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ODR in the Civil Justice System of Bangladesh: Prospects and Challenges

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ABSTRACT: *The judiciary of Bangladesh is overburdened with a huge case backlog (currently about 3.63 million, where nearly 1.54 million are civil cases). It still operates in traditional ways, with limited or no use of technology. Consequently, the justice delivery process in Bangladesh is not economical regarding cost and time effectiveness. To address these issues, Bangladesh adopted and developed a system of court-annexed mediation in 2003, but it did little to change the situation. Hence, the government is actively considering moving towards e-judiciary, for which the COVID-19 pandemic also served as a push factor. Given this context, the article has assessed the prospects of introducing Online Dispute Resolution (ODR) in the formal justice system of Bangladesh, having its socioeconomic realities in context. In doing so, this research has investigated the economic and commercial benefits of ODR. It has also developed the normative framework of ODR, analysing the experiences from the States of Utah, British Columbia, and the UK, where ODR got some developments. Then, the study assessed the prospects and challenges of introducing ODR in Bangladesh based on the proposed normative framework.*

1. INTRODUCTION

Although the use of Alternative Dispute Resolution (ADR) as an integrated part of the formal civil justice system has been in practice for some years now, ODR, in its strict sense, is utterly absent in Bangladesh. The country inherited a significant portion of its laws from the British colonial power in the subcontinent that is still in force without any significant amendment. The Code of Civil Procedure, 1908 (CPC)¹ and the Evidence Act, 1872² are two remarkable

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¹ Act No. V of 1908.

² Act No. I of 1872.

legislations on which the foundation of the present civil justice system primarily stands were legislated during the British rule in the subcontinent. These laws prescribed strict procedural formalities, which need to be updated or revised today, resulting in a delay in case disposal. In addition, Bangladesh has a very disproportionate judge population ratio of just 10 per million.³ The problem exacerbates further by poor infrastructure, logistics, and human resources. These problems created a backlog of nearly 3.63 million cases as on September 2022, where about 1.54 million are civil cases.⁴ Lawsuits in Bangladesh run for years together even as long as 50 years,⁵ and each lawsuit, on an average, runs for 9.5 years.⁶ A report from the United Kingdom's Foreign and Commonwealth Office also recognises this phenomenon of the overloaded justice system in Bangladesh and delays.⁷ Barkat et al. found that 76.58% of civil cases are related to land litigation, which affects 25% of the country's total arable land.⁸ Delayed disposal of land litigation causes government expenditure equivalent to 10% of the GDP.⁹ Such litigation causes poverty, sickness, and a decline in income and food consumption.¹⁰ Thus, the national economy becomes affected by delayed disposal of civil litigation.

In a bid to contain the huge case backlogs, Bangladesh, like many other countries, embraced ADR into the formal civil justice system in 2003.¹¹ Though ADR was initially optional, a legislative amendment in 2012 made it compulsory, requiring the parties to try mediation within a specific timeframe.¹² Subsequently, in 2015 the legislature empowered District Legal Aid Officers (DLAOs)¹³ to try mediation when any dispute is either referred to them by any court or the parties volunteer to mediate.¹⁴ However, the COVID-19 pandemic seriously affected the administration of justice in Bangladesh, which remained stuck for several months until the President of Bangladesh promulgated an Ordinance named 'the Use of Information Communication Technology by Court'¹⁵ on 09 May 2020, empowering the courts

³ The latest statistics show that the number of judges serving with the Bangladesh Judicial Service is 2003, out of which about 200 judges serve in deputation at government departments, including the Ministry of Law and the Supreme Court Registry. See Bangladesh Supreme Court's Gradation List and ID Number of the Members of Bangladesh Judicial Service, 2023. On the other hand, the population in the country is recorded at 165,158,616 in the latest census. See Population and Housing Census, 2022 (Preliminary Report) https://drive.google.com/file/d/1Vhn2t_PbEzo5-NDGBeoFJq4XC0sZOVKg/view, accessed 09 February 2023.

⁴ The total pending cases are 3,631,059, where 1,545,028 are civil, and 2,086,031 are criminal cases. These numbers include suits at both trial and appellate courts. See Bangladesh Supreme Court's Report on Case Statistics (Dhaka, September 2022).

⁵ Abul Barkat and Prasanta K. Roy, *Political Economy of Land Litigation in Bangladesh: A Case of Colossal National Wastage* (ALRD and Nijera Kori, Dhaka 2004) 78. In addition, as a judge, the first author of this article has some experience of disposing of several cases in 2010, which were instituted in the 1960s.

⁶ *Ibid.*, 90.

⁷ Foreign and Commonwealth Office, 'Corporate Report on People's Republic of Bangladesh- Human Rights Priority Country' www.gov.uk/government/publications/peoples-republic-of-bangladesh-human-rights-priority-country/peoples-republic-of-bangladesh-human-rights-priority-country, accessed 30 September 2021.

⁸ Barkat and Roy, *supra* note 5, 81.

⁹ *Ibid.*

¹⁰ *Ibid.*, 95-101.

¹¹ The Code of Civil Procedure (Amendment) Act, 2003 (Act No. IV of 2003).

¹² The Code of Civil Procedure (Amendment) Act, 2012 (Act No. XXXVI of 2012).

¹³ They are the serving judges of Bangladesh Judicial Service working on deputation as legal aid officers administering government legal aid to the poor and vulnerable segment of society.

¹⁴ Legal Aid Services Act 2000, s 21A(2) and the Legal Aid Services (Legal Advice and Alternative Dispute Resolution) Rules 2015.

