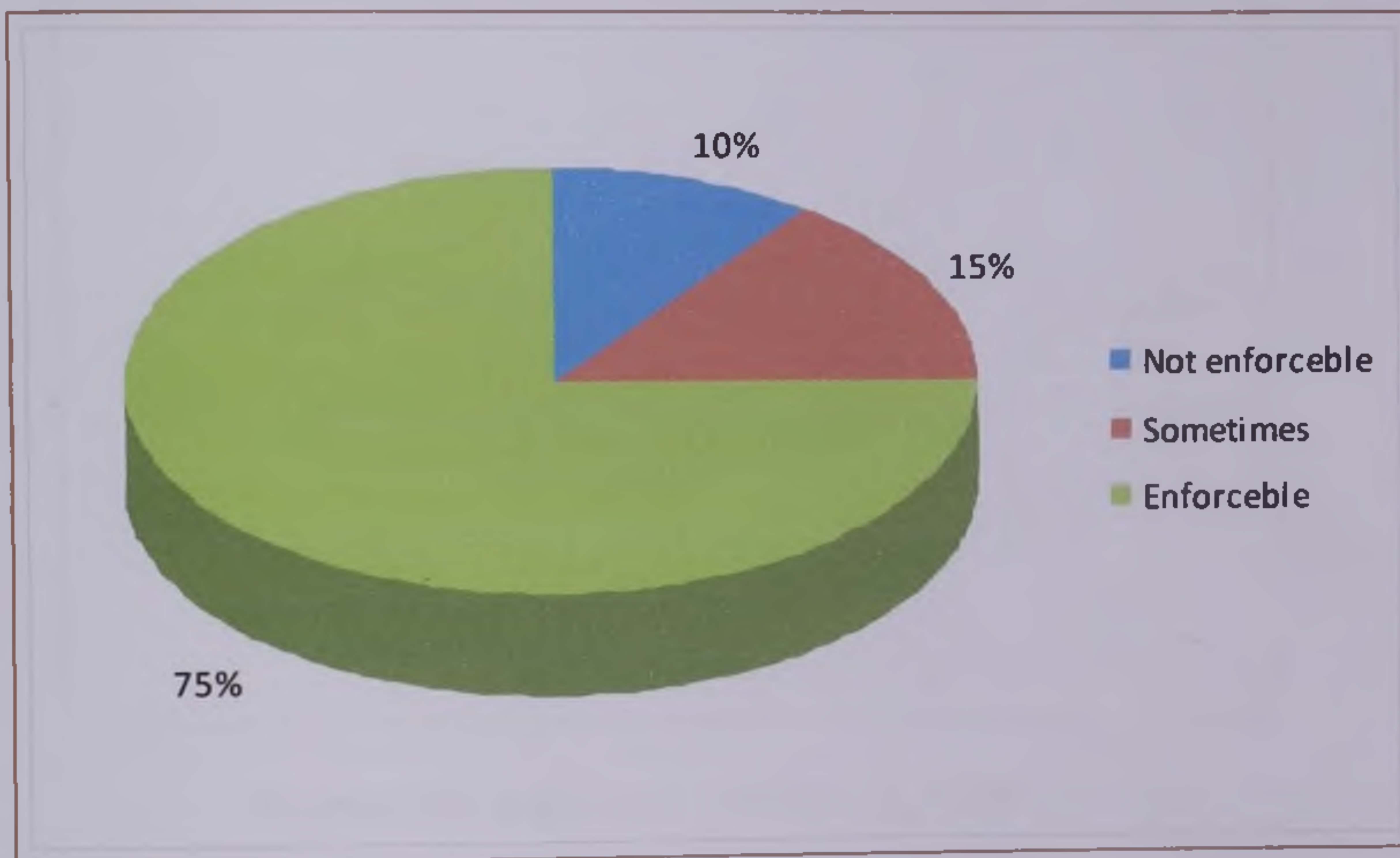

Figure-19: Enforcement of ADR agreement

Result and interpretation: The figure shows that the 10% of the respondents have given the answer the process is not enforceable 15% of the respondents have the answer that the process is enforceable in sometimes 75% of the respondents have given the answer that the process is enforceable in the ADR mechanism. So the respondent whose gave the answer positive is high.

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Q8. Are there sanctions which the courts will apply if the parties refuse to consider ADR?

	Value	Percentage
Yes	6	30%
No	12	60%
Others	2	10%

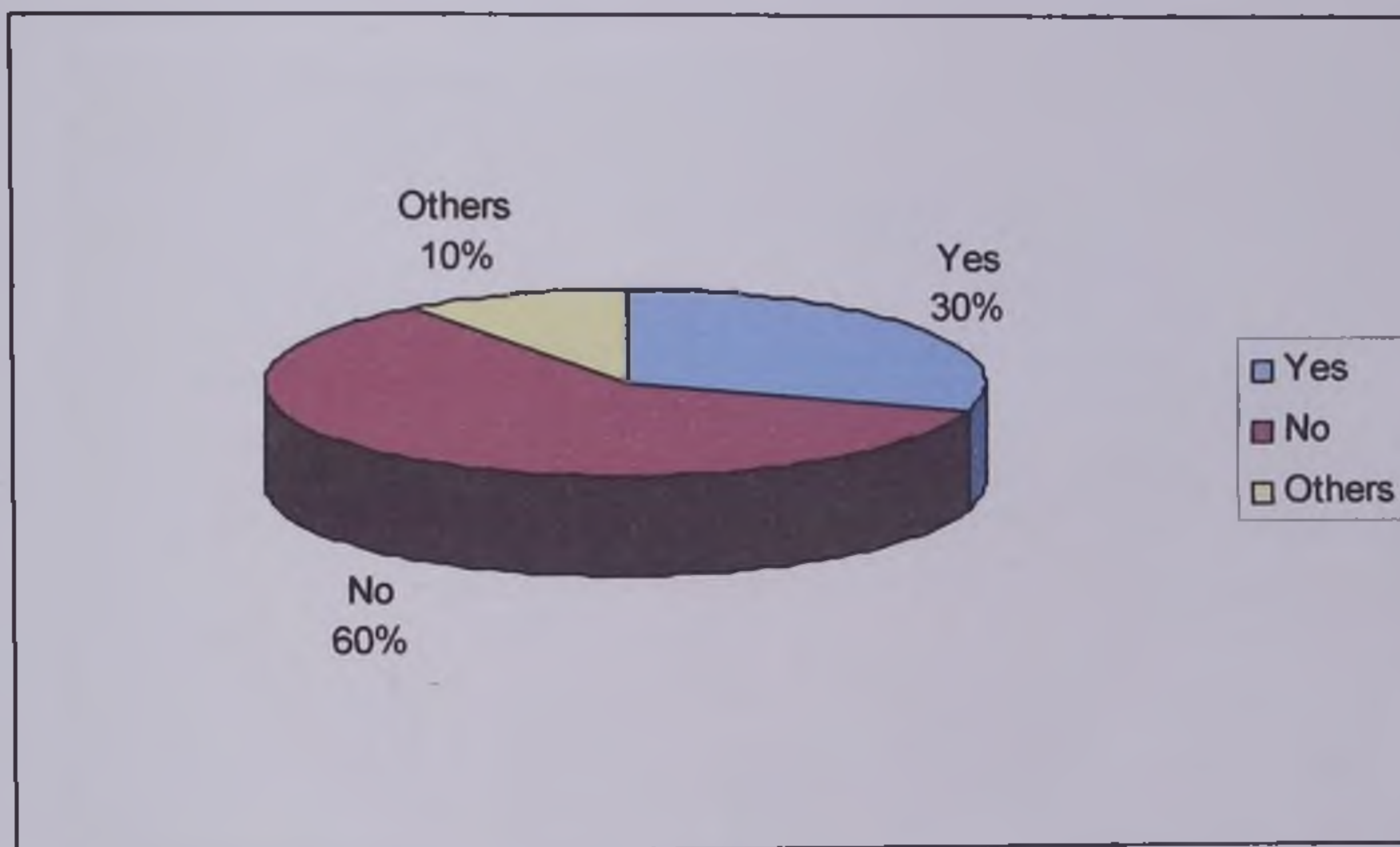

Figure-20: Sanctions process of ADR

Result and interpretation: The pie chart shows that the 30% of the respondents have given the answer that there is sanctions in the process. 60% of the respondents have given the answer there is no sanctions in the process. 10% of the respondents answers are different. Therefore, the respondent whose gave the answer negatively they are the majority.

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Q 9. Are you aware of ADR of methods being used negatively? E.g. ADR being used to view the other sides evidence?

	Value	Percentage
Yes	5	25%
No	15	75%

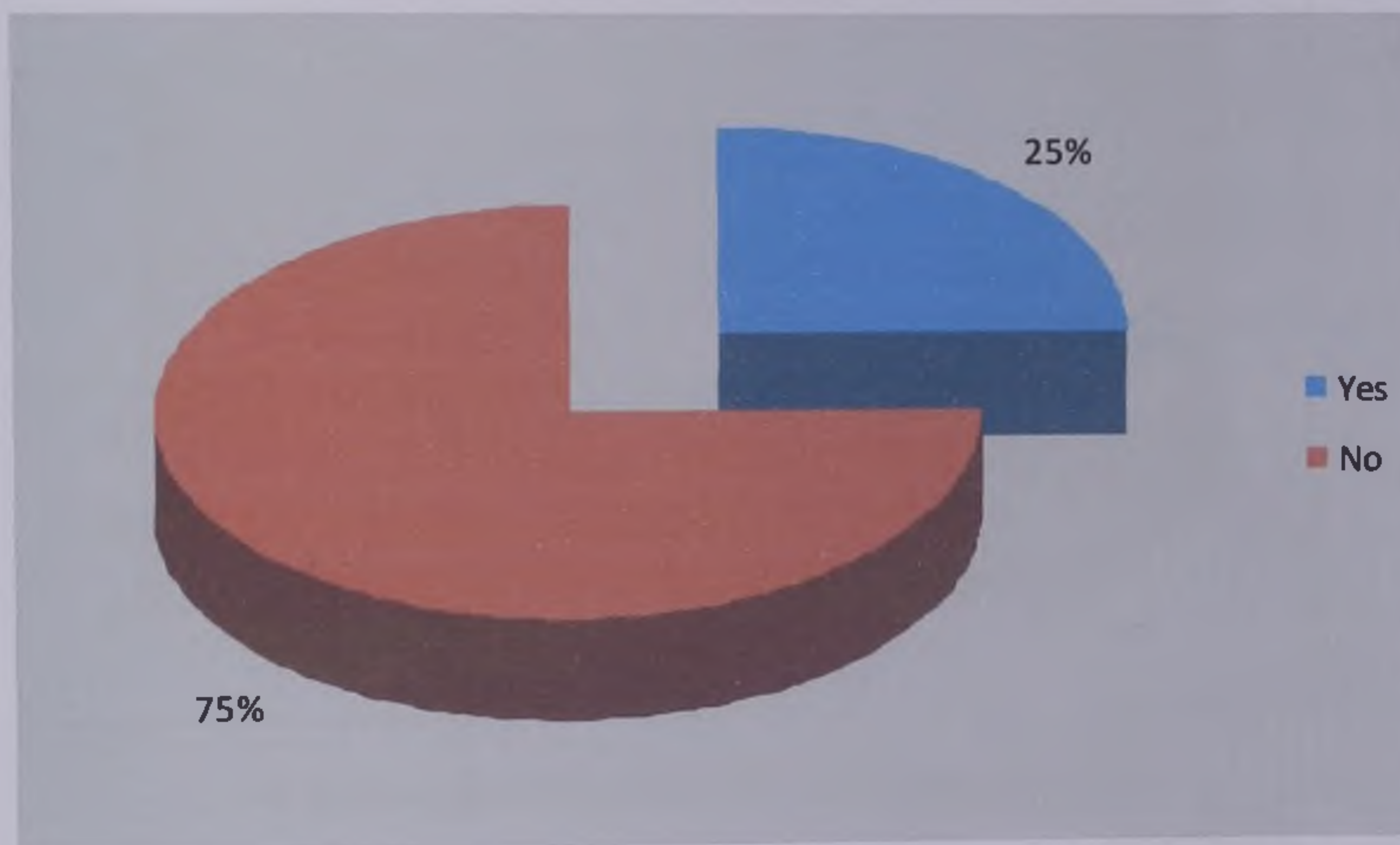

Figure-21: awareness of ADR

Result and interpretation: The pie chart shows the 25% of the respondents have given the answer that that do not think that the process is used negatively 75% of the respondents have given the answer that they do not think the process is being used negatively. So that, the negative responders are the majority.

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Q10. Do you think the ADR process as a whole can be provided?

	Value	Percentage
Yes	4	20%
No	16	80%

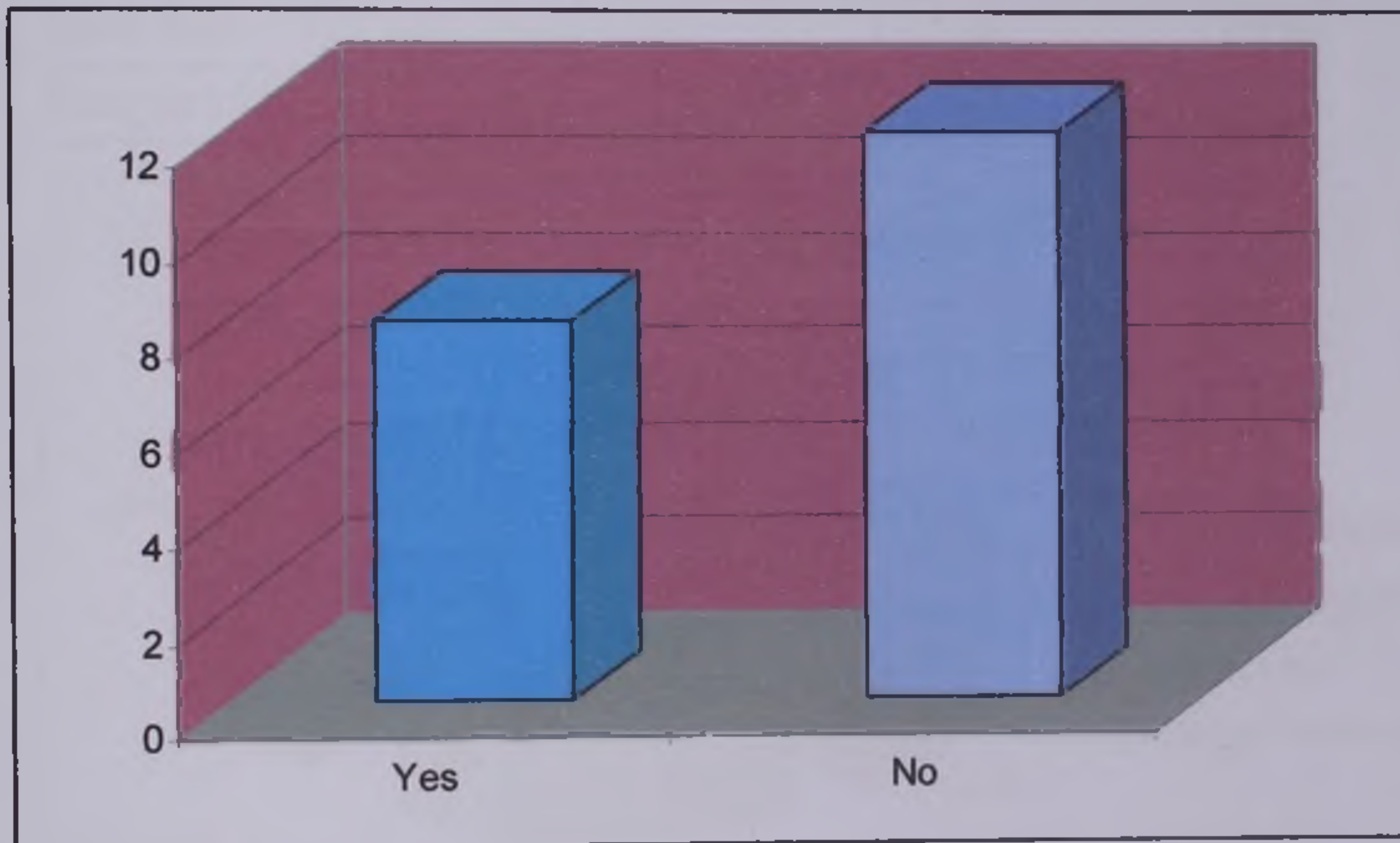

Figure-22: Providing the ADR process

Result and interpretation: The column shows the 20% of the respondents have given the answer that they are agreed with process. 80% of the respondents have given the answer that they cannot agree with the process. Therefore, the negative answer is high.

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Q11. What do you think are the main advantage of ADR compared with traditional court procedures?

