

Amending Section 345 CrPC to Introduce ADR in Criminal Cases

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Introduction

According to recent statement presented by law minister in the parliament regarding the backlog of cases is about 3.3 million pending for disposal till 31 December, 2017¹. Of these, 2.8 million is pending with the lower court where 1.5 is criminal cases.² Behind this scene, there are some reasons such as delay in investigation particularly in criminal litigation, shortage of manpower, traditional justice providing system, long and complex procedure, not appearing the witnesses on time etc. In civil justice system, a provision relating to alternative method of disposing cases easily was added in the code of civil procedure by amendment. This provision benefits the all the parties concerned and it helps to reduce the case log. In case of criminal justice administration in Bangladesh, no provision regarding alternative method of dispute resolution is existed despite having an indication to introduce alternative dispute resolution in the code of criminal procedure. The absence of alternative ways suffers the parties concerned with criminal litigation. Sometimes it is seen that an innocent is kept in detention for long time being not having specific allegation and it violates his constitutional rights.

Unlike the suits and trial cases, ADR is a proceeding out of the court. Due to huge pendency of the cases, ADR has gained paramount significance. Abraham Lincoln commented on the 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.*”³ So it is the time to introduce ADR in criminal litigation to protect the life and property and ensure peace as well as to provide justice fairly, easily, harassment free.

This is all about backlog of cases in Bangladesh. A report of UNDP said that the case log-jam may reach 5 million by 2020, the year before Bangladesh’s golden jubilee when the country is projected to become a middle-mid-income country. Increasing case backlog has become an emerging challenge for governance, judicial effectiveness, access to justice, rule of law and citizen rights.

Urgency of ADR in criminal justice administration

Undoubtedly, speedy trial is an essence of criminal justice system and delay in trial by itself constitutes denial of justice. Pendency for long periods operates as an engine of oppression.⁴ In order to reduce the delay in disposing of criminal cases, introducing ADR in criminal litigation has become necessary. In Bangladesh courts are overburdened with pending cases, the trial process is inordinately long, and the expenditure is very high. The unusual delays in the disposal of criminal trials and appeals have been a matter of great concern in administering criminal justice. The above-mentioned estimation of arrears of cases is a matter of concern not only for the state but also for the parties – prisoners and victims.

¹Dhaka Tribune news, Law Minister: over 3.3m cases pending in courts (January 16th,2018).Available at <<https://www.dhakatribune.com/bangladesh/court/2018/01/16/law-minister-3-3m-cases-pending-courts>>Last accessed on 25th August,2018

² Ibid.

³JOE MARKOWITZ, ‘3 Quotations from Lincoln on Conflict Resolution’, available at <mediate-la.com/3-quotations-lincoln-conflict-resolution/> last accessed on 25th August, 2018

⁴ Ms. Amrit Pal Kaur& Ms. AartiGoyal, ‘JUSTICE IN PLEA BARGAINING- IS IT A COERCION TO COMPROMISE’. Bharati Law Review, April-June 2016, p 213-218. Available at <<http://docs.manupatra.in/newslines/articles/Upload/585DB32A-3E8F-4A0F-A580-2D02778B5BFA.pdf>> last accessed on 25th August, 2018

According to world prison brief data, the rate of pre-trial detainees/remand prisoners is 77.7% and in number 61,678 in November 2017.⁵ It should be noted that the number of pre-trial prisoners fluctuates from day to day, month to month, year to year. This is because of weak, faulty and manipulated police investigation, inefficient, political and transitory nature of public prosecutor's work and large-scale corruption practiced in the courts by stakeholders.⁶ Such imprisonment violates some constitutional rights guaranteed by Bangladesh Constitution under Articles 33, 32 and 36. It is seen in many ways that many suffer imprisonment wrongfully for false allegation. For example, two persons were freed after serving 29 years jail and were declared innocent by the High Court.⁷ Such cases violate the Article 33 deal with arrest and detention, Article 32 (life and personal liberty) and Article 36 (right to movement freely). To get rid of these circumstances, it is necessary to commence ADR system in criminal litigation.

The following points are the reasons of introducing ADR in criminal justice administration in order: Speedy disposal of criminal case – reduction in heavy backlog of cases, Less time consuming, End of uncertainty of a case, Saving legal expenses of both parties, Expediting delivery of criminal justice, Making the parties harassment free, Making the justice delivery system friendly, Ensuring peace and creating brotherhood relationship in society, Protecting constitutional rights, Beneficial to wider community.