¹⁵ Originally, the Ordinance was in Bangla titled 'আদালত কর্তৃক তথ্য-প্রযুক্তি ব্যবহার অধ্যাদেশ, ২০২০'. Later that year, it was transformed into an Act of parliament on 8 July 2020.

to conduct the court's proceedings virtually utilizing video conferencing (especially over free Zoom) and other unpaid ICT tools. The government is now considering implementing an e-court system in order to establish a judiciary that is 'properly functioning'¹⁶. Since there will be e-courts, there will automatically be an ODR system.

Given the context, this paper will first explore the emergence of ODR from e-commerce to formal justice system and its economic and commercial importance. Secondly, it will briefly outline the position of ADR and ODR in the civil justice system of Bangladesh. Thirdly, it will discuss the development of ODR in three jurisdictions- British Columbia in Canada, the State of Utah in the USA, and the UK. A normative framework of ODR will be identified based on the development in these jurisdictions. Finally, it will explain how the ODR norms developed in Canada, the USA, and the UK can work in the present reality of the Bangladeshi civil justice system.

2. EMERGENCE OF ODR FROM E-COMMERCE TO FORMAL COURT SYSTEM, AND ITS IMPORTANCE

The idea of ODR started to grow with technological innovations and developments. There is no standard and universally accepted definition of ODR. However, the definition offered by Colin Rule, Co-Founder of Modria (currently an entity of Tyler Technologies), has been considered more precise and popular: 'the use of information and communications technology to help parties manage, transform and resolve their conflicts.'¹⁷ Generally, ADR processes conducted online with the support of the machine, software, and, more recently, artificial intelligence (AI) may be termed ODR.¹⁸ In that sense, any form of ADR may be transformed into ODR. However, for this study, by the term ODR, we primarily refer to technology-mediated dispute resolution processes with or without the involvement of human neutrals.

The concept of ODR and its integration into the formal justice system is relatively new. However, its journey in the private e-commerce domain is fairly old and started in the last century's final decade. With the invention of personal computers and the lifting of restrictions on the use of the internet for commercial purposes, internet users taking services offered by private Internet Service Providers gradually became more active online, engaging in different commercial activities that eventually resulted in disagreements and disputes regardless of geographical territory. Although the disputes were minor in numbers and primarily homogeneous, they grew exponentially afterwards, creating a need for new dispute resolution processes.¹⁹ Since the disputes arose online, the parties were mostly far from each other, and a

¹⁶ General Economic Division (GED) of the Government of the People's Republic of Bangladesh 'Making Vision 2041 a Reality: Perspective Plan Of Bangladesh 2021-2041' (2020) 15, <http://oldweb.lged.gov.bd/uploadeddocument/unitpublication/1/1049/vision%202021-2041.pdf>, accessed 25 February 2023.

¹⁷ Colin Rule, 'What is ODR?' Presentation made at the 2008 International Forum on Online Dispute Resolution, Victoria, BC, Canada, 18 June 2008 in Doug Leigh and Frank Fowlie, 'Online Dispute Resolution (ODR) within Developing Nations: A Qualitative Evaluation of Transfer and Impact' (2014) 3 *Laws* 106.

¹⁸ Arno R. Lodder and John Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press, 2010) in John Zeleznikow, 'Using Artificial Intelligence to provide Intelligent Dispute Resolution Support' (2021) 30 *Group Decis Negot* 789, 790.

¹⁹ Leah Wing, Janet Martinez, Ethan Katsh, and Colin Rule, 'Designing Ethical Online Dispute Resolution Systems: The Rise of the Fourth Party' (2021) 37(1) *Negot J* 49, 50.

face-to-face meeting was difficult and impractical, people involved in the process realised that those disputes could not be economically resolved in terms of cost, time, and convenience using traditional offline mechanisms.²⁰ This phenomenon prompted the e-commerce marketplace hosts like eBay to look out for dispute resolution options using the internet. With the assistance of the National Center for Technology and Dispute Resolution (NCTDR) based at the University of Massachusetts, eBay successfully introduced the first-ever ODR mechanism in March 1999 that initially mediated fifty percent of the registered consumer disputes.²¹ Subsequently, with the help of SquareTrade, eBay developed a 'two-stage process of technology-assisted negotiation' where the disputing parties could mediate themselves initially, requiring the involvement of human mediators only at the final stage when there was no resolution achieved at the initial stage.²² Other tech-driven web-based financial service providers and e-commerce giants like PayPal, Amazon, and Alibaba also took up similar initiatives.²³ Apart from them, the ODR system designed and operated by the Internet Corporation for Assigned Names and Numbers (ICANN) for domain name disputes based on a 'nonbinding arbitration system' has also been considered to be successful 'in terms of convenience' and the volume of disputes resolved so far through this process.²⁴ Subsequently, *Rechtwijzer*, an ODR platform developed in the Netherlands in 2014 by The Hague Institute for Innovation of Law (HiIL) and the Dutch Legal Aid Board, with technological support from Modria for resolving family conflicts between separating couples, has also been quite successful.²⁵

Besides, the United Nations Commission on International Trade Law (UNCITRAL) also adopted the Technical Notes on Online Dispute Resolution in its 49th session in 2016 in order to facilitate resolution of disputes resulting from cross-border low-value online commercial transactions.²⁶ The UNCITRAL model works in three distinct stages through an ODR platform: negotiation, facilitated settlement and final determination of the dispute by a neutral (arbitration).²⁷ Likewise, with the adoption of Regulation (EU) 524/2013, the European Union (EU) also introduced a four stage ODR model: submission of complaint through ODR platform, agreement on selection of dispute resolution body, handling of the complaint by the dispute resolution body and pronouncement of outcome.²⁸ There is, however, uncertainty as to whether

²⁰ Ethan Katsh and Colin Rule, 'What We Know and Need to Know about Online Dispute Resolution' (2016) 67 *S C L Rev* 329

²¹ Ethan Katsh and Orna Rabinovich-Einy, 'Online Dispute Resolution and Prevention: A Historical Overview' in *Digital Justice: Technology and the Internet of Disputes* (OUP 2017) 25-32.