	Value	Percentage
Lot of Advantages	6	30%
Save time and labor	2	10%
Save cost	4	20%
Simple method	8	40%

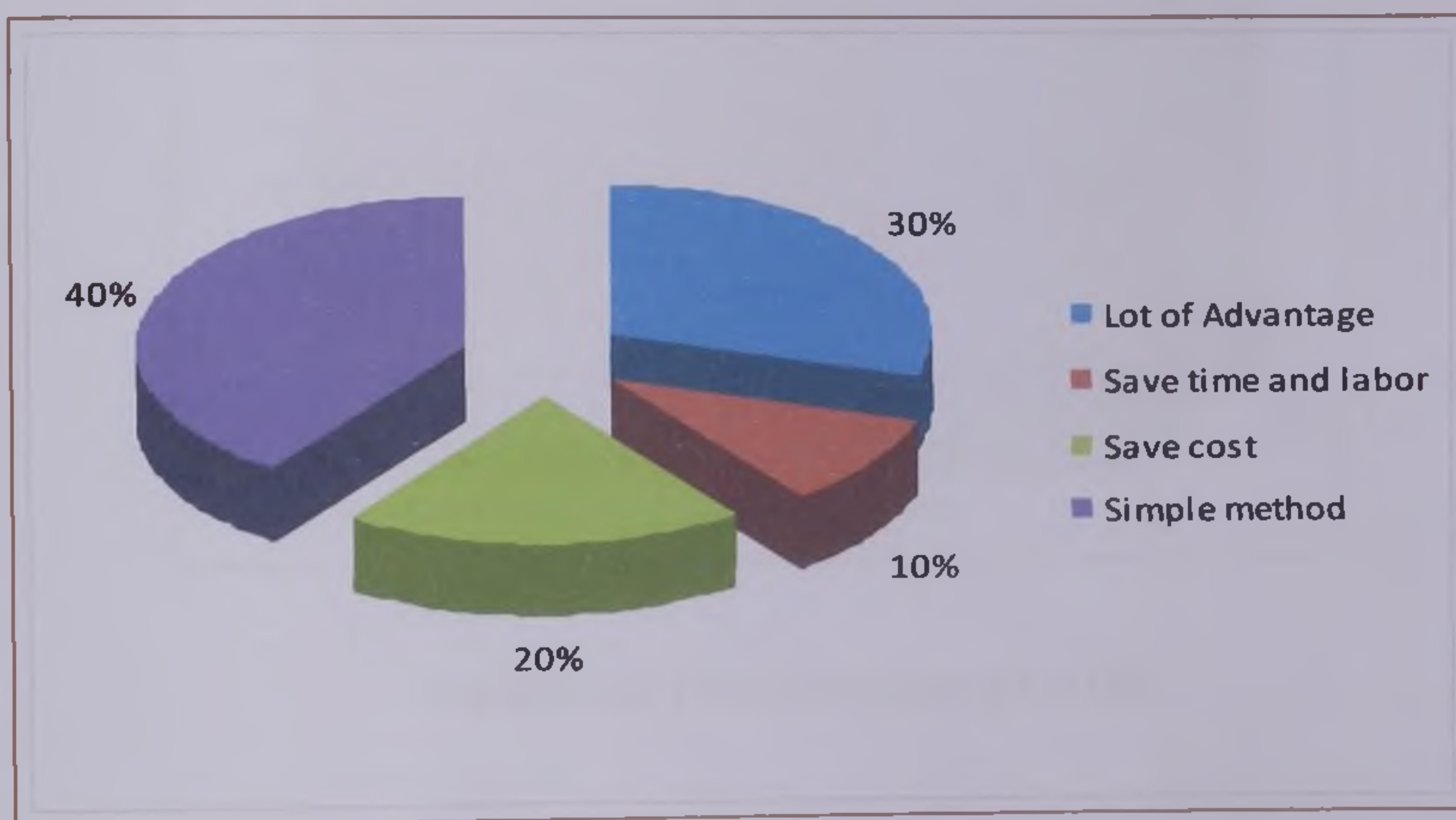

Figure-23: Main advantages of ADR process

Result and interpretation: The diagram shows that the 30% of the respondents have given the answer that they think that there are a lot of advantages of ADR to the traditional system. 10% of the respondents think that the process is a simple process. Therefore, the research revealed that the ADR process is a simple method.

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Q 12. Are there any disadvantages of ADR?

	Value	Percentage
minor disadvantage	4	20%
no disadvantage	16	80%

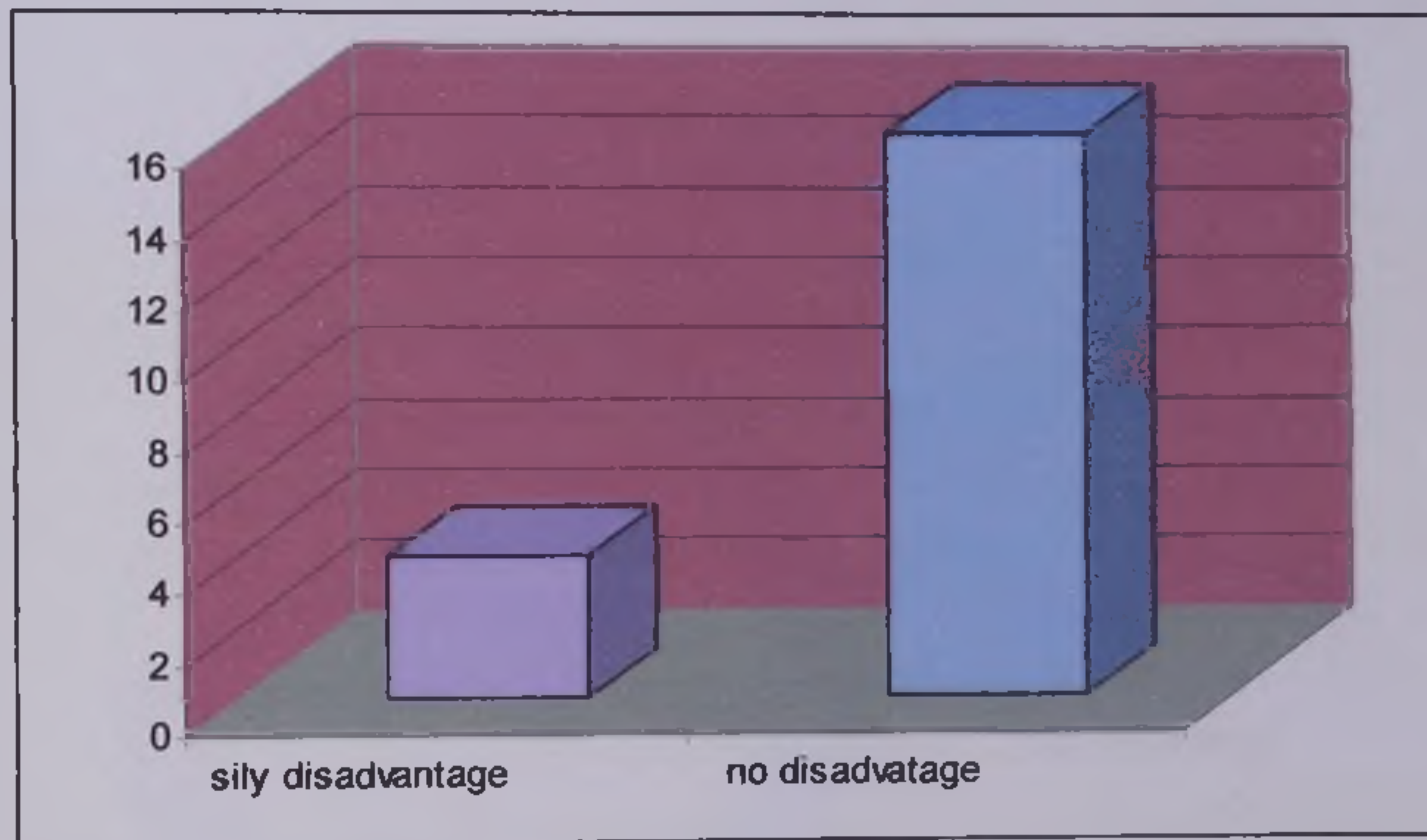

Figure-24: Disadvantages of ADR

Result and interpretation: In this column shows the 20% of the respondents have given the answer that the ADR process have no any minor disadvantages. 80% of the respondents have given the answer that the ADR process have no any disadvantages. Therefore, the maximum respondent think that there are no disadvantages of ADR process.

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Q 13. Is there any other information which group members should be aware of, concerning ADR in your jurisdiction.?

	Value	Percentage
Yes	10	50%
No	05	25%
Disagree	05	25%

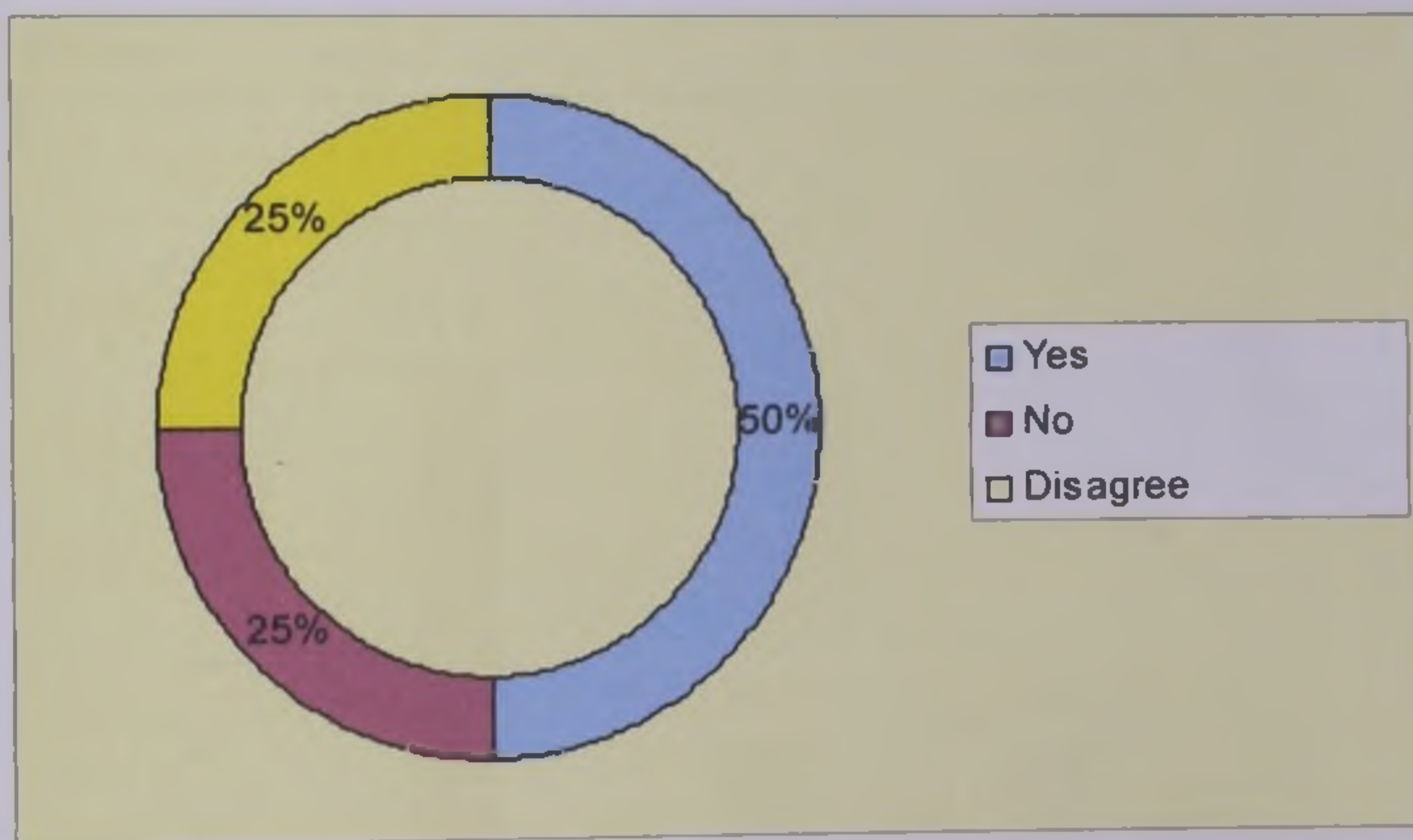

Figure-25: Other information about ADR

Result and interpretation: In the Doughnut shows the 50% of the respondents have given the answer that they have the information about the process. 25% of the respondents have given the answer that has no any other information about the process. Rest of (25%) respondents have given the answer that they are disagreeing with the process. Therefore, the decision is that whose respondent are agree with the process is high.

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Analysis of Clients Answer (Qualitative)

Q1. What is your relationship to this case?

	Value	Percentage
Plaintiff	12	60%
Defendant	4	20%
Others	4	20%

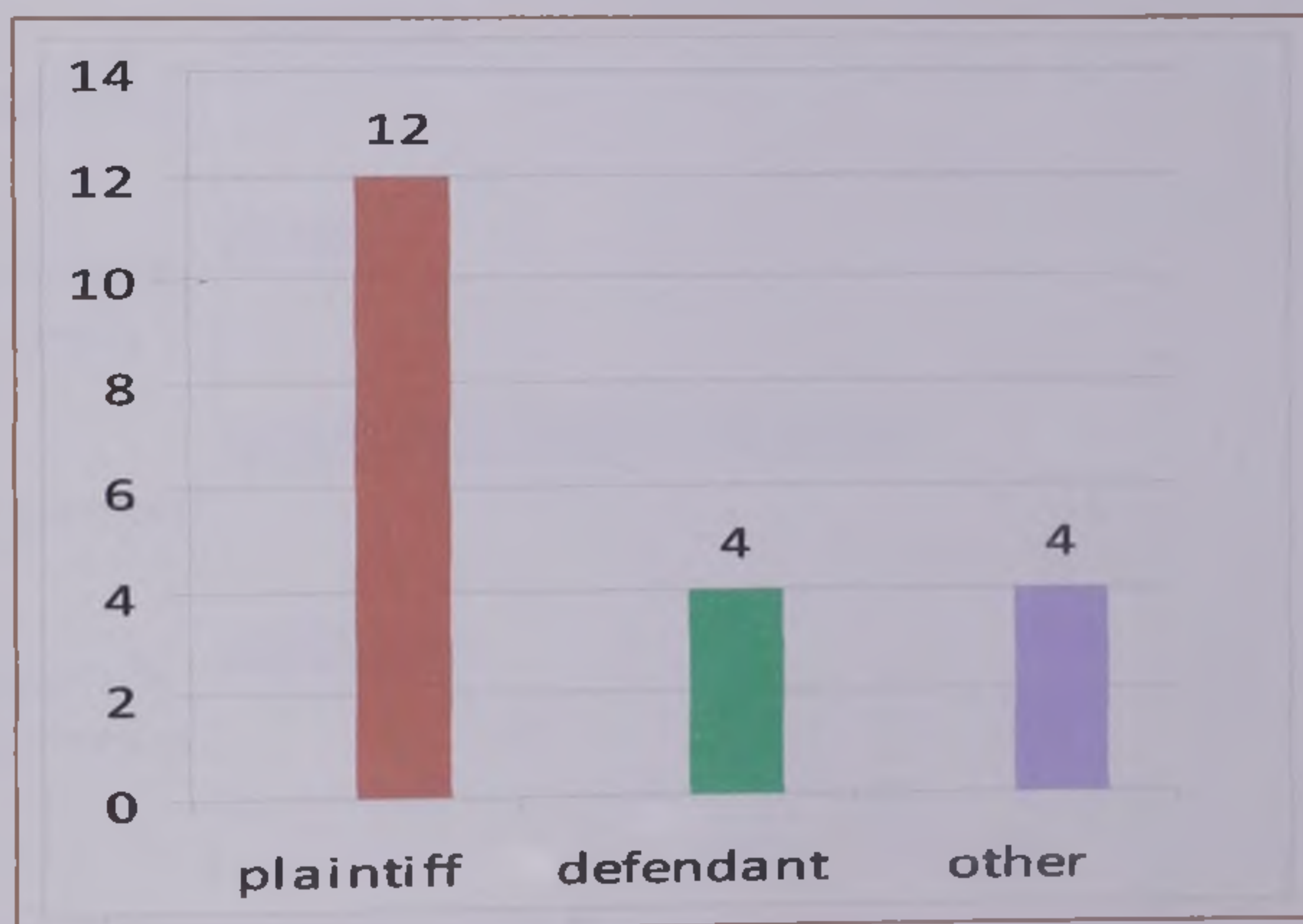

Figure-26: Relationship of the case (ADR)

Result and interpretation: The column shows the 60% of the respondents have given the answer that the relationship was the plaintiff. 20% of the respondents have given the answer that his relation with the case is defendant. Other 20% of the respondents have given the answer that they have maintained the relation by the other means. Therefore, the data is decided that the relationship of the plaintiff is the majority.

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Q2. What categories are the best describes in your status as a party, or the party you represent?

	Value	Percentage
Non-profit organization	4	20%
Business	12	60%
Government agency	2	10%
Individual	4	20%

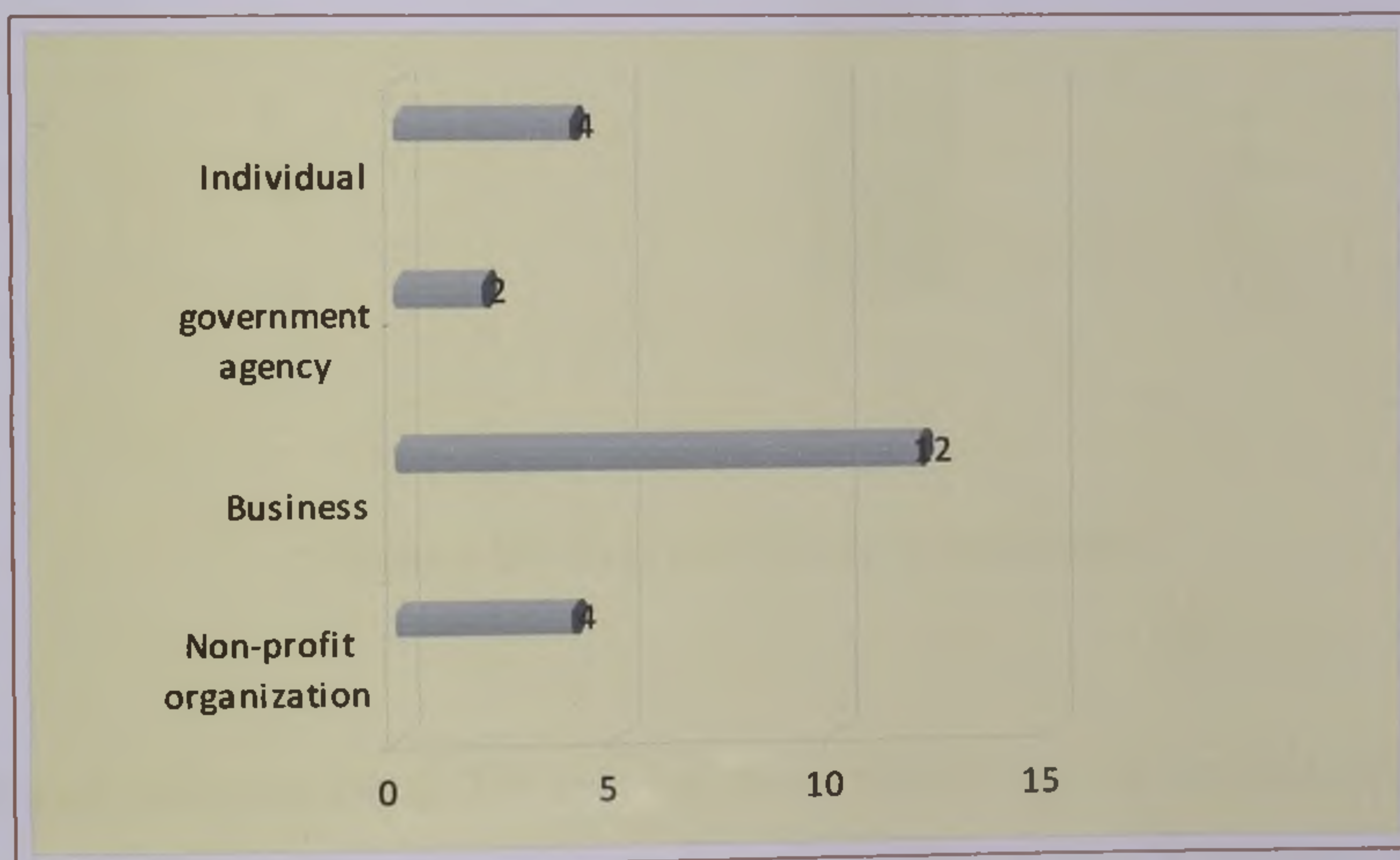

Figure-27: Status of a parties

Result and interpretation: The graph is showing the four categories of respondent's present status. In this bar clearly shows the business class of respondent status is 60%. The respondent category of the individual and the non-profitable organization are 20%. The government agencies are the 10%. Therefore, the business category parties rank is high.