Scope of introducing ADR in criminal litigation under the CrPC

Section 345 of the code of criminal procedure⁸ hints an indication of scope of introducing ADR in criminal justice administration. This provision deals with compounding sentence and it provides two types of offences which can be compounded. Of these, the first one is the offences compoundable without permission of the court and the other is the offences compoundable with the permission of the court. If we analyze the two types of offences, it is found that the punishment of the offences contained in the first phase is one month (minimum) to one year (maximum) imprisonment e.g. under section 298, the punishment is up to one year, section 342 provides one month imprisonment for wrongfully confinement while the punishment of the offences contained in the second phase is two years (minimum) to ten years (maximum) imprisonment and fine or both as well. The existing provision provides limited scope of dispute resolution process. Though this provision doesn't open a way relating to alternative method of dispute resolution expressly and directly, ADR may be introduced by the government by emending or inserting. Besides this, there are scope of alternative dispute resolution of criminal offence in the village court Act 2006 and the Arbitration (amendment) Act 2004.

The Supreme Court of Bangladesh encourages introducing ADR in criminal justice administration. Honorable justice Badrul Haider Chowdhury opined in the case of *MD. Joynul and Others V. Md. Rustom Ali Mia and others*⁹ that “Our Criminal Administration of Justice encourages the compromise of certain disputes and even certain offence can be compound as provided by section 345 of CrPC. Shalish or compromise had been.... a mode of settlement of dispute in this sub-continent from time immemorial.”

In *Abdus Sattar & others V. The State and another*,¹⁰ the court with great importance supported the alternative dispute resolution in criminal justice administration. It observed that “our criminal administration of justice encourages compromise of certain disputes and some of the cases can be

⁵ World Prison Brief (UPB) data (November,2017), www.prisonstudies.org/country/Bangladesh.

⁶ Md. Alamin, “Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview” *Journal of Research in Humanities and social Science* (2015) volume.3, issue 11.

⁷ The Daily Star ,29 years after serving jail,2jessore men declared innocent (21March,2018). Available at <<https://www.thedailystar.net/country/cattle-smuggling-case-india-27-years-after-serving-jail-2-jessore-men-declared-innocent-high-court-1551352>> last accessed on 25th August 2018.

⁸ The Code of Criminal Procedure, 1898, Act No. V of 1898

⁹ 36 DLR (AD) p.240,244

¹⁰ 38 DLR (AD) 38, 40

compounded as provided by section 345 of CrPC. Section 379 of penal code is compoundable by the owner of the property stolen.”

Process to introduce ADR under CrPC

It has already been mentioned above of having scope of introducing ADR under the code of criminal procedure by amending the existed section 345 or inserting a new section as section 345A like the code of civil procedure. Mr. Md. Aktaruzzaman, a joint district and session judge, opined in his book¹¹ to introduce ADR by amending section 345 or adding a new section 345A. It will be better if a new section is inserted with amending the existed provision in including some more offences in it to make eligible for setting in ADR.

In India, plea bargaining system in the form of ADR has been introduced and practiced since 2006 though the bill of the criminal law (amendment) Act was presented in 2005. This Act allows the plea-bargaining system for the following case¹²:-

1. Where the maximum punishment is imprisonment for 7 years.
2. Where the offences don't affect the socio-economic condition of the country.
3. When the offences are not committed against a woman or a child below the age of 14.

I think we should follow the above-mentioned cases in introducing ADR. In case of introducing ADR in criminal litigation, some guidelines may be followed. These are as follows: -

Firstly, the offences of which punishment is imprisonment for up to 7 years under the panel code¹³ must be brought under section 345 of CrPC. There are about 71 sections¹⁴ of offences of which punishment is imprisonment up to 7 years under panel code. Of these, some may be excluded if these are serious offence and harmful to the society and if the crime is committed by the habitual offenders.

Secondly, sitting for ADR should be made mandatory if the offence falls under the section 345.

Thirdly mandatory of sitting in ADR should be made by inserting a new section as section 345A.

Fourthly as a criminal litigation starts on police report or complaining the magistrate, Application of ADR should also start after complaining the magistrate or submitting the police report. But there will be a problem in case of applying for ADR after submitting police report. The problem is that submitting police report to the magistrate takes a long time and it is against the purpose of ADR. In case of such case, a police officer should send the information of an offence to the magistrate as soon as possible whenever he will see that this offence falls under the section 345.

A period for conducting ADR should be framed. Some regulations should be made for the accused prohibiting not committing any offence in future.