²² *Ibid.*, 34.

²³ Hiroki Habuka and Colin Rule, 'The Promise and Potential of Online Dispute Resolution in Japan' (2017) 4 *IJODR* 74, 75-76; Vivi Tan, 'Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice' (2019) 24 *Deakin L Rev* 101, 110.

²⁴ Ethan Katsh and Orna Rabinovich-Einy, 'E-commerce and the Internet of Money' in *Digital Justice: Technology and the Internet of Disputes* (OUP 2017) 62-65.

²⁵ *Rechtwijzer* was primarily intended to assist separating couples with reaching mutual agreements on divorce and parenting issues through a 'structured dialogue,' formalising the agreements in court and thus terminating the marital tie. It, however, stopped operation in July 2017, among others, for financial viability reasons. Nonetheless, it was reintroduced as *Uitelkaar.nl* in September 2017 and since then has successfully been operated by Justice42. See Laura Kistemaker, 'Rechtwijzer and Uitelkaar.nl. 'Dutch experiences with ODR for divorce' (2021) 59(2) *Family Court Review* 232, 233.

²⁶ UNCITRAL Technical Notes on Online Dispute Resolution, United Nations, 2017, pp vii-xi.

²⁷ *Ibid.*, paras 18-21.

²⁸ <https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks>, accessed on 18 March 2023.

participation into the process is mandatory and whether the outcome is binding.²⁹ Similarly, ASEAN also requires its member states to introduce their own ODR platform in order to resolve the e-commerce disputes within ASEAN nations.³⁰ Administered by the Brazilian National Consumer Secretariat, Brazil uses a common ODR platform *Consumidor.gov.br* that works on a single stage of non-binding negotiation process interestingly turned out to be more popular than that of the EU.³¹

Even though ODR was introduced for resolving disputes originating from the e-commerce marketplace during 1990s, subsequently it has been extensively used for resolving disputes that are not internet based.³² In the recent years, ODR has been embraced as an integrated part of a formal dispute resolution system for resolving selected offline disputes in different jurisdictions worldwide. The NCTDR has documented 32 courts that have formally incorporated ODR.³³ Additionally, David Allen Larson also listed some courts that either offer complete ODR systems or support some level of remote or online dispute resolution.³⁴ In the past few years, the ODR system introduced in the State of British Columbia of Canada and the State of Utah of the USA as an integrated part of the formal court system, together with the proposed ODR system in the UK, received some appreciation across the world.³⁵

2.1. Economic and Other Benefits of ODR Compared to Traditional ADR

Court processes worldwide are ‘expensive, slow, complex, inaccessible, and overburdened.’³⁶ Starting with complex procedural formalities³⁷, inordinate delays,³⁸ exorbitant costs,³⁹ disproportionate judge-population ratio⁴⁰ and absence or limited use of technology⁴¹ are cited as some of the dominant reasons behind the miserable state of the traditional dispute resolution processes that accumulated huge case backlogs over time, crippling the judiciary and thereby frustrating access to justice. Even adjudicative ADR, like arbitration, which is still popular in the business world, is also considered pretty expensive.⁴² Now, let us see, despite having the

²⁹ Phet Sengpunya, ‘Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspectives’ (2020) 2020/1 *Pécs Journal of International and European Law* 58, 65.

³⁰ *Ibid*, 70-71.

³¹ M.J. Schmidt-Kessen, R. Nogueira and M. Cantero Gamito, ‘Success or Failure?—Effectiveness of Consumer ODR Platforms in Brazil and in the EU’ (2020) 43 *J Consum Policy* 659.

³² Zeleznikow, , *supra* note 18, 800.

³³ The figure goes in the following order: 1 in Mexico, 3 in Canada, 4 in China, and the remaining are in the USA. The updated list is available at <https://odr.info/courts-using-odr/>, accessed 30 May 2022.

³⁴ David Allen Larson, ‘Designing and Implementing a State Court ODR System: From Disappointment to Celebration’ (2019) 2 *J. of Disp. Resol.* 77, 96-97.

³⁵ These developments will be discussed briefly in the later part of this article.

³⁶ Ethan Katsh and Orna Rabinovich-Einy, ‘The Present and Future of Digital Justice and the “Moving Frontier of Injustice”’ in *Digital Justice: Technology and the Internet of Disputes* (OUP 2017) 178.

³⁷ A. B. M. Rashedul Hassan and Md. Abdul Malek, ‘ADR Mechanisms in Bangladesh: Widening Scopes for Access to Justice’ (2019) 1 *EBAUB Journal of Law* 1, 5, <https://ssrn.com/abstract=3827222>, accessed 6 July 2022.

³⁸ Melvin M. Belli, ‘The Law’s Delays: Reforming Unnecessary Delay in Civil Litigation’ (1981) 8 *J Legis* 16, 18.

³⁹ Umme Sharaban Tahura, ‘Role of Clients, Lawyers, Judges, and Institutions in Hiking Litigation Costs in Bangladesh: An Empirical Study’ (2022) 9 *Asian Journal of Law and Society* 59.

⁴⁰ Vandana Ajay Kumar, ‘Judicial Delays in India: Causes & Remedies’ (2012) 4 *JL Pol’y & Globalization* 16.

⁴¹ Umme Sharaban Tahura, ‘Can Technology Be a Potential Solution for a Cost-Effective Litigation System in Bangladesh?’ (2021) 42(2) *Justice System Journal* 180.