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Q3. If you are a litigant in the case, does an attorney represent you?

	Value	Percentage
yes	12	60%
no	8	40%

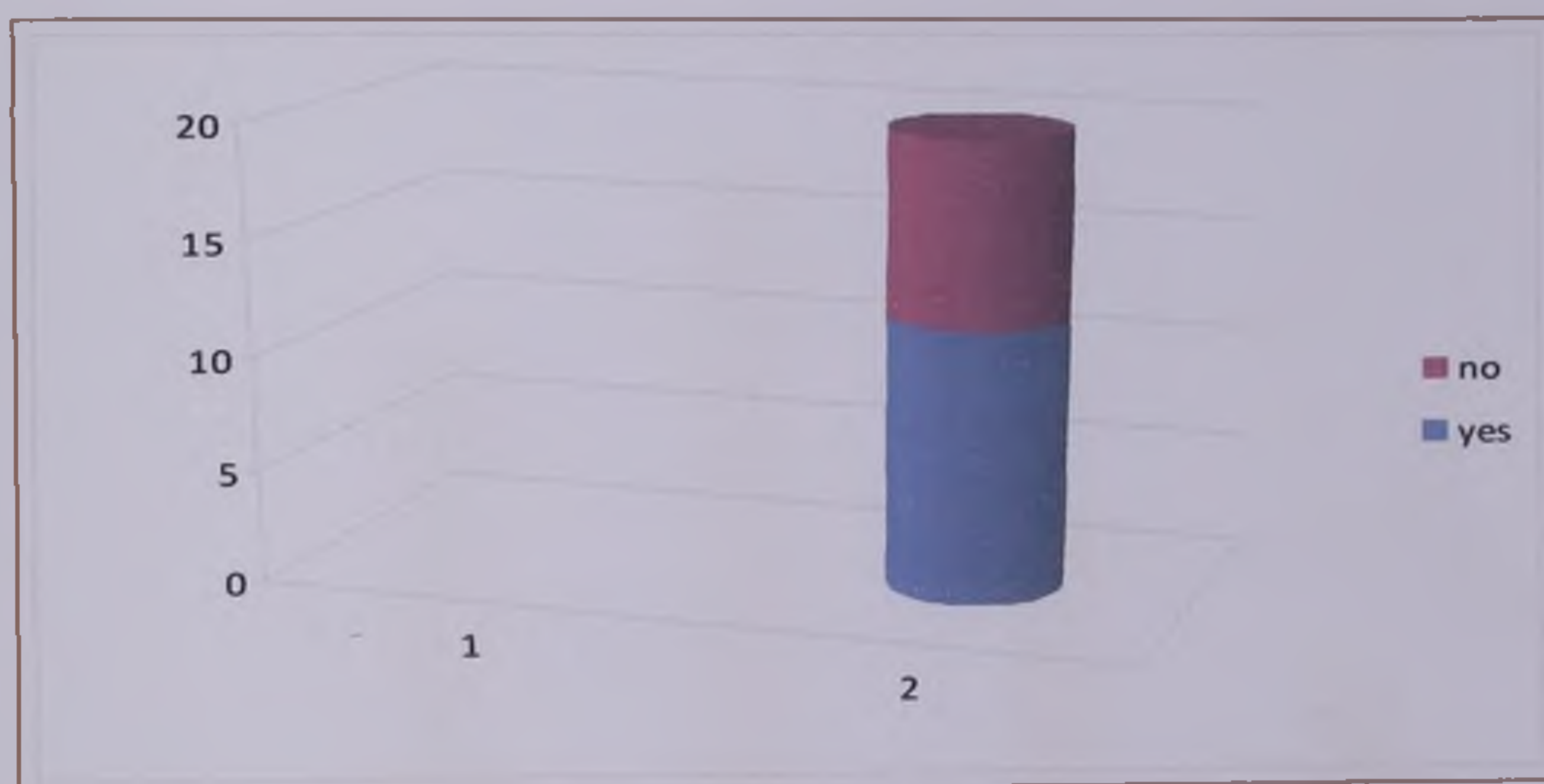

Figure-28: Representations of a litigant

Result and interpretation: The column shows the 60% of the respondents have given the answer that their status in respect of appointing the attorneys. 40% of the respondents have given the answer that they are not engaged the attorney. Therefore, the majority of the respondents are not willing to engage the attorney.

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Q 4. What types of case was mediated?

	Value	Percentage
Land use	6	30%
Business	8	40%
Family	4	20%
Others	2	10%

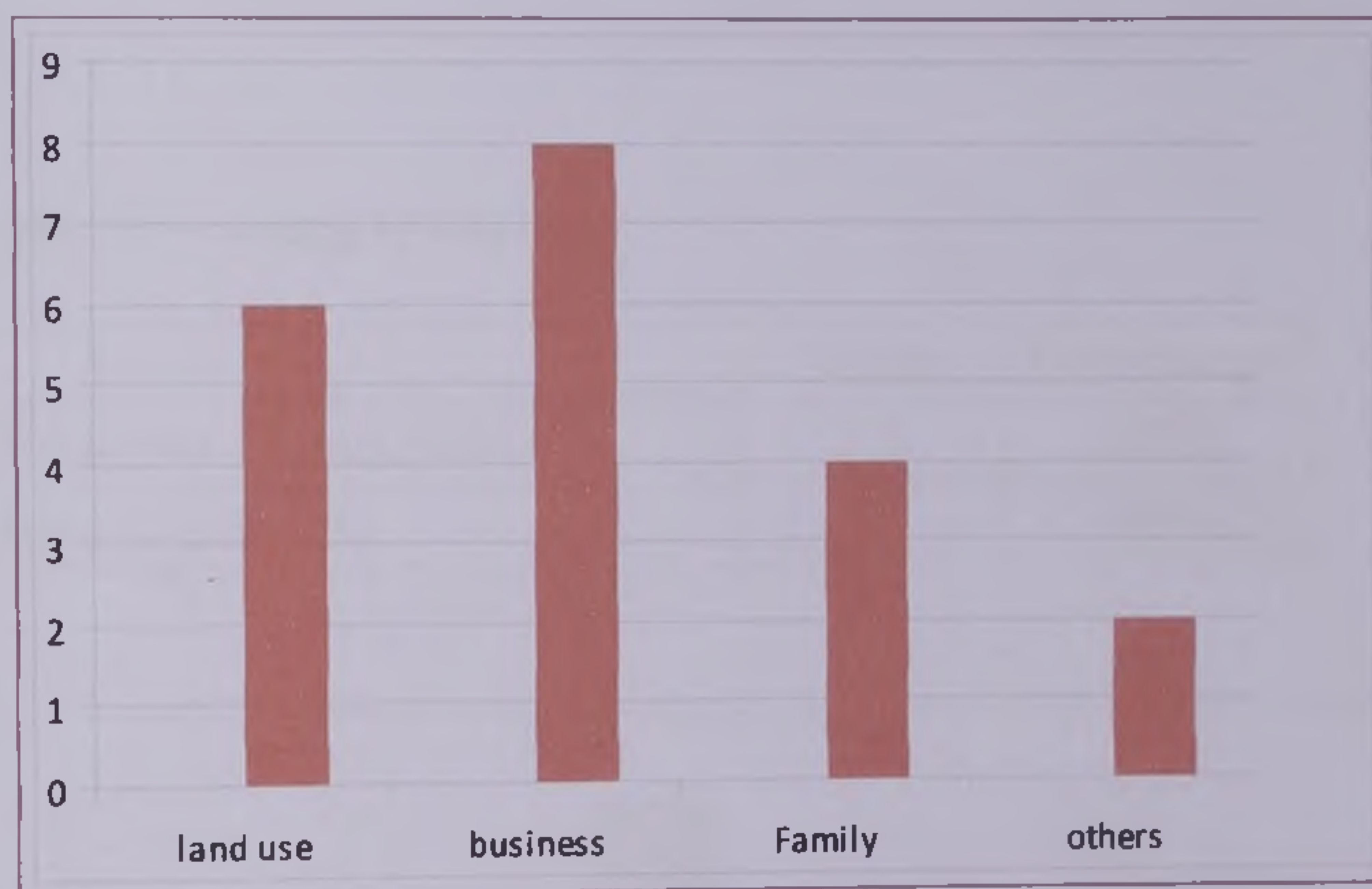

Figure-29: Mediation litigation

Result and interpretation: The sample I collected in this column shows that the types of mediation. 40% of the respondents have given the answer that they are the type of business litigants. 30% of the litigants are the land users. 20% of the respondents have given answer that they are the family class. 10% of the respondents have answer that they are that other classes. So the business class litigants are the majority.

Q 5. Have you ever used mediation to resolve a legal dispute before?

Result and interpretation. The respondent gave no answers. Because, a lion share of respondent did not meet to any mediation before resolve the legal dispute

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Q6. Is it your own choice to go for ADR?

Result and interpretation: Maximum respondent answer that they prefer the (ADR) mediation process. However, some respondent refer that they choose the mediation by the influence of advocates and other mediations processers. In that respect time, labor and cost are also important factor. Therefore, they go to for ADR process.

Q 7. The chances of winning at trial are:

	Value	Percentage
Unknown or uncertain	12	60%
Hope to solution	8	40%

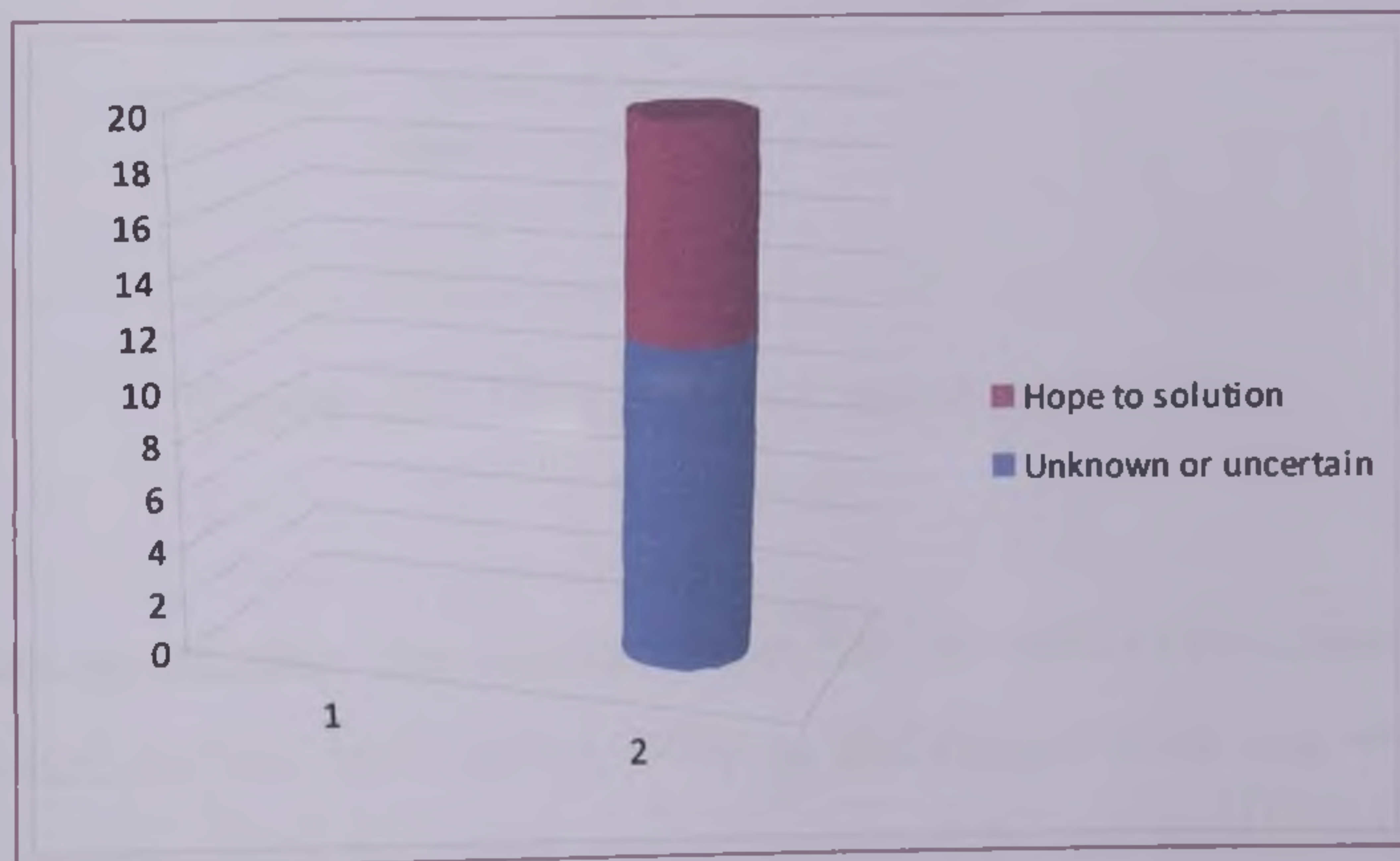

Figure-30: The chance of winning at trial stage

Result and interpretation: The column shows the 60% of the respondents have given the answer that they have won the trial situation. 40% of the respondents have given the answer that they are hoping that they are able to solve the litigation on the trial process.

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Q 8. How did you select the mediator provider for this case?

	Value	Percentage
a. party select	12	
b. mediation provider from the court list	6	
c. others	2	

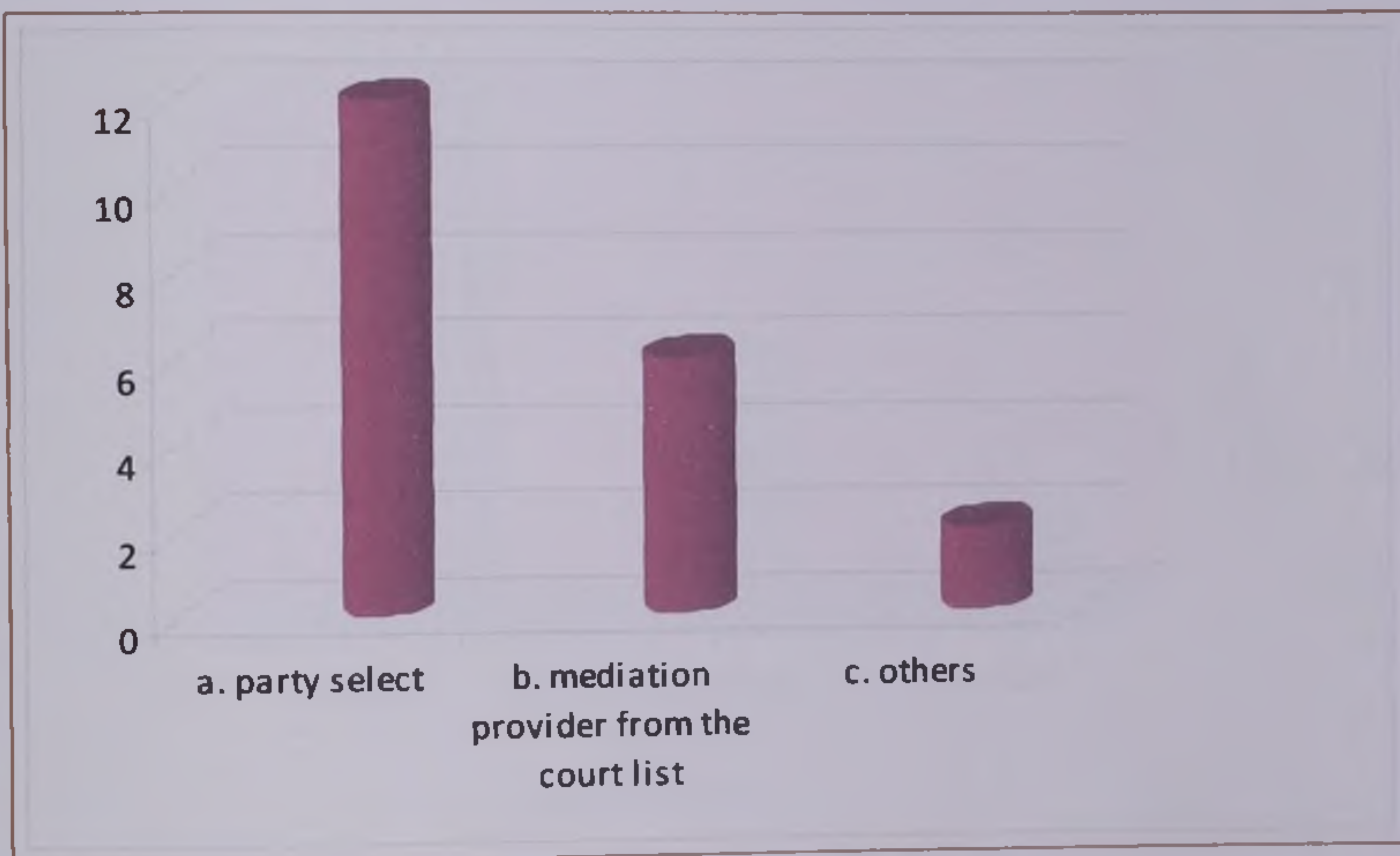

Figure -31: The process of mediator provide

Result and interpretation: The column shows that the 60% of the clients are selected by the mediators by his own choice, 30% of the clients think that the Court will provide the mediator from the panel lawyers selected by the district judge and others 10% think that the mediators are selected by the other means. I present there option to the 'sample class, first observation of party select second observation is mediation provider from the court list. The minor are of the others.