Procedure to be followed in conducting ADR in criminal justice administration

The whole procedure of conducting ADR may be inserted in the new section 345A like the code of civil procedure lays in sections 89A-89E. In case of ADR under CrPC, the procedure may be in the following manner:

¹¹আখতারুজ্জামান, মোঃ বিক্রমবিরোধনিষ্পত্তিরধারণাওআইনএবংআইনগতসহায়তাআইন, ২য়সংস্করণ(২০০৮),

¹²Lokesh Vyas, 'Concept of plea bargaining under Indian laws'. Available at <<https://blog-iplleaders-in-cdn.ampproject.org/v/s/blog.ipleaders.in/plea-bargaining-practice-india/>> last accessed on 25th August, 2018

¹³ The Penal Code 1860. Act No. XLV of 1860

¹⁴ Sections regarding 7years imprisonment under Penal Code, 1860 are 115,118,128,125,126,127,134,193,201,211,213,214,216,216A,219,220,221,222,225,231,234,243-45,247,249,256-260,281,308,312,317,325 330, 363,365,369,370,380,381,387,392,397,398,401,402,404,407,408,420,433,435,451,452,465,468,472,473,474,475,476,477A,489C,498,496,505,505A,506

If a complainant/informer brings a complaint or information of an offence to the magistrate or police officer, the first duty is to see whether it falls under the section 345. If it goes under section 345, the informer should be ordered to make an application for sitting ADR if he is magistrate. But if the complaint or information receiver is a police officer, he shall take the informer to the magistrate and then the magistrate shall follow the same.

After receiving the application, the magistrate shall call the accused and hear him in camera. Then he shall fix a date for a meeting with the parties concerned.

The parties may appear with their representatives – the lawyer of the accused and the prosecution.

In this meeting the parties shall make an agreement and it shall be signed by the parties. Then it shall be sent to the magistrate.

Another meeting may be held in the present of the magistrate.

After receiving the agreement, the magistrate shall examine it. After that the magistrate shall fix another date to sit with the parties for final disposal of the case. In that day the magistrate shall sign in it if he thinks fit for final disposal. If he approves and signs, the case will finally be disposed.

It shall be written in the agreement that no allegation can be brought in future on the same issue which has already been settled by ADR.

The government may make such provision to introduce ADR in the criminal litigation. It will surely help the court to dispose the case easily and shortly and to reduce the huge burden of cases, to reduce sufferings of the parties concerned.

Exceptions to ADR in the administration of criminal justice:

Some cases can't be brought to ADR which are serious and harmful to the society in nature. Some experts have also suggested that the offences which are relating to women and children, against the socio-economic condition of the country etc. Dr. Jamila A. Chowdhury in his book¹⁵ mentioned that Plea bargaining should not be used for habitual offenders and those who commit crimes against women. Md. Aktaruzzaman, a joint district & session judge, in his book¹⁶ said that the following crimes cannot be disposed such as murder, culpable homicide, rape, abduction, dacoity, robbery, acid throwing etc. MS Amrit pal kaur and MS Aartigoyal, Indian researcher said in their research regarding plea bargaining that it does not apply to cases where the offence is committed is socio economic offence or where the offence committed is against a woman or a child below the age of 14.

Therefore, in brief the following crimes cannot be brought to ADR. Crimes committed by the habitual offenders. Crimes committed against a woman and a child. Crimes committed against socio economic condition of the country, Crimes which are serious and dangerous in nature for example murder, culpable homicide etc and crimes which are under the special laws.

Some imperatives to be followed in case of ADR in criminal litigation

The purpose of alternative dispute resolution is to dissolve the disputes and to bring back the peace in the society. As ADR is new format of providing justice administration in criminal litigation, it should be handled cautiously and carefully so that it doesn't be opposite to any law of

¹⁵ Chowdhury, Dr. Jamila A. ADR THEORIES AND PRACTICES (A GLIMPS ON ACCESS TO JUSTICE AND ADR IN BANGLADESH), 1st edition, London College of Legal Studies ,Dhaka 1205

¹⁶ Supra note 14

the country. The following rules should be ensured that these are being maintained during conducting ADR:

ADR must be conducted by following the principles or rules of law and to be borne in mind that no laws be violated. Decision should be taken by hearing the parties concerned attentively and with great importance. No decisions can be conferred upon the parties. Partiality cannot be showed to any of the parties. Balance and Equality should be maintained between man and woman. The agreement shall be signed by the both parties and the magistrate.

Conclusion

Despite having criticisms and some limitations for beneficial to wider community, ADR should be introduced in criminal litigation and this is the demand of present time of Bangladesh context. It is argued that ADR is contradictory to the principles of criminal laws for instances doctrine of presumption of innocence, doctrine of benefit of doubt etc. Nevertheless, are not always possible to fulfill these principles for various reasons e.g. false police report, associating non-compoundable sections where being not necessary, no corroboration among witnesses etc. From such disharmony, it will be beneficial if ADR is introduced in criminal litigation for the wide and large convenience and interest of the citizen and the state. As a result, the parties shall get rid of untold sufferings mentally, physically and financially and the judiciary shall also get away from the case log. Concededly, after considering all the matters relating to this issue, the government should take initiative to introduce ADR in criminal litigation immediately.