⁴² David Brown, ‘What Steps Should Arbitrators Take to Limit the Cost of Arbitration’ (2014) 31 499; Thomas J. Stipanowich, ‘Arbitration: The New Litigation’ (2010) 2010 *U Ill L Rev* 1. On the contrary, regarding costs of arbitration, Rutledge concludes that though the ‘criticisms are not entirely invalid, but the rhetoric far exceeds the reality’. See Peter B. Rutledge, ‘Whither Arbitration?’ (2008) 6 *Geo JL & Pub Pol’y* 549, 568.

vibrant presence of different dispute resolution mechanisms, what makes ODR more relevant today in addressing the major challenges that traditional litigation and even some ADR processes cannot effectively address.

When considering a dispute resolution process, factors influencing our decision include whether the system is economical, especially in cost, time, simplicity, and accessibility.⁴³ ODR has already proved its efficacy, especially for small-scale disputes in all those parameters. Hence, Blake *et al.* rightly identified that three reasons were instrumental behind the development and growth of ODR: firstly, it can offer a quick but cost-effective resolution of a dispute; secondly, it is particularly suitable for small-scale disputes; and thirdly, the parties are not required to meet physically.⁴⁴ It is almost universal that the cost of litigation is exponentially higher. Hence, most people in need of legal redress cannot afford lawyers and eventually fail to exercise their right to access to justice.⁴⁵ Additionally, people may have commitments at work or family, and even disability may restrict their access to justice. In the ODR process, the disputing parties initially negotiate themselves and try to reach an amicable settlement by being connected from a distance through the internet anytime and anywhere without needing a lawyer. Third-party-neutral only involves when the initial negotiation process fails, which also costs a very nominal fee and is quite trifling compared to costs involved in litigation. As a result, people who cannot come to the courthouse—because of disability, needing to be at work, or having to take care of children—can litigate their cases from home and avoid a default judgment.⁴⁶ Michael Legg has explained the potential benefits of ODR in terms of cost-effectiveness and increased access to justice to the following effect:

A key driver of online dispute resolution (ODR) is the need for affordable access to justice. For many lower-value disputes what is at stake is worth less than the cost of commencing formal legal proceedings or even seeking legal advice. Even for disputes that involve a substantial amount of money for the individual, the legal costs to resolve the dispute can be significant and unaffordable. Consequently, ODR, with its lower cost structure, provides an opportunity for extending access to justice to many citizens.⁴⁷

Therefore, it appears that ‘when properly designed, ODR provides promise for opening new low-cost avenues to remedies and voice without the travel and time challenges presented by traditional in-person processes’.⁴⁸ Moreover, with the processes of ODR, huge amounts of data are collected and stored that can be swiftly but efficiently analysed with precision by algorithms that can be utilised for developing more sophisticated ODR system for future disputes.⁴⁹ Consequently, ‘efficiency, transparency, case flow, settlement rates, outcome

⁴³ Christian Leathley, ‘The Mercosur Dispute Resolution System’ (2003) 4 *J World Investment* 787.

⁴⁴ Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (4th ed., OUP, 2016) 74.

⁴⁵ Amy J. Schmitz and John Zeleznikow, ‘Intelligent Legal Tech to Empower Self-Represented Litigants’ (2021) 23 *Colum Sci & Tech L Rev* 142, 144.

⁴⁶ Deno G. Himonas and Tyler J. Hubbard, ‘Democratizing the Rule of Law’ (2020) 16 *Stanford Journal of Civil Rights & Civil Liberties* 261, 271.

⁴⁷ Michael Legg, ‘The Future of Dispute Resolution: Online ADR and Online Courts’ (2016) 27(4) *ADRJ* 207.

⁴⁸ Schmitz and Zeleznikow, *supra* note 45, 146.

⁴⁹ Katsh and Rule, *supra* note 20, 330.

patterns, transaction costs, accessibility, and outcome consistency may all be enhanced through machine learning' employed in the process of ODR.⁵⁰ Moreover, ODR proved its worth during the COVID-19 restrictions ensuring access to justice without requiring physical meetings, and has been progressively demonstrating its 'relevance and usefulness' to the world at large.⁵¹

ODR has some environmental benefits too. Ebner et al. asserted that 'ODR is inherently green' since it prevents a series of 'environmental costs' that are incurred through other forms of dispute resolution processes, including those of the courts.⁵² In the process of ODR, since 'parties connect at a distance,' it prevents 'carbon emissions resulting from travel.' Besides, using paper and the need for office space can be reduced significantly through ODR, decreasing the need to construct office buildings.⁵³ All of these aspects of ODR have a cumulative positive impact on the overall condition of the environment. Thus, it turns out that technology employed in the ODR process may significantly improve individuals' access to justice⁵⁴ for people who do not have adequate access to either ADR or justice processes⁵⁵ if compliance with 'access to justice standards' can be ensured.⁵⁶

A court-annexed ODR contributes to developing the quality of judicial processes, which helps a country attract Foreign Direct Investment (FDI), and thereby achieve SDGs too.⁵⁷ Although the World Bank discontinued its 'Ease of Doing Business Ranking' last 16 September 2021,⁵⁸ it has some relevance in promoting FDI in a country. The judicial performance of a country in enforcing contracts was one of the ten criteria upon which the Ease of Doing Business Ranking used to be prepared.⁵⁹ Some significant scores of this ranking depended on a country's court automation and alternative dispute resolution system.⁶⁰ Since a court-annexed ODR comes with court automation, ODR has some value in setting a country in a better global ranking in terms of business and investment climate.

2.2. Resolution of Commercial Disputes and Relevance of ODR

'Could an unreformed analogue dispute resolution system be really either sustainable or ethical in a world where everything else is obtained digitally?'⁶¹ Master of the Rolls concluded his

⁵⁰ Leah Wing et al. 'Designing Ethical Online Dispute Resolution Systems: The Rise of the Fourth Party' (n 19) 53.

⁵¹ *Ibid*, 57.