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Q9. How satisfied are you with the outcome of the mediation process?

	Value	Percentage
a. good	12	60%
b. not satisfied neither dissatisfied	6	30%
c. excellent	2	10%

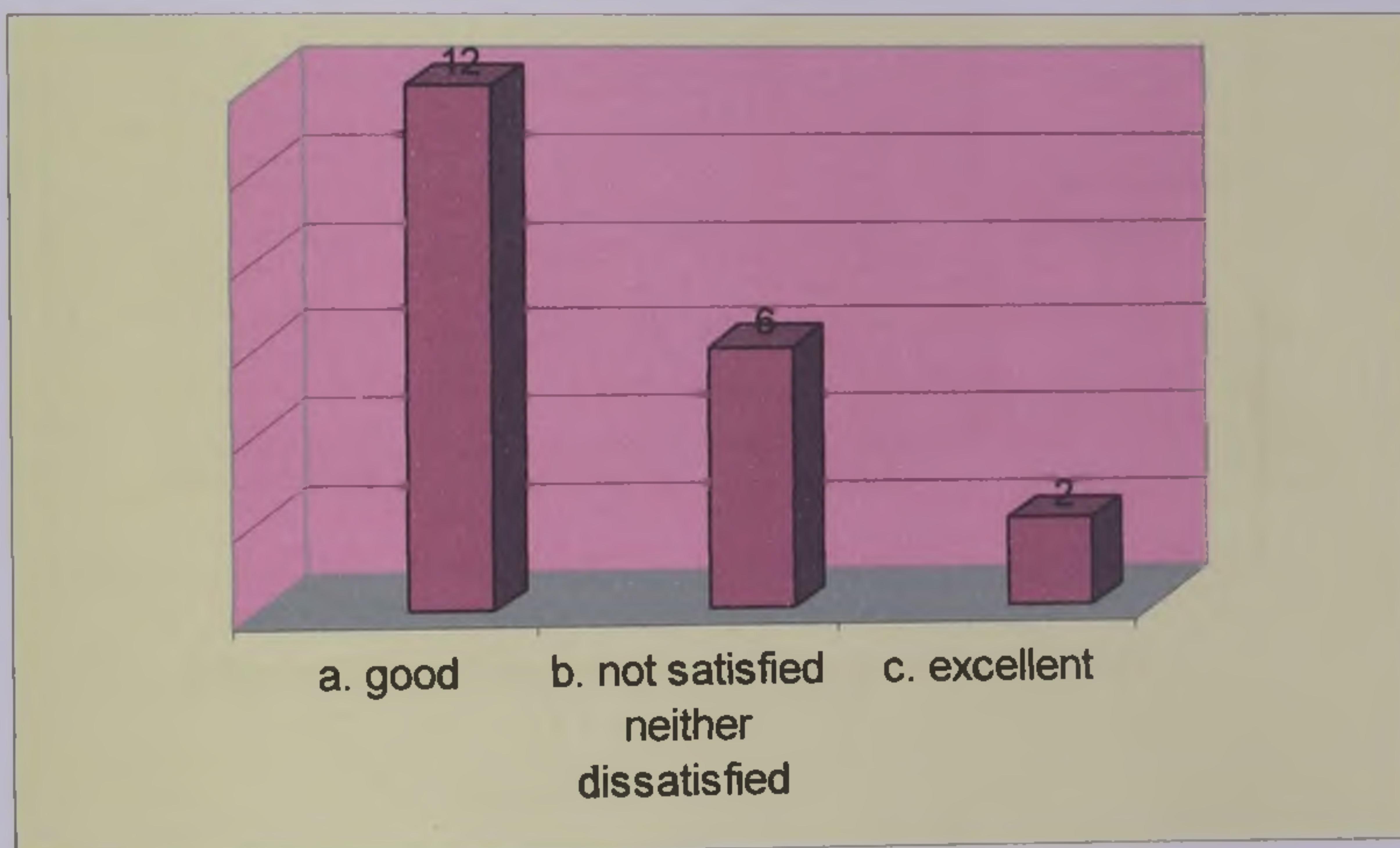

Figure-32: Satisfaction with the mediation process

Result and interpretation: This chart shows the open question to the respondent that about the satisfaction of mediation process outcomes satisfaction. 60% of the respondents are opinion they are satisfied about the outcome of the ADR process. In addition, neither satisfied nor dissatisfied 30% and 10% have commented that the process is excellent.

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Q 10. How effective was the panel members (mediators, lawyers, judges etc.)

	Value	Percentage
Not bad	12	60%
Good	8	40%

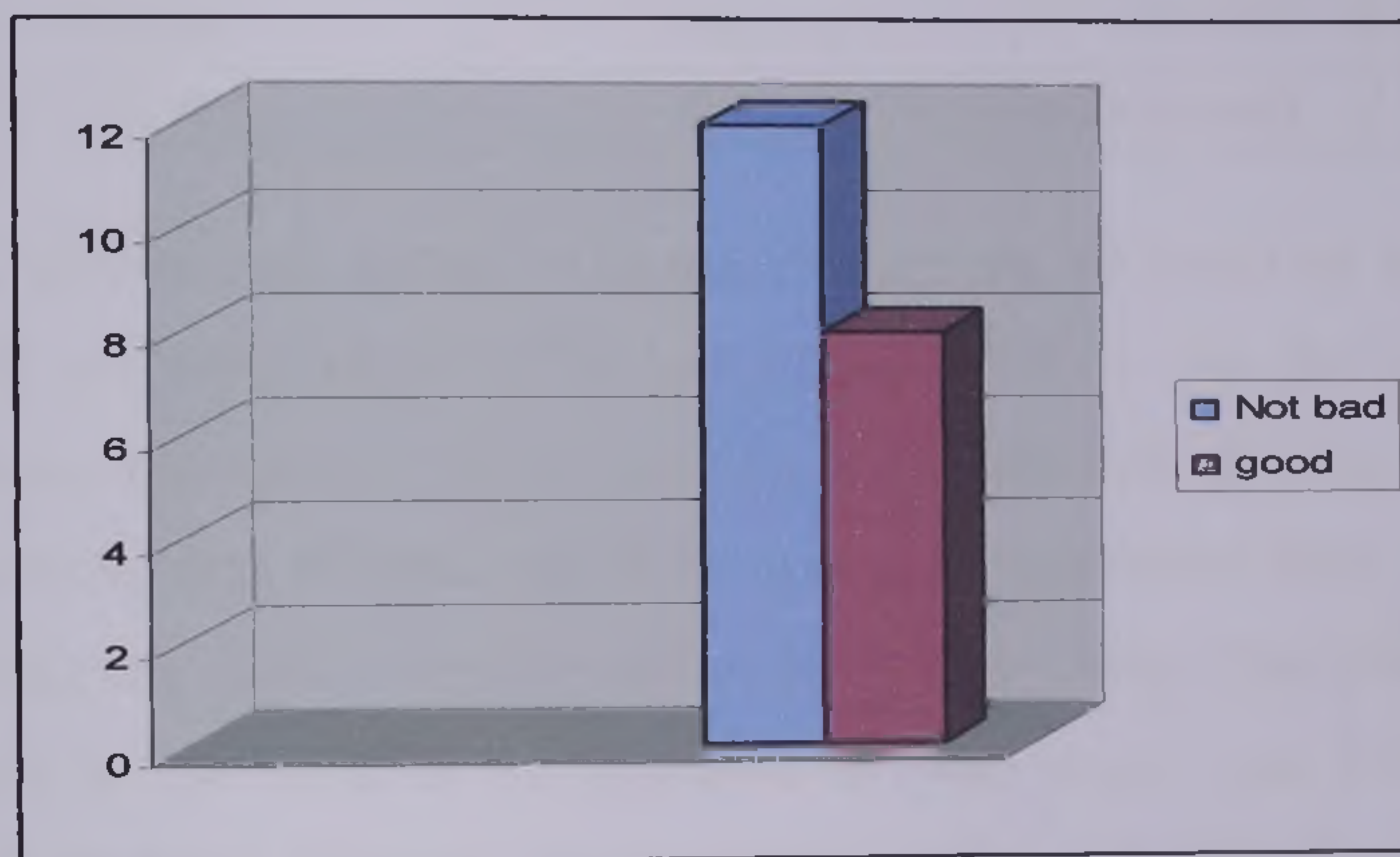

Figure-33: Effectiveness of the panel members

Result and interpretation: This bar also shows that the 60% of the panel members are not bad according to the respondent observation for their effective mediation of their litigation. Another 40% of respondents are very satisfied about the performance of the panel members.

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Combined Analysis
(Comparative Discussion)

Table-1: Interest of ADR use.

Survey Class	Use of ADR (Survey Report)	Person
Lawyer	Minimum	6
Judge	Maximum	15
Client	Medium (Not Random use)	12

Charts, graphs, and textual write-ups of data are all forms of data analysis. These methods are designed to refine and still the data so that the readers are keen on interesting information without needing to sort through all of the data on their own. Summarizing data is often critical to supporting arguments made with that data, as is presenting the data in a clear and understandable way. The raw data may also be included in the form of an appendix so that people can look up specifics for themselves. Even when the above situations exist, it is often unclear which sampling method should be used. Test different options, using hypothetical data if necessary. Choose the most cost-effective approach; that is, choose the sampling method that delivers the greatest precision for the least cost.

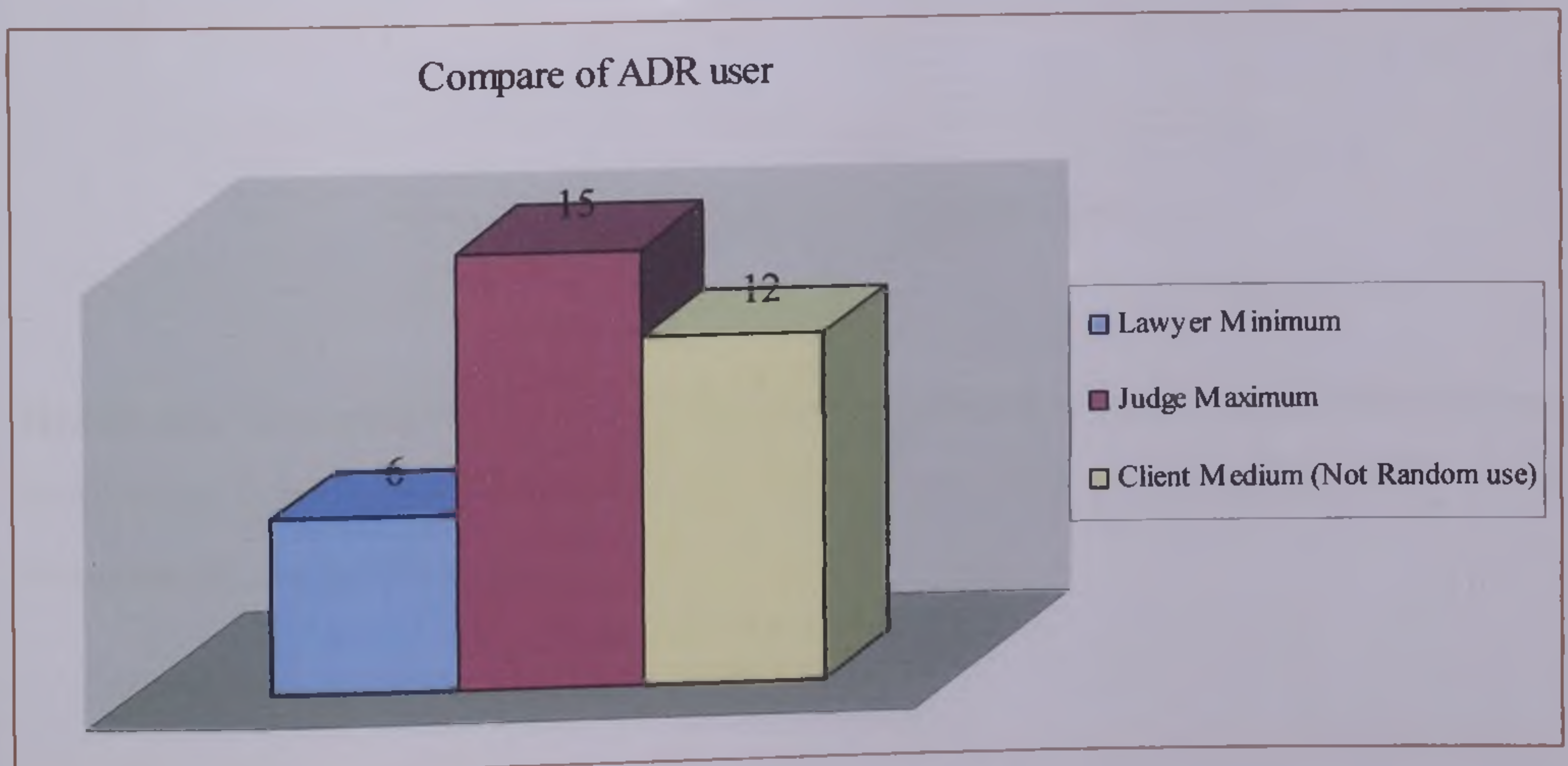

Figure-34: Compare of ADR users

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Result and interpretation: This Column shows here the rate of ADR users of three categories respondents. The maximum of respondents opine that the use of ADR is increasing day by day. A good number of respondents are thinking that the uses of ADR are increasing day by day and a few number of respondents opine that the use of ADR is increasing.

Table- 2: Client category of ADR uses interest.

Client Category	Business	Individual
Percentage	60%	40%

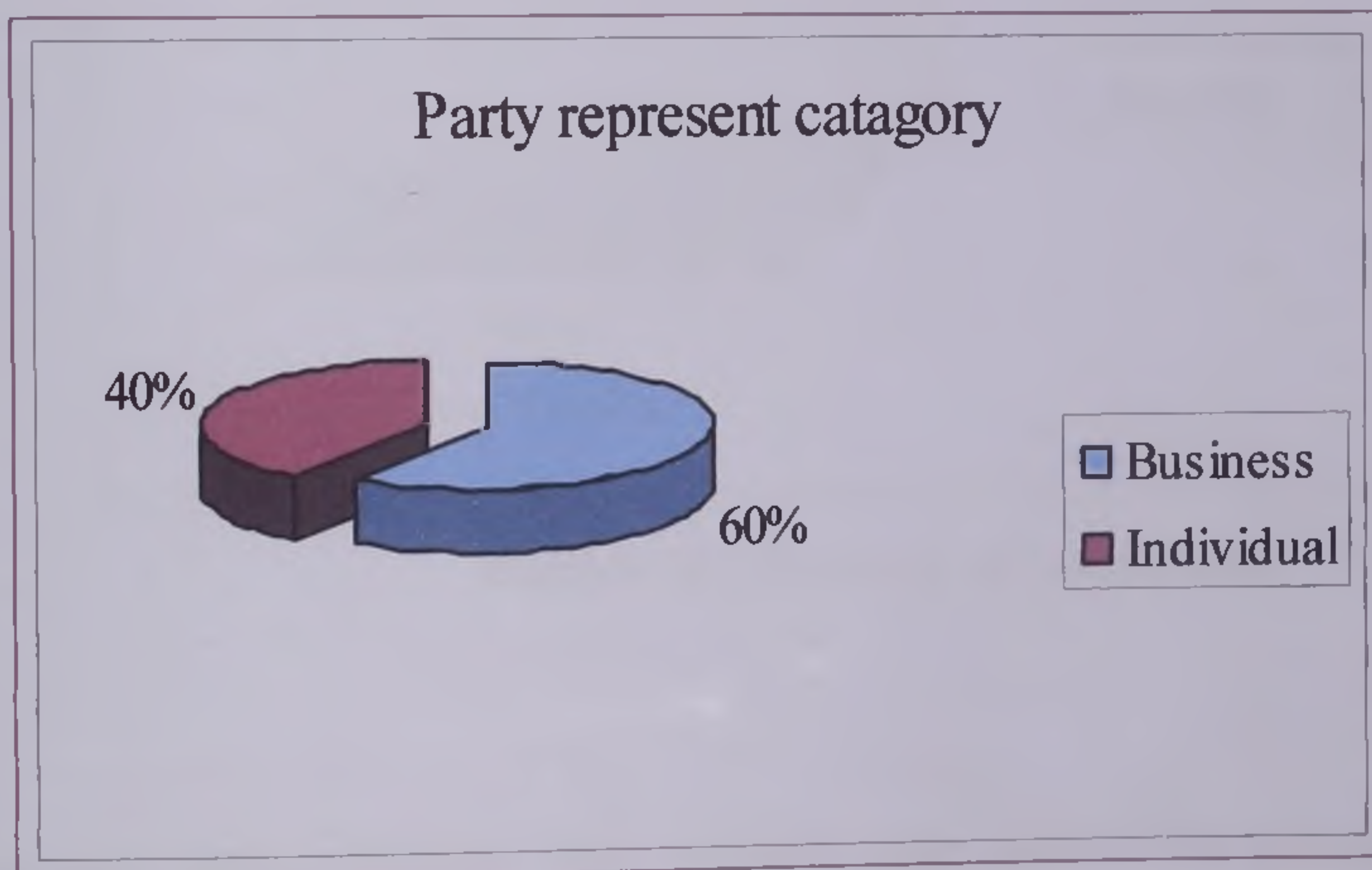

Figure-35: client category of ADR users

Result and interpretation: In our country, the interest of ADR method depends on the parties. 60% of the respondents are the business men and rest of the 40% of the respondents are the individuals.