⁵² Noam Ebner and Colleen Getz, 'ODR: The Next Green Giant' (2012) 29 (3) Conflict Resol Q 283, 285.

⁵³ *Ibid*, 286.

⁵⁴ Anjanette H. Raymond and Scott J. Shackelford, 'Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case' (2014) 35 *Mich J Int'l L* 485, 511.

⁵⁵ Susan S Raines, 'Mediating in your pajamas: The benefits and challenges for ODR practitioners' (2006) 23 Conflict Resol Q 359, 367.

⁵⁶ Hibah Alessa, 'The role of Artificial Intelligence in Online Dispute Resolution: A brief and critical overview' (2022) 31(3) *Information & Communications Technology Law* 319, 342.

⁵⁷ Sekander Zulker Nayeem, 'Promoting FDI and SDGs through judicial development' (2019) The Daily Star, www.thedailystar.net/law-our-rights/news/promoting-fdi-and-sdgs-through-judicial-development-1775374, accessed 25 February 2023. Also see in https://openaccess.city.ac.uk/id/eprint/25633/1/Promoting%20FDI%20and%20SDGs%20through%20judicial%20development%20_%20The%20Daily%20Star.pdf, accessed 25 February 2023.

⁵⁸ World Bank's Statement to Discontinue Doing Business Report (2021), www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report, accessed 25 February 2023.

⁵⁹ Zulker Nayeem, *supra* note 57.

⁶⁰ *Ibid*.

⁶¹ Speech by the Master of the Rolls: London International Dispute Week 2022, www.judiciary.uk/speech-by-the-master-of-the-rolls-london-international-dispute-week-2022/, accessed 11 March 2023.

speech in the last year's London International Dispute Week with this question. This statement clearly depicts how important it is to transform the justice delivery system through digital means where the world generally and the commercial world in particular have been transformed and are continuously being transformed digitally. The way the world has moved and is consistently moving towards online, some dispute resolution experts believe that eventually, 'most dispute resolution processes will likely migrate online, and ODR will be relevant to almost every kind of dispute.'⁶² ODR, as observed earlier, has already proved its worth and efficacy in resolving private e-commerce disputes, including both B2C and B2B disputes.⁶³ Roberge et al. thoroughly conducted a feasibility study on developing an ODR model for fair and efficient resolution of commercial disputes arising from SMEs, where they concluded that if tailored carefully taking into consideration the challenges SMEs face relating to 'information, predictability, costs-delays and relationships', ODR can ensure access to commercial justice from a user-centric perspective.⁶⁴ However, we have yet to come across comprehensive research on how far ODR would be effective in resolving high-value commercial disputes. With the revolutionary growth and development of machine learning and AI, it is possible that over time high-value commercial disputes may also be resolved using sophisticated ODR platforms.

3. ODR IN THE CIVIL JUSTICE SYSTEM OF BANGLADESH

In Bangladesh's formal civil justice system, ODR is absent, and only ADR is there. Its presence is mainly in the form of mediation, especially court-connected mediation. Other forms of ADR, such as negotiation and conciliation, are not established within the formal civil justice system. Therefore, for Bangladesh, the definition of ADR has been narrowed down only to the 'court-connected' or 'court-annexed' mediation. In this part, firstly, the emergence and operational aspects of ADR will be discussed in the context of Bangladesh. Then, there will be a discussion on how far it has progressed toward ODR.

3.1. Emergence and Functioning of ADR in the Civil Justice System of Bangladesh

Bangladesh adopted the concept of court-annexed mediation for resolving family disputes through the Family Courts Ordinance, 1985 (FCO).⁶⁵ After successfully piloting the mediation scheme in three family courts of Dhaka, the government was convinced that ADR might also work for non-family disputes.⁶⁶ Accordingly, provisions on non-mandatory court-annexed ADR were incorporated in CPC in 2003 for resolving disputes of civil nature through mediation,

⁶² Katsh and Rule, *supra* note 20, 339.

⁶³ More than 400 million disputes have been reported to be resolved through ODR mechanisms since 2000. See Ricardo Vieira de Carvalho Fernandes, Colin Rule, Taynara Tiemi Ono and Gabriel Estevam Botelho Cardoso, 'The Expansion of Online Dispute Resolution in Brazil' (2018) 9(2) *International Journal for Court Administration* 20, 22.

⁶⁴ Jean-Francois Roberge and Veronique Fraser, 'Access to Commercial Justice: A Roadmap for Online Dispute Resolution (ODR) Design for Small and Medium-Sized Businesses (SMEs) Disputes' (2019) 35 *Ohio St J on Disp Resol* 1, 60.

⁶⁵ Ordinance No XVIII of 1985 which came into force on 15.06.1985 vide SRO No. 239-L/85, dated 29 May 1985.

⁶⁶ In two years, three pilot family courts in Dhaka successfully mediated 1322 family cases and recovered BDT 4,85,00,309/- from the defendants. See Justice Mustafa Kamal, 'Judicial Settlement and Mediation in Bangladesh' (2004), paper read at the third working session of The Conference on Alternative Dispute Resolutions organized by the International Centre for Alternative Dispute Resolutions, New Delhi and Bombay High Court in Bombay on 20-21 November 2004.

conciliation, and arbitration.⁶⁷ Similarly, repealing the Artha Rin Adalat Ain, 1990 (Money Loan Court Act), a new legislation was enacted in 2003 keeping provision on settlement conference (that too was mediation in covert form) for resolving money loan disputes relating to banking and non-banking financial institutions.⁶⁸ Subsequently, mediation provisions under both legislations were made compulsory through separate legislative amendments in 2012 and 2010, respectively.⁶⁹ More recently, CPC went through yet another amendment in 2017, empowering the court to refer any civil disputes to the District Legal Aid Officers (DLAO)⁷⁰ for trying mediation.⁷¹