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Table- 3: Level of satisfaction ADR user.

Level of Feel	Person
Satisfaction	8 out of 20
Neither Satisfaction nor dissatisfied	12 out of 20

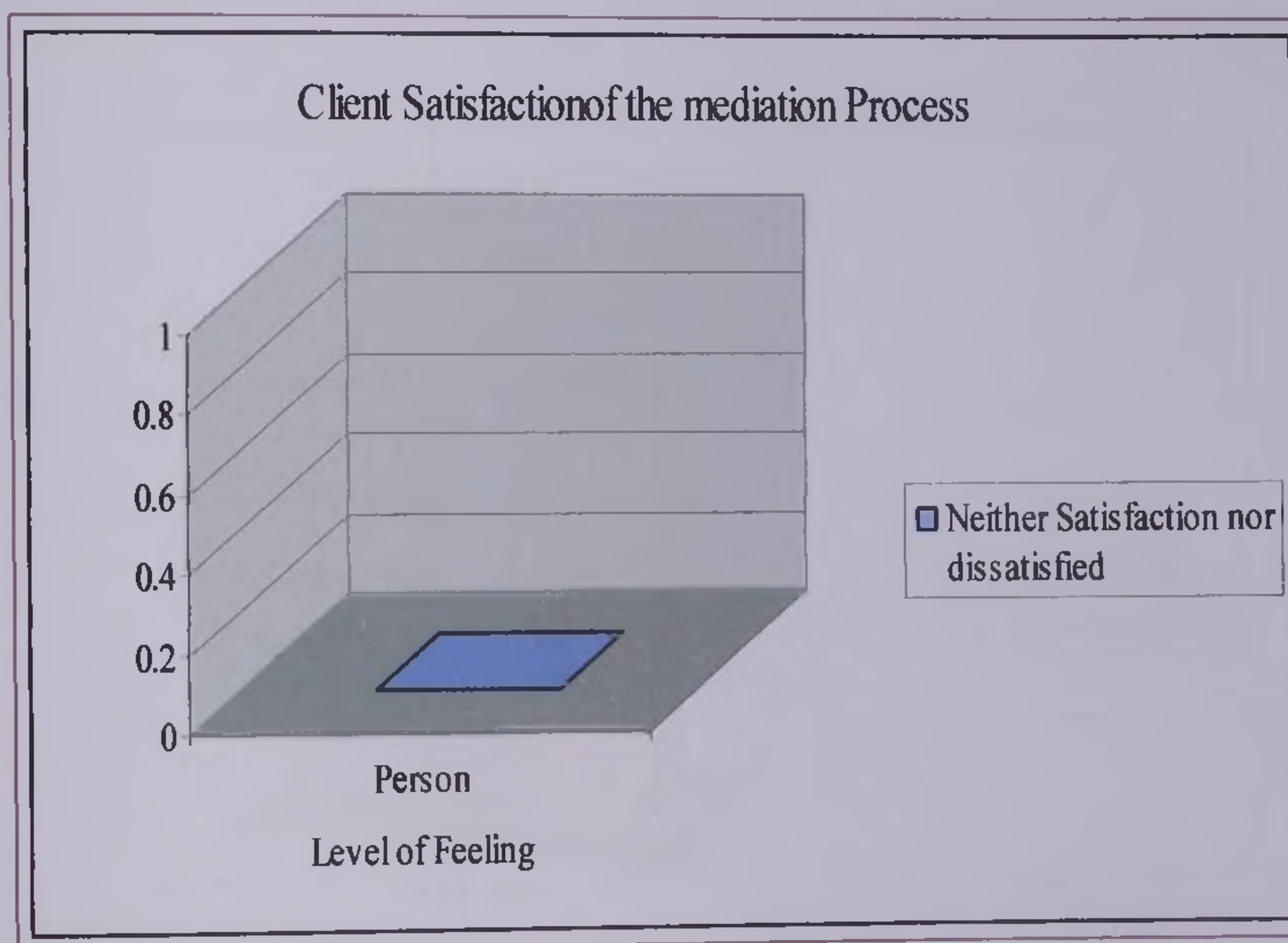

Figure-36: The level of satisfaction

Result and interpretation: The column chart shows the picture of respondents satisfaction of mediation process. Satisfaction depends on person. The values show neither satisfaction nor dissatisfied.

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Table- 4: The Chances of winning at trial

Unknown Client	Uncertain will win	Hope to solution
15%	10%	75%

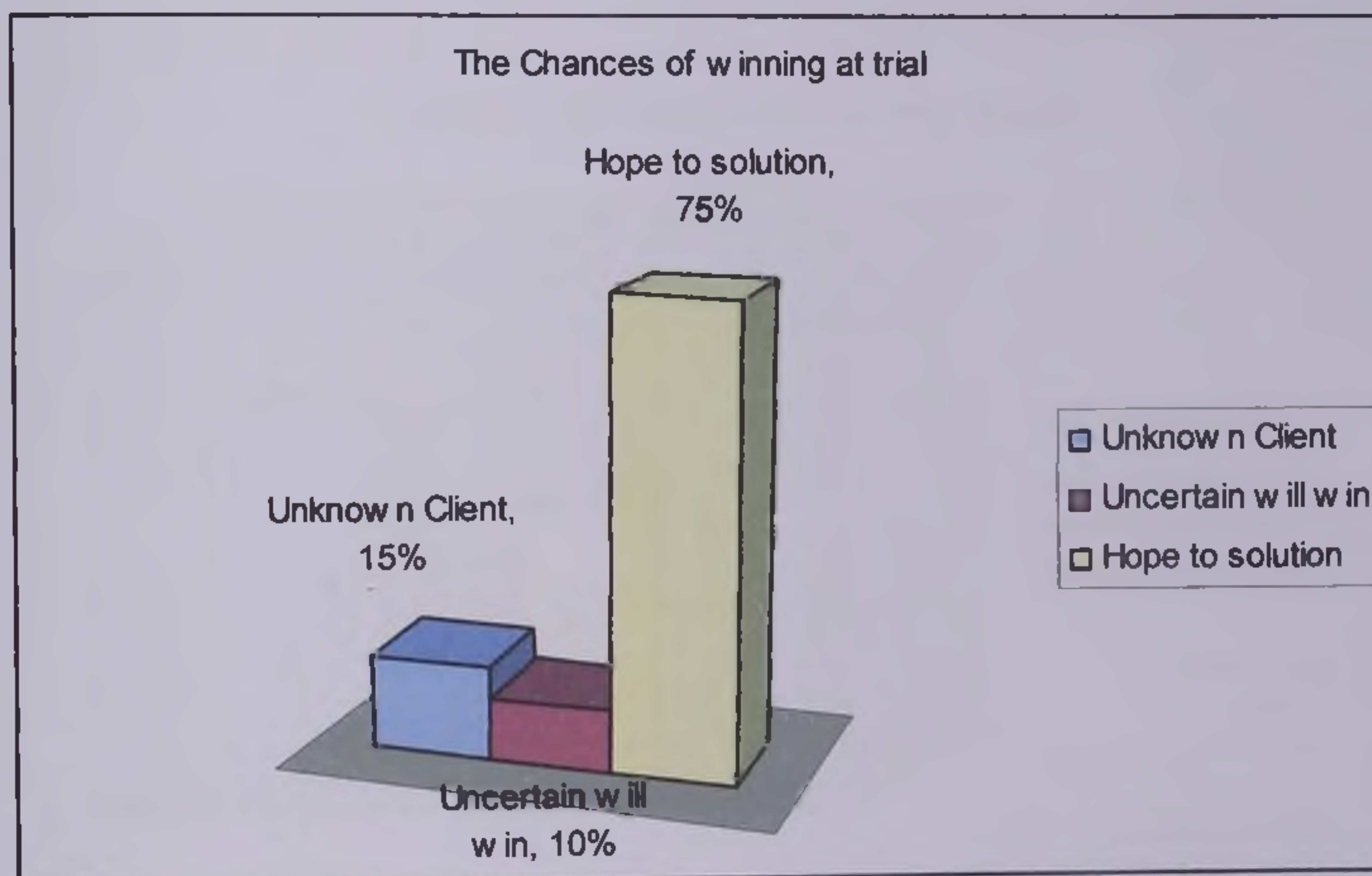

Figure- 37: Chances of winning at trial

Result and interpretation: The column shows that the 75% of the cases have the chance to by the ADR process solution, 10% of the cases are uncertain about the win and 15% clients are not identified.

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Table- 5: Compare with case cost (survey report)

Compare with cost	Average %
4 to 6 time less	21%
4 to 5 time less	12%
6 to up time less	15%
Minimum expense	30%
No comments	rest of

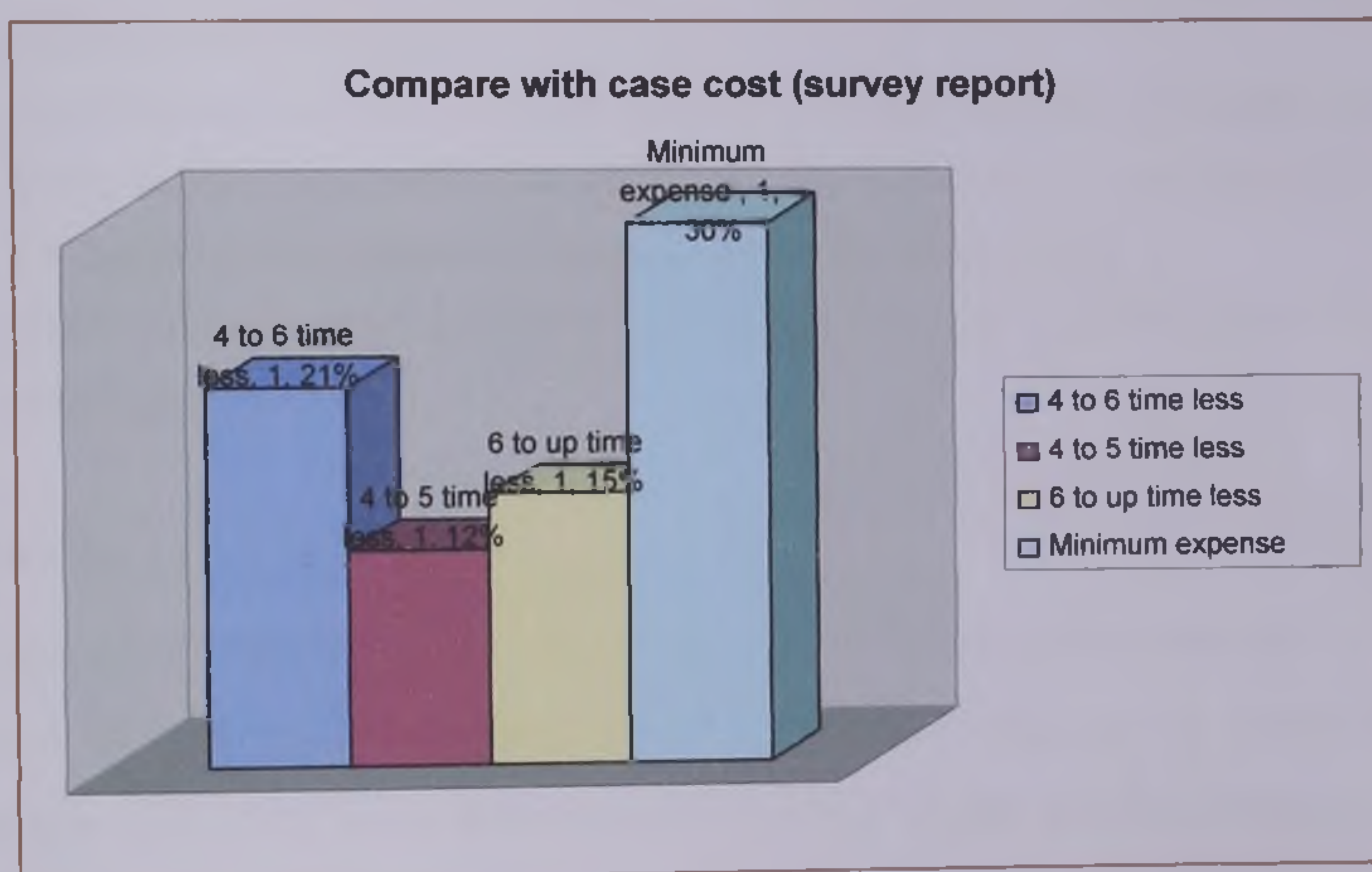

Figure-38: Compare with the cases cost

Result and interpretation: The survey is not a quantitative analysis. The column shows that the procedure of clients cases cost compare with the traditional cases procedure cost. It is just a measurement of sampling of qualitative analysis. It is an approximated idea by the judges, lawyers and clients whose are deals with various cases procedure.

Limitations of this Study

After long observation of this study, the research found that some respondents irrespectively avoid the important questionnaire and select some wrong answers unconsciously, which make this study one. For example, who will be the best mediators for ADR in this questionnaire are the remain open. Thus, the quality of mediators cannot be ascertained in this study.

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In spite of all these limitations, I think ADR mechanism is the only one way to reduce the backlog of the huge number of cease in our country. The researchers think more study will be needed in this respect.

Results of Observation

Finally the research draws the outcomes and suggestions of the field analysis

1. To increase the use of ADR.
2. To try to develop the participation of plain tiff and defendant ADR and to reduce their sufferings.
3. Facilities of clients should be proper guidance by the advocates and mediators.
4. More fruitful solution to the civil and family related confidential critical cases.
5. To Increase awareness to mass people for using ADR.
6. Need to more publicity about advantage of ADR and demerits of traditional court procedure.

Evaluation

Some questions presented to the respondent which questionnaire is not properly answered by the sample classes. It is called the missing of values, so that, it is declared by the thesis is needed to more research about various spheres of ADR. If the researchers want to remove the long standing backlog of the cases in the traditional judicial systems, the research should apply the ADR process. It is already made a proverb further goes to trail but case results are unknown to the generation after generation. Justice delayed, and justice denied.

Conclusion

According to the questionnaire format, Analysis, Data arranging and Diagram, Pie-Chart, Doughnut Bar showed the actual conditions of ADR method. It is proved that the observation of ADR is a procedure, which not only easy method but also a time consuming method. In the above circumstances we suggested that trial related personalities like judges, lawyers, and clients also increased the use of ADR. Because, clients need to be reduced labor, time and cost, and easy access to justice.

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Case Study

Case Study 1:

Rahima Khatun, father's name-Ghunu Mrida,Village- Bhabanypur, Thana-Joydevpur, District- Gazipure and others- Plaintiff filled a Civil suit no 380/2010,dated 4/7/2010 for the declaration of title and miss- record of RS Khatian No. 102 against Afsar Mridha, father's name, Yeaseen Mridha,Village-Mouchack, Thana-Joydwvpure, District- Gazipure and others-Defendant, in the Senior Assistant judge, First Court, Thana-Jaidevpure ,PO- Babanipure District- Gazipure and the value of the suit is four lacs.

Facts of the suit: The cause of suit arises about the 58 decimals of land which was situated District-Gazipure,Thana, Jaidevpure,Mouja,Gubindabari,CS. Khatian No. 240, SA. Khatian No. 320 and RS. Khatian No. 102. CS.& SA & RS DhaghNo. 8,the total land is 186 decimal &CS&SA Dhagh No. 229, RS plot No. 362, total land is 171 decimal, gross total land is 365 decimals. The disputed land is CS, SA&RS plot No. 8, total land are 58 decimals out of 186 decimals.

After two years later, both the parties have realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. Both the parties are neighbor, co-relative and peace loving decided that they would resolve the matter by the Court mediation under section 89A of the Code of civil Procedure, 1908.

By the Court mediation, both the parties reached an accord and they placed the solenama before the Court by their engaged lawyer. The Court accepted the Solenama and passed a decree on compromise dated 17-1 2013 according to the solenama.

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Case Study 2:

Md. Alal Uddin, father's name, Churrut Ali, Village-Dherashram, Thana-Joydevpure, District- Gazipure and others Plaintiff, filed a Civil suit No 446/209,dated 10/9/2009 against Md. Abul Hashem, father's name late, Abdus Samad, Village-Barendha, PO-Kashimpure,Thana- Joydepure, District-Gazipure and others-Defendant,for the correction of RS Khatian No. 159 in the Senior Assistant Judge, First Court, Thana- Jaidevpure,District-Gazipure, and the value of the suit is Tk/- One Lac and Twelve Thousand Five Hundred.

Facts of the suit: The cause of suit arises on the 20 decimal land which was situated District:,Gazipure, Thana, Jaidevpure, Mouja Barenda,CS. Khatian No.13, SA. Khatian No. 106 and RS. Khatian No.159. CS.& SA & RS Plot No. 35&36(old) 46,42,43,44,45.the gross total land are 20 decimals out of 150 decimals.

After four years later, in absentia of Plaintiff the sitting Court dismissed the matter without cost, dated on10/4/2012. The sitting judge argued that without the prayer for declaration of the title suit is not maintainable only for the correction of Khatian.

Aggrieved by the impugned judgment dated 10/4/2012 the Plaintiff (Md. Alaluddin and others)- as Appellant filled a civil appeal No.101/2012 which was heard in the First Court of Joint-District Judge, Gazipure.

At the appellate stage, both the parties have realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. Both the parties are neighbor, co-relative and peace loving and they have decided that they would resolve the matter by the Court mediation under section 89A of the Code of Civil procedure, 1908.

By the Court mediation, both the parties reached an accord and they placed the solenama before the Court by their engaged lawyer. The Court accepted the Solenama and passed a decree on compromise dated 5-3-2013 according to the solenama.