FCO is the first legislation in the post-independence period of Bangladesh that contained provisions of court-annexed mediation in the form of 'compromise or reconciliation' both at the pre-trial and the post-trial stage of a family suit. Under this law, every family court is bound to initiate a 'compromise or reconciliation' process after determining 'the points at issue between the parties'.⁷² If the mediation initiative fails to result in any settlement, the court continues to hear the case and record evidence.⁷³ After the trial's conclusion, the court must attempt again for a compromise or reconciliation between the parties.⁷⁴ If the mediation at either stage succeeds, the court passes a compromise decree reflecting the terms of such compromise or reconciliation.⁷⁵ On the contrary, the court pronounces judgment if no settlement is reached.⁷⁶

As far as court-annexed mediation under CPC is concerned, the court itself is statutorily bound to initiate mediation with the end of settling the dispute in the suit or it may, for undertaking settlement efforts through mediation, refer the dispute either (i) to DLAO, or (ii) to the engaged lawyers of the parties, or (iii) to the parties themselves where no lawyer is engaged, or (iv) to a mediator from the panel of mediators nominated by the District Judge.⁷⁷ Where the dispute is referred to the engaged pleaders, they, upon consultation with the parties, must appoint one or more suitable person(s) to serve as a mediator for effecting settlement.⁷⁸ The parties are at liberty to agree on the fees and the procedure to be followed in the course of mediation, but when a dispute is referred to DLAO by the court, he determines the procedure and does not charge any fee for mediation.⁷⁹ When the court refers a dispute to the parties or their engaged pleaders, they must inform the court within 10 days from the date of reference whom they have chosen as the mediator, failing which the court appoints one within the next seven days.⁸⁰ The mediation must be concluded within 60 days with a possibility of 30 days

⁶⁷ The Code of Civil Procedure (Amendment) Act, 2003.

⁶⁸ The Artha Rin Adalat Ain, 2003 (Act No. VIII of 2003).

⁶⁹ See the Code of Civil Procedure (Amendment) Act, 2012 (Act No. XXXVI of 2012) and the Money Loan Court (Amendment) Act, 2010 (Act No. XVI of 2010).

⁷⁰ They are judges of Bangladesh Judicial Service appointed on deputation under Section 21A of the Legal Aid Act, 2000, among others, to administer and oversee the government legal aid services in a district, to provide legal advice, and to conduct mediation upon reference from the court or of his own initiative.

⁷¹ The Code of Civil Procedure (Amendment) Act, 2017.

⁷² FCO, s 10(3).

⁷³ *Ibid.*, s 12.

⁷⁴ *Ibid.*, s 13(1).

⁷⁵ *Ibid.*, s 14.

⁷⁶ *Ibid.*, s 13(2).

⁷⁷ CPC, 1908, s 89A(1).

⁷⁸ *Ibid.*, s 89A(2).

⁷⁹ *Ibid.*, s 89A(3).

⁸⁰ *Ibid.*, s 89A(4).

extension by the court.⁸¹ After that, the mediator or DLAO informs the court in writing about the outcome of mediation, in which case if the mediation results in a compromise, the terms of the compromise are reduced into writing, having the signatures of the parties as executants and the mediator or DLAO and the pleaders as witnesses.⁸² Thereupon, the court passes a compromise decree confirming the submitted compromise agreement.⁸³ If mediation initiated by the court itself results in compromise, the court also passes a compromise decree reflecting the terms of compromise between the parties.⁸⁴ On the contrary, if the mediation initiative fails, the court proceeds with the case as if there had been no decision to mediate or reference for mediation.⁸⁵ The legislature has also kept the mediation window open even when the disputes are pending before the appellate court.⁸⁶ Regarding mediation under the Money Loan Court Act, 2003 (MLCA), a procedure similar to mediation under CPC is prescribed.⁸⁷ Additionally, the Act has also created scope for mediation after the conclusion of the trial but before the pronouncement of judgment⁸⁸ and even at the appellate⁸⁹, revision⁹⁰ and execution⁹¹ stage of a suit.

DLAO holds a vital position within the mediation scheme of the country. Apart from cases sent by the court, DLAO also conducts mediation of his/her initiative under the Legal Aid Services (Legal Advice and Alternative Dispute Resolution) Rules, 2015 (the ADR Rules) if both parties consent to mediation.⁹² The ADR Rules empowered the DLAO to receive and mediate any dispute before deciding its eligibility for legal aid.⁹³ The ADR Rules have detailed provisions on the *modus operandi* of a mediation session,⁹⁴ dos and don'ts on the part of DLAO⁹⁵ and the procedure to be followed when mediation results in settlement.⁹⁶ In case of a successful dispute resolution, the DLAO will reduce the settlement terms in writing in an agreement where the parties put their signatures as executants, their representatives as witnesses, and the DLAO as chair of mediation.⁹⁷ When a settlement agreement is signed and sealed by DLAO upon execution by the parties and their representatives, it becomes a valid legal document admissible as evidence in any legal proceeding.⁹⁸ The available facts and figures suggest that the mediation scheme administered by DLAO is consistently getting popular across the country. For instance, some 36,095 people were benefited through mediation, more than BDT 310 million was recovered, and 1,101 cases were conclusively resolved as a direct

⁸¹ *Ibid.*

⁸² *Ibid.*, s 89A(5).

⁸³ *Ibid.*

⁸⁴ *Ibid.*, s 89A(6).

⁸⁵ *Ibid.*, s 89A(7).

⁸⁶ *Ibid.*, s 89C.

⁸⁷ MLCA, s 22.

⁸⁸ *Ibid.*, s 23.

⁸⁹ *Ibid.*, s 44A.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, s 38.