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Case Study 3:

Mrs. Amena, Husband, Md. Shahidullah, Father's name, Late, Chan Miah, Village-West Shaildubi, PO-Shardagonj, Thana-Joydevpure, District- Gazipure and others-Plaintiff filled A Civil suit No 357/2011 dated 27/8/201 against (1) Mrs. Rehana Khatun, Husband, Shukkur Ali, Village- Shaildubi, PO- Kashimpure, Thana-Joydevpure, District- Gazipure (2) Sub- Registrar, Gazipure Sadare, Gazipure-Defendant,for the declaration of title and cancellation of deeds (heba-Bil-Awaz) No.11958 for forgery in the Senior Assistant judge, First Court, Thana-Jaidevpure,PO-Sardagonj,District- Gazipure, and the value of the suit is two thousand taka.

Facts of the suit: The cause of suit arises against a deed of Registered Heba-Bil-Awaz measuring land 4 decimals vide deed No. 11958, entered in Book No. 1 Volume No. 162, P.-191-193, dated 21/11/1995 which was situated Gazipure District, Thana-Sadare, was a fabricated and false one and the value of the deed was Two thousand taka. The illegal deeds correspond to land situated in Mouja Gubindabari, SA. Khatian No.674 RS. Khatian No. 29, SA plot No. 2800, RS. plot No. 1648, total land is 306 decimals. The disputed land is four decimals out of 12.375 decimals.

One year later, both the parties have realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. Both the parties are neighbor, co-relative and peaceloving and decided that they would resolve the dispute by the supervision of Court under section 89A the Code of Civil Procedure, 1908.

By the Court mediation, both the parties reached an accord and they placed the solenama before the Court by their engaged lawyer. The Court accepted the Solenama and passed a decree on compromise dated 10-2 2012 according to the solenama.

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Case Study 4:

Tahmina, Father's name, Abdure Rahman, Village&PO,Abadpure, Thana-Karimgonj, District- Kishoregonj - Plaintiff, filled A family suit- No.1/2011, dated 2/1 2011 against her husband name Md. Hafizuddin, Father's name, Late, Md. Fariduddin, Village- Gatia, PO-Sadarepure, Thana-Karimgonj, District-Kishoregon at the Senior Assistant Judge/Family Judge Court , Karimgonj Court, Thana-,Karimgonj, District-Kishoregonj for Dower money amounting taka five lacs and for her maintenance,

Facts of the suit: The Plaintiff got married with the Defendant according to Muslim Shariah fixing taka Five lacs as dower money with registrad Kabinnama. Provided that, though taka one lac and fifty thousand showed as realized in clause 15 of the registered kabinnama, but actually the defendant gave not a single paisa to the plaintiff. After marriage, they lived together peacefully. However, at one stage of conjugal life, the defendant claimed the plaintiff and her family for dowry and he did so repeatedly. Finally, the defendant pressurized the plaintiff for dowry amounting taka eight lacs on dated 20/12/2010. In default of payment of requisite dowry, the defendant tortured and bodily assaulted the plaintiff and drove away the plaintiff from his house.

After four months, with request from the parents/relatives of the plaintiff to live them together happily and being failed with dismay in her attempt to live with the defendant the plaintiff filed a family suit against the defendant for dower money amounting taka five lacs and taka eight thousand for per month for her maintenance.

After one year, both the parties have realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. Both the parties decided that they would resolve the matter by Court mediation under section 89A of the Code of Civil Procedure, 1908.

Henceforth, with the supervision of Court mediation, under section 14 of the Family Court Ordinance, 1985 both the parties reached an accord for payment of taka seven lacs as dower and maintenance to the plaintiff by the defendant and they placed a solenama before the court by their engaged lawyer and the court accepted the solenama. The Court passed a decree on admission according to the solenama dated 9/1/2012.

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Case Study 5:

Selina Afrin Malik, Father's Name, Malik Golam Mohammad Bachchu, Village& PO- Baniachal, Thana&District- Narsingdi- Plaintiff filled a Family Suit No. 98/2012 dated 13/5/2012 at the Senior Assistant Judge/ Family Joudge Court in the Sadar Court,Norsigdi for dower money amounting taka six lacs and maintenance against her husband Mir. Lukman Hossain, Father's Name, Mir Mokter Hossain, Village- South Shilmandhi, PO,-Shilmandhi, Thana&District- Narsingdi- Defendant.

Facts of the suit: The Plaintiff got married with the Defendant according to Muslim Shariah fixing taka six lacs as dower money with registered Kabinnama. Provided that, though taka one lac showed as realized in clause 15 of the registered kabinnama, but in reality, the defendant gave not a single paisa to the plaintiff. After marriage, they were living together peacefully.

However, at one stage of conjugal life, the father and mother of defendant instigated him to pressurize the plaintiff and her family for dowry repeatedly. Finally, the defendant pressurizes the plaintiff for dowry amounting taka five lacs on 3/4/2012. In default of getting requisite dowry, the defendant tortured and bodily assaulted the plaintiff and drove her away from his house.

After one month, requesting for living together and after meth failure her request, the plaintiff suit against the defendant for dower money amounting taka six lacs and taka eight thousand each month for her maintenance.

After one year, both the parties have realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. Both the parties decided that they would resolve the matter by Court mediation under section 89A of the Code of Civil Procedure, 1908.

Henceforth, with the supervision of Court mediation, under section 14 of the Family Courts Ordinance, 1985 both the parties reached an accord for payment of taka six lacs as dowry to the plaintiff by the defendant and they placed a solenama before the court by their engaged lawyer and the court accepted the solenama. The Court passed a decree on compromise according to the Solenama on 30/4/2013.

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Case Study 6:

Mrs. Khaleda Akter, Husband, Late, Abul Kashem,Village- Nandipara, PO-Chinispure, Thana&District- Narsingdi- Plaintiff filed a Civil suit No. 77/2012 dated 30/5/2012 against (1) Ain Uddin, Fathes Name, Late, Ayeb Ali, Village&PO, Savardia, Thana-Monohordy, District- Narsingdi (2) Deputy Commissioner, District-Narsingdi, Sub-Registrar, Monohordy Sub Registry Office,Thana- Monohordy, District- Narsingdi on the behalf of the People's Republic of Bangladesh- defendant for correction of Registered deed No. 861 dated 23/1/1991 registered at the Monohordy Sub-Registry Office in the Senior Assistant Judge Court, Thana-Monohordy, District-Norsingdi.

Facts of the suit: The Plaintiff filed the suit for the correction of Balupura Mouja instead of Savardia Mouja and present plot No.18 instead of former plot No. 861, which was registered in Monhordy Sub-Registry Office dated 23/1/1991.

After few months, both the parties realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. As both the parties are neighbor, co-relative and peace loving so they have decided that they would resolve the matter under Court mediation in the Section 89A of the Civil Procedure Code, 1908.

Henceforth, with the supervision of the Court mediation, under section 89A of the Code of Civil Procedure both the parties reached an accord and they placed the solenama before the Court by their engaged lawyer. The Court accepted the Solenama and passed a decree on compromise dated 5-3-2013 according to the solenama.

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Case Study 7:

Mrs. Rejia Begum,Husband name, Md, Jainal Abedin,Village-Choto Gathairchar, PO-Mahdabdi,Thana and District- Narsingdi-Mozhor (Plaintiff) filed a Pre-emption misc-case No.6 /2005 dated on 13/1/2005 in the Senior Assistant Judge Court against Md. Ibrahim Bhauiya, Father's name Late, Md. Hassen Ali Bhauiya, Village- Gathaircgar, Thana and District-Narsingdi -Tarafshani, Seller and Hafez Mohammad Anower Hossain and others- (defendant) in the Narsingdi Sadar Court , Norsingdi and the value of the suit is taka one lac forty seven thousand.

Facts of the case: The Plaintiff (Mozhor) filed a for the Pre-emption misc-case for land- situated at district, Narsingdi, Thana and Sub-Registry Office, Narsingdi, No. 220 presently 131 Mo. Ghadairchar Mousa, Pourashava, Madabdi, Khatian No. SA 2303 RS 714 previous 78, plot No. 880 Clasess of land is House and Shop, quantity of land is 10 decimal, and value of the land is taka one lac and forty thousand and with five per cent interest of total taka is seven thousand and gross totals is one lac and forty seven thousand.

After eight years, both the parties have realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. Both the parties are neighbor, co-relative and peace loving and they have that they would resolve the matter under Court mediation in the Section 89(A) Civil Procedure Code, 1908.

Henceforth, with the supervision of the Court mediation, under section 89A of the Code of Civil Procedure both the parties reached an accord and they placed the solenama before the Court by their engaged lawyer. The Court accepted the Solenama and passed a compromise decree dated 25-4-2013 according to the solenama.

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Case Study 8:

Haji Keramat Ali, Father's name, late, Kismat Ali,,Village -Kalai Ghobindhapure, PO- Dhari Nabipure, Thana and District- Narsingdi- Plaintiff filed a civil suit No. 185/2012 dated 3/5/2012 in the Senior Assistant Judge Court for declaration of title against-(a) Deputy Commissioner,(b) Additional Deputy Commissioner (Revenue), (c) Assistant Commissioner (Land), Narsingdi District and (d) Union Assistant Officer(Land)or Tahshilder, Chinispure Union Land Revenue Office, Thana and District- Narsingdi- On the behalf of the people's Republic of Bangladesh. And (a)Helena Begume, Husband, Chattar, (b) Dilara Begume, Akter Hossain, (c) Majida Begum, Husband, Ismail,village &PO-Chardigaldi,Thana and District- Narsingdi- Defendant, and value of the suit is four lacs

Facts of the case: The plaintiff aware of miss record of his father's name of RS Khatian No. 1521, Column No. 1, scheduled name of landowner was written Abbas Ali in place of Kismat Ali. The land is demarcated at District, Narsigdi, Thana, Narsigdi, Mouja, Dilarpure, Khatian No. CS- 803, 537, SA-360, RS-1521. Plot No. CS/SA-2596, 2598, RS-3829, 383o and gross total land are 63 decimals.

After one year later, both the parties have realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. Both the parties are neighbor, co-relative and peace loving decided that they would resolve the matter under Court mediation in the Section 89A of the Code of Civil Procedure, 1908.

Henceforth, with the supervision of the Court mediation, under section 89A of the Code of Civil Procedure both the parties reached an accord and they placed the solenama before the Court by their engaged lawyer. The Court accepted the Solenama and passed a decree on compromise dated 24-3-2013 according to the solenama.

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Case Study 9:

Abdul Barek, Father's name, Late, Dalu Bepari, Village-Chardumuria, PO-Chardumuria, Thana and District-Munshigonj and others Plaintiff filed a Civil case No. 159/2011,dated 16/11/2011 in the Senior Assistant Judge Court against (1) Noor Hossain Khan, Fathers name Late, Alek Khan, Village- Chardumuria, Thana and District-Munshigonj (2) Deputy Commissioner of Munshigonj, Assistant Commissioner (Land) Munshigonj-on the behalf of the Peoples Republic 0f Bangladesh- defendant for declaration of title and for correction of RS Khatian No.47. The value of the suit is taka one lac ninety four thousand and one hundred twenty four.

Facts of the suit: The plaintiff aware of miss record of quantity of land measuring 9 decemals instead of 12 decemals, RS Khatian No.47, in the Column of quantity of the land of his father name. The land is situated at District-Munshigonj, Uppazila& Sb-Registry Office, Munshigonj Sadar, Mouja, No-75, Khatian No. CS-24, SA-23, RS-47, plot No. CS-109, RS-74, RS- 138,139,107, total land is 21 decimals.

After few months, both the parties have realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. Both the parties are neighbor, co-relative and peace loving decided that they would resolve the matter under Court mediation in the Section 89A of the Civil Procedure Code, 1908.

Henceforth, with the supervision of the Court mediation, under section 89A of the Code of Civil Procedure both the parties reached an accord and they placed the solenama before the Court by their engaged lawyer. The Court accepted the Solenama and passed a decree on compromise dated 22/4/2013 according to the solenama.

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Case Study 10:

Md. Wasiur Rahman, Father's name, Late, Md. Siddiqure Rahman,House- C/8A-Road No. 5 ,Section- 7, Mirepure, Dhaka-1216, on the behalf of Md. Shah Alam,Fathers name Md. Amanullah Sharker, Village&PO- Phanchawghar, Thana & District- Munshigonj, empowered by the power of attorney filed a civil suit dated 12/9/2012 for declaration of title and correction of RS Khatian No-74, and the value of the suit is one lac sixty nine thousand and thirty eight, in the Senior Assistant Judge Court, Munshigonj against (1) Abdul Aziz, Father's name Late, Subede Ali, Village-Khanka dhalanpara, PO&Thana- Rampal, District- Munshigonj and (2) Depty Commissioner, Additional Deputy Commissioner (Revenue), Assistant Commissioner(Land), Munshigonj Sadar.

Facts of the suit: The Plaintiff aware of miss of RS Khatian No.92, in the Calam of possession. The schedule of the land is District&Uppazila, Munshigonj, Sadar, CS-61 No. Khanka Semithethista land, Khatian No. CS-43/142, SA-143/74, RS-67, plat No. CS, SA, RS No. 175/201, 176/202, 177/203, 174/200, gross total land was 27 decimals.

After one year, both the parties have realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. Both the parties are neighbor, co-relative and peace loving decided that they would resolve the matter under Court mediation in the Section 89A of the Code of Civil Procedure Code, 1908.

Henceforth, with the supervision of the Court mediation, under section 89A of the Code of Civil Procedure both the parties reached an accord and they placed the solenama before the Court by their engaged lawyer. The Court accepted the Solenama and passed a decree on compromise dated 14/2/2013 according to the solenama.

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Case Study 11:

Billal Hossain Howlader, Father's name, Late, Md. Mostafa, Village-Viti Shilmandi, Thana & District- Munshigonj Plaintiff filed a Civil case No. 164/2007,dated 76/2007 in the Senior Assistant Judge Court, Munshigonj against (1) Shamsul Haque Gazi , Fathers name Late, Rashid Ghazi, Villa&PO- CHatakhali, Upazilla & District-Munshigonj, and others (2) Deputy Commissioner, Assistant Commissioner (Land), Munshigonj-on the behalf of the Peoples Republic 0f Bangladesh- defendant for declaration of title and for correction of RS Khatian No.92. The value of the suit is taka three lacs and ninety two thousand.

Facts of the suit: The plaintiff demanded that the RS recode is illegal and the land being recorded of the RS Khatian in the column of quantity of land measuring 14 decimals instead of 28 decimals, which is situated at District & Upazilla-,Munshigonj, Sadar, Mouja, Dhewbug, No-80, Khatian No. CS-441, SA-582, RS-92, plot No. CS-1242, SA-1241, RS- 2035, 2034, total land are 28 decimals.

After seven years, both the parties have realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. Both the parties are neighbor, co-relative and peace loving decided that they would resolve the matter under Court mediation in the Section 89A of the Code of Civil Procedure, 1908.

Henceforth, with the supervision of the Court mediation, under section 89A of the Code of Civil Procedure both the parties reached an accord and they placed the solenama before the Court by their engaged lawyer. The Court accepted the Solenama and passed a decree on compromise dated 1/1/2013 according to the solenama.

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Case study 12:

Md. Shamir Uddin Bhuiya, Father's name, Late, Abdul Rashid, Village- Khajair, PO- Dhanga Bazar, Thana- Palash, District- Narsingdi- Plaintiff filed a Civil case No. 47/201 for the sanction of permanent injunction dated 10/3/2011 in the Senior Assistant Judge Court, Palash, District-Narsingdi against (1) Md. Monir Bhuiya, Fathers name Late, Jhanab Ali Bhuiya Village-Khajair,PO- Dhangha Bazar, Thana- Palash, District-Narsingdi- defendant which was situated in Distrit-Narsingdi,Thana- Palash, Mousa-Khajair, CS- Khatian No.356, SA-Khatian No.504 & RS- Khatian No.674, plot No.RS-1595. The quantity of the disputed land are 13.5 decimals and the value of the suit is taka two thousand.

Facts of the suit: The Plaintiff has been possession for a long period of the disputed land and he drugs the pond half of the land and rest of the land, he planted the wood tree. All on a sudden, on 16/2/2011 the defendant and his hired terrorist tried to possession the disputed land and he cut down some of the wood tree by the collaboration of the terrorist. In addition, he threatened the plaintiff that he occupied the disputed land by hook or crock and announced that he would commit murder if need do so.

After two years, both the parties have realized that the procedural systems of the formal Courts are lengthy, costly and time consuming. Both the parties are neighbor, co-relative and peace loving decided that they would resolve the matter under Court mediation in the Section 89A of the Code of Civil Procedure, 1908.

Henceforth, with the supervision of the Court mediation, under section 89A of the Code of Civil Procedure both the parties reached an accord and they placed the solenama before the Court by their engaged lawyer. The Court accepted the Solenama and passed a decree on compromise dated 21/4/2013 according to the solenama.

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CHAPTER-IX

CONCLUSION

The research has accomplished an empirical case study to get a firsthand experience and knowledge on how ADR works in Bangladeshi, Pakistani and Indian society, culture and nations at large. In this Chapter, we will sum up the three countries existing ADR related laws and rules, float some suggestions and insightful outcomes of the research work, which might be found helpful.

From the first half of the twentieth century many substantial contributions have been made in modernizing the forms of Alterative Disputes Resolution mechanisms, which are to be incorporated in legal systems of subcontinent, especially in Bangladesh. Furthermore, there are huge scopes for these countries to modify, transform and improve their respective Alternative Dispute Resolutions.[1]

Access to justice is the way to reach to the goal 'Justice'. The capacities, intentions and objects of the parties in contact with laws vary to a large extent depending on their socio-economic, geo-political, psychological upbringings and positions. In these perspectives access to justice delivery system connotes not only physical entry into the Court houses but also to reach to other stakeholders of the justice delivery system and to receive substantive cooperation in time and at an affordable cost. It can hardly be considered that the existing legal systems of the subcontinent provides adequate legal service to the litigant peoples who are in ever increasing dire and multiple facetious needs.