⁹² Legal Aid Services (Legal Advice and Alternative Dispute Resolution) Rules, 2015 (ADR Rules) r 4.

⁹³ ADR Rules, rr 3, 4.

⁹⁴ *Ibid.*, rr 6-10.

⁹⁵ *Ibid.*, rr 11, 14, 15.

⁹⁶ *Ibid.*, r 13.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, r 16.

consequence of mediation in the fiscal year 2021-2022, whereas the figure was 28,513 people, BDT 248 million, and 872 cases respectively in the previous fiscal year.⁹⁹ The court-annexed mediation scheme of Bangladesh is unique in the following senses:

- (i) No fee is charged at all for mediation sessions led by the court or DLAO;
- (ii) Court fees paid are returned when the dispute is successfully settled through mediation;¹⁰⁰
- (iii) In case of a successful mediation, the court directly recognizes the settlement agreement and passes a compromise decree;
- (iv) The court directly recognizes and enforces a compromise decree;
- (v) If a judge-led mediation initiative fails, the case is heard by another court of competent jurisdiction;¹⁰¹
- (vi) No parties to the compromise can file an appeal or revision challenging the order or decree passed as per the settlement agreement.¹⁰²

3.2. Court-connected ODR System: Making a Case for Its Introduction in Bangladesh

As noted earlier, ODR is still absent in the justice system of Bangladesh. Nevertheless, it can be claimed that it is gradually taking its way into the justice system if we consider two recent developments: first, the decision of the government to digitize the judiciary, and second, the responses of the government and the Supreme Court during COVID 19 pandemic and their general acceptance by the legal community and the litigants.

First, the government and the Supreme Court proposed digitizing the judiciary in 2017 at the cost of BDT 2,878 crore (28,780 million), which was supposed to be implemented through a five-year project from June 2020 to June 2024.¹⁰³ The project, however, was not started and remained stalled for several years. Although there is no available document regarding the project in the public domain, officials both at the Ministry of Law and the Supreme Court confirmed that the project is still in the development phase and the Project Proposal will be submitted before the Executive Committee of the National Economic Council soon. The e-judiciary project, among others, seeks to develop enterprise architecture for the judiciary, develop enterprise resource planning software, establish a virtual private network for the judges, and establish 1400 e-court rooms across the country.¹⁰⁴ Since the e-judiciary project

⁹⁹ See Annual Reports 2020-2021 and 2021-2022 http://www.nlaso.gov.bd/site/view/annual_reports/-, accessed 09 February 2023.

¹⁰⁰ CPC, s 89A(11).

¹⁰¹ *Ibid.*, s 89A(9).

¹⁰² *Ibid.*, s 89A(12).

¹⁰³ <https://archive.dhakatribune.com/bangladesh/2021/08/11/high-court-inquires-about-progress-in-establishing-e-judiciary>, accessed 12 July 2022.

¹⁰⁴ Strategic Plan of Supreme Court of Bangladesh 2017-2022, (2017) 41-43. https://supremecourt.gov.bd/resources/contents/Strategic_Plan.pdf, accessed 09 February 2023. Also see Shaikh Md Mujahid Ul Islam, 'Access to Justice through E-judiciary' (*The Daily Sun*, 8 May 2019) www.daily-sun.com/printversion/details/390722/Access-to-Justice-through-Ejudiciary, accessed 12 July 2022.

is being developed now and there is a court-connected ADR system in Bangladesh, the ODR system is generally integrated and implemented with the development of this project.

Second, as there was no use of technology in the justice system of Bangladesh, the judiciary was in a stalemate situation during the COVID-19 pandemic. The government and the Supreme Court responded to this situation by activating the courts to a limited extent through virtual hearings. When the entire country, including the judiciary, went through a lockdown to restrict the spread of the coronavirus, the government promptly responded by introducing a new law upon a request from the Supreme Court.¹⁰⁵ Undeniably, COVID-19 broke out as a deadly threat but took the justice system through trials and tribulations that were otherwise not possibly conceivable in a country like Bangladesh. Although the law had given broader scope to conduct trial and inquiry or hear appeals or applications or arguments or take evidence or pass orders or judgment through a virtual platform,¹⁰⁶ it was mainly utilized for hearing and disposing of matters of urgent nature like bail applications, police remand, and injunction petitions. Just in two and a half months between 10 May 2020 to 04 August 2020, 147,339 bail petitions were heard, and 73,083 prisoners were released, including 854 children in conflict with the law from correction centers across the country.¹⁰⁷ It is true that the application of the Act and the Practice Directions issued thereunder by the Supreme Court were limited to urgent matters like bail and injunction hearings; still, the responses demonstrate the willingness and the readiness to embrace changes in ADR and, thereby, a turn to ODR.

4. IMPLEMENTATION OF ODR IN OTHER JURISDICTIONS

In order to understand how court-annexed ODR functions in practice, let us consider three examples from three different jurisdictions: the Civil Resolution Tribunal of British Columbia (where court-annexed ODR schemes have been in operation for some years now), the ODR program of the State of Utah, and the proposed Online Court of the UK (which is in the process of starting operation).

4.1. Civil Resolution Tribunal of British Columbia (BC)

The Civil Resolution Tribunal (CRT) of British Columbia, Canada, is the first-ever operational court-annexed ODR system in the world launched in 2016 that currently deals with vehicle accident claims, small claims not exceeding \$5000, disputes relating to strata property, and disputes arising from societies and cooperative associations.¹⁰⁸ The system works in four distinct stages where neither party is required to retain a counsel nor are they required to attend any court hearing.¹⁰⁹

- (a) The first stage of the system involves initiating claims. In doing so, the claimant is required to explore an intelligent system called 'Solution Explorer,' which guides them

¹⁰⁵ The Use of Information Communication Technology by Court Act, 2020 (UICCTA 2020).