The legal systems of subcontinent still carry the legacy of long 190 years of colonial rule from which they got independence nearly six decades ago. The colonial rulers introduced systems to protect their empire for exploitations and never thought of a mass oriented and people friendly adjudication system. In post-colonial societies where the formal modern judicial institutions have not been developed and

[1] Zahir, M 1988, Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.

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strengthened properly, the informal and the traditional justice delivery systems are still widely in practice in South Asia.[2]

As mentioned earlier, there is no constitutional provision directly addressing the issue of ADR in the Constitution of Bangladesh India and Pakistan. However, ADR related laws and special enactment are embodied in the domestic laws of each of these countries. As regards the administration of civil justice, the most common feature is that the Code of Civil Procedure was amended to introducing sections of 89A, 89B and 89C in Bangladesh, India and Pakistan. In India and Pakistan, Order X of the Code of Civil Procedure has further been amended. India has inserted certain new rules relating to ADR provisions by the CPC (Amendment) Act of 1999. In Pakistan, similar rules were added under Order X by inserting a new Rule 1-B in Code of Civil Procedure, 1908. Moreover, in exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 and Section 89-A of the said Code, the High Court of Pakistan has framed and issued the **Alternative Dispute Resolution and Mediation & Conciliation Rules, 2005.**

Another common feature of the legal framework of ADR is the application of the Arbitration Act of 1940 in all three countries. As the Arbitration Act of 1940 was enacted during the British period, the basis of ADR mechanism for all three counties was founded upon the rules and procedures contained by the same enactment. In this respect, India has enacted **Arbitration and Conciliation Act in 1996**. In Bangladesh, the Act of 1940 was in force until 2001 when the Arbitration Act, 2001 was enacted. Under the Act of 1940, the Courts were very much concerned over the supervision of Arbitral Tribunal and they were very keen to see whether the arbitrator has exceeded his jurisdiction while deciding the issue which was referred to him for arbitration. There was much delay in settlement of disputes between parties in law Courts, which prevented investment of money in Bangladesh by other countries. As such Bangladesh has undertaken major reforms in its arbitration law in the recent years and finally in 2001 the Arbitration Act, 2001 was enacted by the Parliament

[2] Kamal, Siddiqui, 1998. ' In Quest of Justice at the Grass Roots', Journal of Asiatic Society of Bangladesh, Vol. 43, no.1.

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bringing in substantial reforms in arbitration, regarding domestic and intentional disputes.[3]

In this Sub-continent, the ADR mechanism is most effectively introduced in resolving the disputes relating to family matters. As all three countries of this sub-continent have established an independent forum for resolving family related disputes, namely the family courts, they all have incorporated ADR mechanism in the respective legislations. In Bangladesh, the provisions relating to ADR are contained in section 10 and 13 of the Family Courts Ordinance, 1985. In India and Pakistan, similar provisions are found in the Family Court Act 1984 and the West Pakistan Family Courts Act of 1964 respectively. It is however important to mention that the enactment and application of the Muslim Family Laws Ordinance, 1961 in Pakistan and Bangladesh provides the room for taking recourse to ADR process in resolving family related dispute which is absent in India. For example, section 6, 7 and 9 of the MFLO contain the provisions relating to ADR process regarding, restricted polygamy, talaq and maintenance etc.

Apart from this, each of these countries has enacted some special legislation relating to the ADR process depending upon the peculiarity of their respective socio-economic and cultural milieu. Most notable among these are the establishment of Lok Adalat in India, which marks a significant advancement in the ADR movement of this sub-continent. The concept of Lok Adalat is not quite new in Indian legal system. It has a long rooted tradition in India's history of ADR methods being practiced in the society at grass roots level. Indeed, modern lok adalats are greatly influenced by the philosophy of ancient panchayat system. By virtue of the constitutional mandate in Article 39-A of the Constitution of India, **the Legal Services Authorities Act 1987** gives a statutory status to Lok Adalats, containing special provisions for the informal settlement of disputes.[4]

In case of Pakistan, the dispute resolution forum of the Pukhtuns and Baloch which is known as the jirga is another example of society-specific mode of ADR mechanism.

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[3] Khair, S 1998 2004, 'Alternative dispute resolution: How it works in Bangladesh', The Dhaka University Studies, Part F, vol. 15, no. 1, pp. 59-92.

[4] Ibid

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The jirga, like the panchayat in Punjab and Sindh, was used by the British in modified form to enforce law and order in certain parts of the NWFP and Baluchistan (under 'the Frontier Crimes Regulations). The traditional jirga, nevertheless, continues to exist parallel to that constituted by the British. Yet another category of jirga, constituted under certain special laws, is a post-independence development applicable to the provincially administered tribal areas of the NWFP and Baluchistan.

To encourage the ADR process, Pakistan enacted The **Small Claims and Minor Offences Courts Ordinance in 2002. This** Ordinance is a law intended to establish of Small Claims and Minor Offences, where the value of the small claims suit is less 300,000 ($1600) and the punishment for minor offences is less than three years. Purpose of the law is to "provide legal cover to amicable modes of settling disputes parties easily and expeditiously." Apart from this, sections 102-106 under Chapter XI of the SBNP Local Government Ordinance of 2001 also encourage "amicable settlement of disputes through mediation, conciliation, and arbitration." Given that, this is provincial law, it goes to show that Pakistan has resolved to the use ADR methods, even at a local level.[5]

Bangladesh has also enacted some special legislation for promoting and facilitating the ADR mechanism in both the local and municipal levels. To this effect, the Dispute Resolution (Municipal Area) Act was passed in 2004. Section 3 of the Dispute Resolution (Municipal Area) Act 2004 provides that there shall be a Conciliation Board in every Pourashava to try all cases of offences and matters specified in Schedules." Most notably, The Village Court Act was passed in 2006, Section 5 of which provides the mechanism of ADR process at the local level.

So far as the criminal justice system is concerned, the Code of Criminal Procedure was amended to accommodate the ADR related provisions in all these countries. **Section 345 of the Code of Criminal Procedure, 1898 contains the provisions relating to the compounding offence which provides that** the offences punishable

[5] Kamal, M, CJ 2002, 'Introducing ADR in Bangladesh: Practical model', paper presented at the seminar on alternative dispute resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October, 2002.

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under the sections of the Penal Code may be compounded by the some specified persons.[6] Apart from this, the provisions relating to the trial of any offence including the provisions of summery trial also encourage the ADR process. However, the most important aspect is that the criminal justice systems of all three countries have recognized the principle of plea bargaining. The basis of the principle of plea bargaining is thought to be founded on the provision of section 345 which encourages that compromise of certain disputes and some of the cases can be compounded as provided under this section. Again, Section 345(6) says that the composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded. Section 345(7) provides that no offence shall be compounded except as provided by this section.[7]

It can hardly be considered that the existing legal systems of subcontinent provide adequate legal service to the litigant peoples who are in ever increasing dire and multiple facetious needs. The post-independence period was Janus faced wearing both the aspects of hopes and countenance of uncertainties. With the increase in and complexities of the clashes of interests in the heterogeneous groups, something new or supplemental to the existing system needed intelligent considerations.

The procedural civil and criminal laws substantially exist as were in the pre-independence period. Nations are striving to boom their ailing economies and ensure better living conditions of their clients upholding the spirits of democracy, development and rule of law on common basis. These aspirations are inextricably associated with the justice delivery systems and capabilities. With the growth of population, the number of cases is soaring up beyond the capacities of the machineries to tackle those up. The procedural laws are to a great extent time-consuming, complex, cumbersome and costly. Questions are being raised that the substantive laws are also failing in part to cover up the disputed events and facts and the emerging issues.

[6] India has enacted a new CrPC in 1973 but the it also contains the same provisions.
[7] Documents and Settings Yaseen Desktop Present and future tends of ADR-2609 11 doc.

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Justice Mustafa Kamal once commented ADR as "a means of disposing of cases quickly and inexpensively[8]" The main purpose of ADR is to lessen the misery of people to get justice by employing effective and useful methods in dispute, settlement. There are many instances where a suit in court prolongs to the next generation like any property passed through inheritance.

ADR techniques are not employed to challenge the traditional court system in the sub-continent. Though now ADR is used in many cases as an effective alternative and sometimes it becomes the principal option chosen by the parties, its role in legal system is still complementary. People take ADR methods in less complicated disputes where no nation of the arbitrator or mediator is strongly needed. The parties always have the choice to go to the court at any time to initiate a legal proceeding when they think ADR is not for them. However, ADR may not always be considered an appropriate substitute for all kinds of the usual modes of formal and institutional modes of settlement of disputes.[9]

About a century after the introduction of ADR in the CPC scopes for working in a new perspective was widened in 2003. Official statistics on the achievement about ADR are scarce in respective organs. However, it is crystal clear from the statistics of pending cases that in the last five years situation has not improved at all; as the number of pending cases keeps on rise alarmingly. It seems that before incorporating the provisions of ADR in the CPC back in 2003, proper attention was not given to the existing provisions in laws in neighboring countries. The success of ADR is being blocked by some shortcomings in the existing provisions. Thus, it is now the demand of time that the ADR process must be reconstructed for making it more effective and people-friendly. The Suggestions for the reconstruction of ADR mechanism may be put forward as follows:

[8] Kamal, Mustafa. J. (former CJ of Bangladesh. 'Itroducing ADR in Bangladesh' paper read in the national workshop on 'Alternative Dispute Resolution: In quest of a new Dimension in Civil Justice Delivery system in Bangladesh' organized by the Ministry of Law, Justice & Parliamentary Affairs, 31 Octover 2002.

[9] Zahir, M 1988, Delay in courts and court management, Bangladesh Institute of Law and International Affairs, Dhaka.

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9.1 General Recommendations

(a) To develop linkages between stakeholders of formal and informal justice system: The information collected during the instant study reflects that most of the cases pending for adjudication in formal justice system, initially in rural areas were dealt under informal justice system without court referral. Even during trial of cases parties engage in exploring settlement through informal means and the parties usually inform the courts when they reach at settlement.

Presently, there is no integration mechanism that may coordinate/connect decision-makers of two systems. Generally the settlement arrived through informal system between the parties is not brought on record of the formal judicial format. In civil cases parties prefer to file either an application for compromise or withdrawal of the case or allow the matter to be dismissed for non prosecution. In criminal matter of compoundable nature parties file compromise and in non-compoundable cases, parties do not support the prosecution that leads to acquittal. Conflict resolution tools and techniques need to be developed, and integrated so that informal justice systems effectively interface with the formal justice apparatus of the state. It would bring the informal justice systems under regulatory discipline, inculcating value for fair play, adherence to basic principle of natural justice, minimum level of judicial protocol and human rights aspect while deciding the dispute amicably.

Further, it would ensure that the decisions are in accordance with Constitution and relevant laws. It is therefore, recommended that continuing efforts be made to devise and formulate mechanism for linkages between decision-makers of two systems. This would share the workload of the formal justice system. High Court may direct District & Sessions Judges to develop linkages between stakeholders of formal and informal justice system and for this purpose, District Judge may use the forum of judicial conferences.

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(b) To develop and design training module and material for mediators/ arbitrators/conciliators involved in resolving disputes under informal justice system and public bodies under the ADR mechanism. There is a pressing need to develop, design and make available materials on regular and sustainable basis regarding awareness and capacity building including guidelines both on substantive and procedural matters in simplified vernacular language for the decision-makers of informal justice system.

It would be more appropriate if a minimum standard is designed for processing the matter under mediation, arbitration, and conciliation. This practice may help eliminate bias, prejudice, illegality, violation of human dignity, fundamental rights and will tend to inculcate human values and respect for the constitution and law. Governments in collaboration with Judicial Institutes and International Organizations/Institutions may develop and design such material.

(c) To develop policy and legal framework for early hearing of cases where court referred mediation fails: It is strongly recommended that a separate judicial mechanism be developed for early hearing of court referred mediation cases where mediation fails. Fast Track or evening Courts may be established in each district for trial of such cases. This would be an incentive for the parties who opt for mediation as in case of failure their case will be decided in shortest possible time by the said Fast Track Courts or Evening Courts. This practice will promote utilization of maximum court/working hour and thereby reduction of huge backlog of court cases. High Court may frame rules under the relevant laws for developing mechanisms for dealing cases on fast track which fail in mediation process. Respective countries' Law and Justice Department may suggest proper legislation.

(d) To design material to introduce procedure adopted in informal justice system for public, practicing advocates and newly appointed judges: The public is unaccustomed of the modern and structured techniques of mediation or conciliation. They need to be sensitized on social and gender issues and to

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adopt structured mediation process, develop training material for handling procedural issues of mediation/conciliation/ arbitration. Such materials may be developed for traditional mediator as well as professional mediators who deal with court referred mediation cases. Ministries may be asked to design the material with the technical assistance of International Organizations/ Institutions like UNICEF, UNDP, UNIFEM, IFC etc.

(e) Formation of a coordination, evaluation and implementation committee at all level: It is recommended that coordination, evaluation and implementation committees at all level from all tiers of Courts be formed by members associated with formal and informal justice delivery system, civil administration, bar associations and other stake holders to regulate, coordinate, evaluate and implement the mechanisms of informal redress of grievance. The District Criminal Justice Coordination Committee may be authorized to act as such committee and District & Sessions Judge be authorized to co-opt necessary number of members. This would create harmony among all the segments of the society as well as stakeholders of formal and informal justice systems. Human rights activists working in the NGOs and media, very often critical of the decisions given by decision-makers of informal justice system be co-opted in the said Committee. Errors or omissions in decision of mediator may be discussed and rectified in the committee instead of making them public. High Courts may frame necessary rules for the smooth working of the above-mentioned committee.

(f) To propagate among targeted classes, groups of people, organizations the basic laws they are always in contact with and the existing provisions of laws that link the formal justice delivery system with the informal justice delivery system: It is strongly recommended that existing provisions of laws linking the two systems may be brought to the knowledge of public at large through effective awareness campaign at national levels. The litigants, lawyers and other stakeholders of the justice delivery system generally are not aware of the provisions of laws that link both systems together.

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There is significant change in behavior of the litigants and advocate who now have started to opt for mediation process and mechanisms: The family laws, rent laws, Civil Procedure Code, Criminal Procedure Code, local laws provide opportunity to the parties to opt alternate procedure of dispute resolution i.e. mediation, conciliation, arbitration. The judicial officers though aware with the provision of laws but they do not have the capacity to apply these provisions. Through this study they were usually found to follow the litigation procedure instead of resorting to mediation either themselves or referring the parties for mediation. Most of the judicial officers, who were imparted training on ADR, have expressed that unless clear cut laws are framed for referral of cases to outside agency they cannot refer the cases. Court annexed mediation is not in place.

Though, the judicial officers were of the view that mediation is useful and yields result, but is time and energy consuming and if they themselves indulge in conducting mediation, many other cases suffer delay. For example, laws creating courts to deal with matrimonial & family matters empowers the court to itself persuade disputants to reconcile the matter with the consent of parties. Civil Procedure Code empowers to refer a matter to the mediator. These provisions have not been applied properly by the judicial officers and legal practitioners. It is therefore, recommended that training programs for the judicial officers, staff and members of the bar may be introduced on regular basis.

Training capacity of concerned institutions may be utilized to save cost and resources to reinvent the wheel. Some litigants and advocates have complaint that some judges refer the matter to Mediation although both or one of them does not wish such referral. This result in the failure of mediation and the parties suffer from loss of time and heavy fee paid to the mediators. In the circumstances it is recommended that mediation be made compulsory. Law Commissions may look into the proposed amendment in the Code of Civil Procedure, whereby mediation may be made mandatory

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even prior to filing a suit. Furthermore, extensive training program for each actor of judicial proceeding may be arranged at district level by concerned institutions.

(g) To introduce court annexed mediation centers in civil and criminal cases at district level: The experiment/exercise of ADR has not succeeded so far. The judicial officers duly trained on ADR mechanism are of the opinion that the parties do not opt for the mediation process outside the court due to two reasons; firstly, it would cost them more and secondly, in case of failed mediation the case will be delayed. It is, therefore, recommended that court annexed mediation centre need to be established and the parties having petty disputes may not be charged for mediation proceedings.

Bangladesh with the collaboration of IFC due to their expertise in ADR may be approached for their advisory support and technical collaborations may be explored with other agencies having expertise in the field of ADR, have substantial financial resources but lacks expertise. Law Commissions may suggest amendment in Civil Procedure Code and accordingly High Courts may frame rules to run the court annexed mediation centre.

(h) To set up child protection unit in big cities: The actors of formal and informal justice systems are not aware of pertinent issues related to juvenile offenders. All the three countries under study have ratified the UN Conventions regarding the rights of the children. Moreover, they have their own laws for dealing with children in contact with laws. Probation officers appointed are not asked to submit report about the juvenile concerned. The investigation officers do not call probation officer and the parents of the juvenile while conducting investigation. It is therefore, recommended that a child protection unit may be established in big cities where under one roof, investigation, detention, rehabilitation cells may be provided. Probation officers specially trained on juvenile issues may be posted in the unit so that they may facilitate investigation officers, courts and parents in referring the juvenile under restorative justice system. Juvenile courts may also be part of Child Protection Unit. The staff should be properly trained and qualified on

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juvenile related issues and cultural sensitivities. The Governments in consultation with all the stakeholders may set up such Units.

(i) To set up proper legal aid system for women, juvenile, disadvantaged and marginalized segment of the society: The juvenile and women are not taken care of while facing trial or proceedings under formal or informal justice system. Under informal justice system the juvenile and women hardly participate in the proceedings. The elders of their family represent them. Under formal justice system cases of juvenile are usually delayed due to non engagement of lawyer. Apart from special legislations, special provisions in the Code of Civil Procedure and the Code of Criminal Procedure have been incorporated for dealing with children.

Nevertheless, the arrangement for providing legal assistance particularly in the light of the existing laws is inadequate. Two fold strategy may be adopted, firstly, District and Sessions Judges to be sensitized on the issue and should add financial component, in financial demand for the next fiscal year to meet the cost of engaging counsel for the juvenile delinquent and women. Secondly Finance ministry/department should set up legal aid system by allocating yearly budget in favor of respective District & Sessions Judges for disbursing in the light of laws. UNICEF may take lead in the matter by establishing the system in one model district of each province. The respective Judicial Academies may become the executing partner of the project, which may develop linkages, protocol and operating mechanism between state partners of juvenile justice system and the State to replicate in rest of the judicial districts of the country.

(j) To encourage and acknowledge the services of Mediators / Arbitrators / Conciliators who are playing their effective role to run traditional/informal justice system: The study shows that the decision-makers of informal justice system are disappointed from the role of NGOs and media. Though, they are deciding matters but, do not bring their verdict in writing due to fear of undue criticism. They admit, that their decision or settlement may not be sacraments and may be flawed and could be corrected if mechanism for correction is developed. The fear of criticism is affecting execution of the

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outcome of mediation/arbitration proceedings. They are of the view that their efforts are to be recognized and informal justice system may be run under the supervision and coordination of formal justice system.

It is recommended that the media and NGOs may be sensitized and motivated to highlight positive verdicts given by the decision-makers of informal justice system so that traditional system may be strengthened and preserved to serve the downtrodden mass, which cannot have easy access to formal justice system.

(k) Extend the reach of formal courts throughout the country: It is recommended that reach of general public to formal courts may be extended throughout the country in particular remote areas. There is a need to enhance and expand relationships among stakeholders of formal justice system with civil society, local elites including headmen of castes involved in informal justice system. Protection for ADR works should be extended to the actors of informal justice system. Such reforms will require involvement of the Governments, media, NGOs and other organizations.

(l) Development of linkages between Governmental and non- Governmental organizations: It is recommended that Governments to establish and strengthen relationships with UNIFEM, UNHCR, IFC, International Legal Foundation, UNDP and UNICEF and seek their assistance to sponsor study, to evaluate, suggest and workout implementation of best court annexed models.

(m) Decision under informal justice system may be in accordance with national laws and according to international obligations: It is recommended that the Governments to frame laws to make sure that decisions made under informal justice system be in conformity with Statues and international obligations of the Governments including guiding principles and framework for UN justice for children.

(n) Other Measures: Ensuring that the best interests of the child is given primary consideration, guaranteeing fair and equal treatment of every child, free from all kinds of discrimination, advancing the right of the children to express

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their views freely and to be heard, suppression of child abuse, exploitation and violence, treating every child with dignity and compassion, respecting legal guarantees and safeguards in all processes, preventing conflict with the law as a crucial element of any juvenile justice policy, using deprivation of liberty of children only as a measure of last resort and for the shortest appropriate period of time and mainstreaming childrens' issues in all rules of law efforts.

9.2 Recommendations so far as it relates to ADR in Civil Law

(a) The provisions of relevant sections of the Code of Civil Procedure should recast and necessary amendments shall be made keeping mandatory provision for exhausting ADR proceedings before starting trial.

(b) National centers for ADR may be established at the initiative of the Governments to:

(i) Propagate, promote and popularize the settlement of domestic and international disputes by different modes of ADR;

(ii) Provide facilities and administrative and other support services for holding conciliation, mediation and arbitration proceedings;

(iii) Promote reform in the system of settlement of disputes and its healthy development suitable to the social, economic and other needs of the community;

(iv) Appoint conciliators, mediators, arbitrators, etc., when so requested by the parties;

(v) Undertake teaching in ADR and related matters and to award diplomas, certificates and other academic or professional distinction;

(vi) Develop infrastructure for education, research and training in the field of ADR;

(vii) Impart training in ADR and related matters and to arrange for fellowships, scholarships, stipends and prizes.

(c) Model Rules of ADR has to be formulated.

(d) In every district or metropolitan area there should be Judge or Judges who will exclusively be in-charge of taking cognizance of civil suit. Having

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received the plaint, if it appears to him that the case is unfounded or baseless, he will dismiss the case with cost to be paid to the Government.

On the other hand, if it is found that the allegation has got substance, he will take cognizance and issue summons accordingly. After the appearance of the defendant, the cognizing Court shall attempt to dispose of the case through ADR by himself or by referring to the mediators. If it is not possible to mediate the dispute within the specified time, he will refer it to the trial Court for disposal. Notwithstanding the said provisions, the trial Judge shall be able to dispose of the case through mediation if contending pasties by joint petition pray the same.

9.3 Recommendations so far as it relates to ADR in Criminal Law

A new chapter may be incorporated in the Code of Criminal Procedure, 1898 (Act V of 1898) which will exclusively deal with Plea Bargaining in respect of offences relating to Penal Code & other special penal laws.

(a) The offences listed out under section 345 of Criminal Procedure Code and schedule II column 6 (Compoundable with the Consent of the court & compoundable without the consent of the court) must be brought under the aforesaid Chapter for Plea Bargaining. There must be provision for fact bargaining, Charge Bargaining and Sentence bargaining.

(b) The "Plea Bargaining" may be made applicable to offences under the Penal Code and other special penal laws for which punishment of imprisonment is up to a period of 10 years.

(c) The "Plea Bargaining" may be made applicable to all offences whenever child comes in contact with criminal laws and the legal guardian will take part in negotiation on behalf of Child.

(d) The application for Plea Bargaining shall be made in the court while the offence is pending for trial. The plea Bargaining is to be initiated after the accused makes an application to the court or Court suo motu makes an offer for plea Bargaining and may fix a certain period for Plea Bargaining.

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(e) The Court shall play the dominant role in Plea Bargaining. The court may hold a preliminary examination in camera to see whether the accused filed the application voluntarily. If it is found the Plea Bargaining is involuntary the court may reject the petition the proceedings of which can not be used as evidence. In case of successful plea bargaining half of the minimum sentence is to bre provided for the offence committed.

(f) There may be provision that the accused may be released on probation and to the effect laws relating to probation of offenders may be amended.

(h) The accused may also avail of the benefit of section 35A of Criminal Procedure Code for setting off the period of detention undergone by the accused against the sentence of imprisonment on the basis of Plea-Bargained settlement.

(i) The court must deliver the judgment in open court according to the terms of the mutually agreed disposition and the formula prescribed for sentencing including victim compensation.

(j) The judgment delivered in Plea Bargain cases is final and no appeal or revision lies against such judgment.

(k) Plea Bargaining may be applicable in respect of anti-corruption cases. In this respect, the accused may apply to the Anticorruption Commission accepting his guilt and offers to return the proceeds of corruption as determined by commissions. After endorsement by the commission the request shall be presented before the court of Special Judge which will decide whether it should be accepted or not. It will be the absolute domain of the court whether it would accept the Plea Bargain or not. In the case the request for plea bargain is accepted by the court, the accused stands convicted but is neither sentenced if in trial nor undergoes any sentence previously pronounced by a lower court if in appeal. He is disqualified to take part in elections, hold any public office, obtain a loan from any bank and is dismissed from service if he is a government official.

(l) Plea Bargaining may be made at any stage of the case.

(m) Plea bargaining should not be applicable in respect of habitual offenders.

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(n) Consequential amendment has to be made in different legislations relating to offences where there is scope for plea-bargaining.

9.4 Concluding Remarks

The present world is facing a juncture of huge back-log of cases simultaneously in all tiers of courts of the worldwide, especially, in the south Asian countries, like, Bangladesh, India and Pakistan. All these three countries inherited common culture of social, geo-political, economical and ethnical and invariably ensuring the rule of law and access to justice in every spare of society. More or less, huge dismal had existed in all tiers of adjudication, especially in the administration of justice. Several times the potential and emerging democracy had disrupted by the autocratic and coercive rulers of the sub-continent except in India. Sustainable democracy and rule of law interrupted or stem from the autocratic rules.

The existed judicial system in the sub-continent was the legacies of the British common law system and had inherited a congenial judiciary, which evolved through ages. The system had enriched many British Charters, Conventions, Declarations of Human Right's Ratification and Incorporation other rules and regulations in their native constitution.

The esteemed constitution of these three countries had guaranteed the rule of law to secure fundamental and basic rights in many articles. The world-wide free-stile expansion of world population, inter-state commerce, mobilization of multi-national companies and NGO's and power imbalance of giant states the ad judicature system had gained a new dimension in the south Asian Reason.

The most vulnerable part of the society was women in the world-wide and the acceptance of ADR mechanism enhanced betterment of their life, position empowerment of the society. Therefore, in that connection, the NGO's were plays a vital role for conceptualized the ADR mechanism above mentioned three countries.

Ultimate success in the dispute resolution field will require a broad effort to expand our presently limited understanding. Progress will require continued experimentation

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and research, as well as further attempts to conceptualize the field. Enhanced public education about the benefits to be derived from alternative modes of dispute settlement will be necessary. All the ADR movement will require the broadened involvement and support not only of the legal and legal education establishments, but also of the political and social orders and the public at large. The potential benefits are simply too great to leave these challenges unmet. With the increased inclusion of ADR methods in domestic and international arena and more widespread publication of ADR success, it is expected that ADR use in the Bangladesh, India and Pakistan will continue to expand.

Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to the ADR mechanism.

Experience shows and law reports bear ample testimony that the proceedings under the informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts, been clothed with 'legalese' of unforeseeable complexity. ADR has acquired a new meaning in the subcontinent; but we must develop the will to work it in the right spirit and with good faith. Today, therefore, the issue is to examine and chose a right formal legal system, such as the Alternative Dispute Resolution procedures and to organize the same on more scientific lines.

Actually informal dispute resolution has a long tradition in many of the world societies dating back to 12th century in China, England and America. The business world has rightly recognized the advantages that the ADR in one form or other is a right solution.

It is felt that it is less costly, less adversarial and thus more conducive to the preservation of business relationships, which is of vital importance in the business world. The use of ADR has grown tremendously in the international business field in recent years. We find that ADR has also become a proximately common provision in

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these three countries. Many experts in this field are of strong opinion that the impact of ADR on international commerce is great and will continue to expand. ADR is not an alternative to the court system but only meant to supplement the same aiming on less lawyering. Experts in the field are of the firm opinion that the ADR Act has long outlived its usefulness and the further enactment and codification will put an end to the present system of ADR under the existing law.

Charles Dickens wrote “In the High Court of Chancery, the solicitors are mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities and making a pretence of equity serious faces, this is the Court of Chancery, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart; that there is honorable man among the practitioners who does not give-who does not often give-the warning, Suffer any wrong that can be done you rather than come here.”

We must know the exhortation made by John F. Kennedy when stated boldly: “Let us never negotiate out of fear but let us never fear to negotiate”. It is the same resolve that is sound foundation of the International Centre for Alternative Dispute Resolution (ICADR).

I can conclude recalling the famous words of US President Abraham Lincoln emphasizing the deep significance of ADR:
Discourage litigation; persuade your neighbors to compromise, whenever you can. Point out to them the nominal winner is often a real loser, in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good person.

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FOR JUDGES

Please state your name and the date on which you completed the questionnaire.

Name ....Date........................

1. Which dispute method would you prefer to use?

   ____Litigation

   ____Adjudication

   ____Arbitration

   ____ADR

   ____Expert Determination

   ____Conciliation

   Other, please specify: ____

   Why do you prefer this method?

   ....

   ....

   ....

2. Is ADR in common use? ....

3. What is the typical cost of a ADR in your jurisdiction? Please state the mediator's fees and the lawyer's fees for each party

   ....

   ....

4. Is ADR encouraged by the courts in your jurisdiction?

   ....

   ....

5. Do you recommend ADR as an alternative to court based litigation in your jurisdiction?

   ....

   ....

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6. Are there sanctions which the courts will apply if the parties refuse to consider ADR?

....
....

7. What do you think are the main advantages of ADR compared with traditional court procedures?

....
....

8. Are there any disadvantages of ADR?

....
....
....

9. Is there any other information which group members should be aware of, concerning ADR in your jurisdiction?

....
....

10. The issues involved in the dispute are:
a. sensitive, involving serious legal and jurisprudential debates etc.
b. pedestrian, unlikely to raise such concerns.

11. The issues involved in the dispute are:
a. highly technical or complex.
b. easily grasped.

12. The central issues in the dispute are factual,
a. but do not turn on the credibility of key witnesses.
b. and turn on the credibility of key witnesses.

13. Does either side have anything significant left to put on the table to induce settlement?
a. yes
b. no

14. The parties wish to control the outcome of the dispute by avoiding binding adjudication and the attendant risk of loss.
a. yes
b. no

15. Neither side needs a decisive legal precedent, a permanent injunction, or other court-administered remedy.
a. yes
b. no

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16. The likelihood that this case can be disposed of by a prompt disparities motion is:
 a. speculative.
 b. very likely.

17. Are you aware of ADR methods being used negatively? e.g. Mediation being used to view the other sides evidence

 ____Yes

 ____No

 If you have answered yes to this, please specify how the methods have been used negatively:

 ....
 ....
 ....
 ....
 ....

18. Which dispute method would you prefer to use?

 ____Litigation

 ____Adjudication

 ____Arbitration

 ____Mediation

 ____Expert Determination

 ____Conciliation

 Other, please specify: ____

 Why do you prefer this method?
 ....
 ....
 ....

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19. Do you think the Alternative dispute resolution process as a whole can be improved?

____Yes

____No

If you have answered 'yes' please state how you believe the process could be improved

....

....

....

....

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FOR LAWYERS

Please state your name and the date on which you completed the questionnaire.

Name …… ……...Date……………………

1. Which dispute method would you prefer to use?

    ____Litigation

    ____Adjudication

    ____Arbitration

    ____ADR

    ____Expert Determination

    ____Conciliation

    Other, please specify:____

    Why do you prefer this method?

    ....

    ....

    ....

2. Is ADR in common use? ....

3. Is the mediator provided by the court or is the mediator found and paid for privately by the parties?

    ....

    ....

4. How long does the ADR process usually take?

    ....

    ....

5. How does this compare with the cost and time taken for a traditional court process?

    ....

    ....

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6. Can the parties to a ADR process agree any settlement terms they wish, or are there restrictions?

....
....

7. Are ADR agreements enforceable once they have been signed by the parties?

....
....

8. Are there sanctions which the courts will apply if the parties refuse to consider ADR?

....
....

9. Are you aware of ADR methods being used negatively? e.g. ADR being used to view the other sides evidence

____Yes

____No

If you have answered yes to this, please specify how the methods have been used negatively:

....
....
....
....
....

10. Do you think the Alternative dispute resolution process as a whole can be improved?

____Yes

____No

If you have answered 'yes' please state how you believe the process could be improved

....
....
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11. What do you think are the main advantages of ADR compared with traditional court procedures?

....

....

12. Are there any disadvantages of ADR?

....

....

13. Is there any other information which group members should be aware of, concerning

ADR in your jurisdiction?

....

....

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FOR LITIGANTS

Please state your name and the date on which you completed the questionnaire.

Name ....Date........................

A. INFORMATION ABOUT YOU AND YOUR CASE:

(i) What is your relationship to this case? (Please check one) ______ plaintiff ______ defendant, x-defendant, etc. ______ other, please specify:______________________________

(ii) What category best describes your status as a party, or the party you represent? (Please check one)
______ individual ______ governmental agency
______ business ______ non-profit organization

(iii) If you are a litigant in the case, are you represented by an attorney?
YES____ NO ____

(iv) What type of case was mediated? (Please check all that apply) ______ Maritime ______ Intellectual Property ______Partnership/Corporate Governance ______ Tax ______ Real Property ______ Land Use ______ Business ______ Labor/Employment ______ Professional Negligence ______ Landlord/Tenant ______ Construction ______ Probate ______ Environmental ______ Personal Injury ______ Family Law/Other ______ Family Law/custody/visitation ______ Other quality of life issues (e.g., neighbor disputes) ______ Other, please describe: ______________________________

(v) Have you ever used mediation to resolve a legal dispute before?
YES____ NO ____

(vi) Is it your own choice to go for ADR? YES____ NO ____
If not, who else helped you?____

(vii) The chances of winning at trial are:

______unknown or uncertain. _____we will win, unquestionably.

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B. INFORMATION ABOUT THE MEDIATION PROCESS:

(i) How did you select the mediator provider for this case?
______ Parties selected a mediation provider not affiliated with the Court program.
______ Parties selected a mediation provider from the Court's list.

(ii) Were you satisfied the mediator was competent to mediate your case?
YES____ NO ____

(iii) Was the timing of the mediation appropriate for the case? (Please check one)
______ Yes, the mediation occurred at an appropriate point in the dispute.
______ No, it would have been more appropriate if the mediation had occurred at another point in the life of the case, e.g., earlier or later, as follows:
____

(iv) In your view, how did the use of mediation affect the timeliness of the resolution of the case, as compared to the traditional court processes? (Please check one)
______ Accelerated resolution of the case; ______ Speeded resolution; ______ Did not affect how promptly the case was resolved; ______ Delayed resolution; ______ Not yet known, case has not yet been resolved.

(v) How satisfied are you with the outcome of the mediation process? (Please check one)
______ Very satisfied.
______ Satisfied.
______ Neither satisfied nor dissatisfied.
______ Dissatisfied.
______ Very Dissatisfied.

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C. COMMENTS ON THE MEDIATION PROGRAM

(i) Would you use the mediation program to resolve a future dispute?
YES____ NO ____

(ii) What suggestions do you have for improving the Court's mediation program?

....
....
....
....

On a scale of 1 to 5, please select the number that best reflects your experience in the above referenced ADR process.

(i) How easy was it to go for ADR for the dispute?

____Poor. ____Good. ____Very Good. ____Excellent. ____N/A

(ii) How would you rate the service you received from the mediators?

____Poor. ____Good. ____Very Good. ____Excellent. ____N/A

(iii) How would you rate the ADR facility?

____Poor. ____Good. ____Very Good. ____Excellent. ____N/A

(iv) How effective was the panel members (mediators, lawyers, judges etc.)?
____Poor. ____Good. ____Very Good. ____Excellent. ____N/A

(v) Overall, did you receive what you expected from this experience?

____Poor. ____Good. ____Very Good. ____Excellent. ____N/A

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