¹⁰⁶ *Ibid.*, Preamble.

¹⁰⁷ Justice M Imman Ali, 'Virtual Justice Delivery System- A Reality Due to Covid-19 and Endeavours to Uphold the Rule of Law' (2021) 20 *Journal of Judicial Administration Training Institute* 1, 6.

¹⁰⁸ Civil Resolution Tribunal, <https://civilresolutionbc.ca/>, accessed 14 July 2022.

¹⁰⁹ *Ibid.*

through different questions and answers with different tools and templates in making the appropriate claim. Once a claim is made, an 'official CRT Dispute Notice' is generated for service to the respondent. After the service of notice, if the respondent replies through the system, it takes them to the second stage of negotiation. However, if they do not respond within the deadline, the claimant may ask for a default decision from CRT that can be enforced like a court order.¹¹⁰

- (b) Once the respondent replies to the claim, the negotiation phase kicks in, and the parties are allocated a 'secure negotiation area' in the system where they can confidentially start a negotiation about the claim. If the negotiation results in an agreement, a CRT case manager follows up about the settlement that can be turned into a formal agreement or order enforceable in court, in which event fees paid are reimbursed to the parties.¹¹¹
- (c) If the negotiation fails, a dispute resolution expert called CRT Case Manager is assigned who helps the parties reach a consensual settlement through facilitation. The case manager contacts the parties through email or phone and may have separate or joint sessions. If the facilitation results in a settlement, the settlement terms are turned into 'an official consent resolution order' enforceable in court.¹¹²
- (d) At the final stage, if the facilitation process fails to result in any agreement, a tribunal member, a legal expert in the field, adjudicates the dispute and makes a final decision based on law, evidence produced, and arguments advanced by the parties. The tribunal member may also take oral submissions through phone or video conference if necessary. This process has a nominal fee, and the decision made is binding upon the parties and enforceable like a court order.¹¹³

The CRT system is available for use anytime from anywhere. The latest statistics show that 'Solution Explorer' was used 37,903 times between April 2021 to March 2022, and 5,309 applications were received, 5,163 disputes were closed, including 2,265 through settlement and 1,289 through final decision.¹¹⁴

4.2. ODR Programme of the State of Utah

The court-connected ODR in Utah was started in 2018 for small claims valued at USD 11,000 or less to dispense 'simple, quick, inexpensive, and easily accessible justice'.¹¹⁵ This system was developed under the direct supervision of the Utah Supreme Court with the following model: 'Educate and evaluate, gather information, provide a meaningful settlement opportunity, and then either the parties settle, or the judicial officer makes a ruling. However, they can

¹¹⁰ How do I make a claim? <https://civilresolutionbc.ca/help/how-do-i-make-a-claim/>, accessed 14 July 2022.

¹¹¹ What is negotiation? <https://civilresolutionbc.ca/help/what-is-negotiation/>, accessed 14 July 2022.

¹¹² What is facilitation? <https://civilresolutionbc.ca/help/what-is-facilitation/>, accessed 14 July 2022.

¹¹³ What is a final decision? <https://civilresolutionbc.ca/help/what-is-a-final-decision/>, accessed 14 July 2022.

¹¹⁴ CRT Annual Report 2021-2022 <https://civilresolutionbc.ca/wp-content/uploads/CRT-Annual-Report-2021-2022.pdf>, accessed 09 February 2023.

¹¹⁵ Deno Himonas, 'Utah's Online Dispute Resolution Program' (2018) 122(3) *Dick. L. Rev.* 875, 881.

always prefer an appeal if the parties do not like the ruling'.¹¹⁶ The Utah ODR system works in different phases,¹¹⁷ such as:

- (a) ODR process starts once a small claims case is filed with the court clerk through an affidavit stating his claim. The plaintiff must register into the ODR system within seven days of filing his claim.¹¹⁸ After service of summons, the defendant must register into the ODR system within 14 days from the date of service, failing which he risks having a default judgment against him.¹¹⁹
- (b) Once both parties register into the ODR system, a trained facilitator is appointed within 7 days from the date of registration in order to 'guide the parties through ODR and to assist them in settling the dispute.' The facilitator explains the process, evaluates the claims and defences, provides advice, sets timelines for negotiation, and communicates with the parties jointly or privately to facilitate settlement.¹²⁰
- (c) As the negotiation process starts, the parties are guided through the process of some simple questions and answers. They try to negotiate the claim through a secure chat room of the ODR system where they may exchange information, make claims or counter-claims, and upload documents. There are online resources that may provide further information to the parties. Thus, if the negotiation results in an amicable resolution, there will be a system-generated settlement document for review by the facilitator and the parties. They may confirm or edit the settlement document or create one and electronically sign it. Finally, the parties may ask the court to enter a judgment based on the settlement terms.¹²¹
- (d) If the parties fail to reach a consensual settlement through the ODR process, the facilitator will notify the court to fix a trial date, and the claim will be taken up for hearing by the court between 7 to 21 days from the date of notification. To that end, the facilitator will prepare a trial document after consulting both sides and submit it before the trial date. Unless, for some reason, the court requires a live hearing, the parties may attend it electronically. If the parties do not like the trial outcome, they have de novo right to appeal before the district court.¹²²

4.3. Online Court of the UK

In the face of outrageous costs, extreme delays, and procedural complexities, especially for low-value claims (£25,000 or less) in England and Wales, the ODR Advisory Group constituted by Civil Justice Council with Professor Richard Susskind as Chair was first to 'call for radical

¹¹⁶ *Ibid.*, 882.

¹¹⁷ Standing Order No. 13, Supreme Court of the State Utah, Issued on 19 September 2018 (revised on 27 January 2021) cited in Himonas, *supra* note 115, 882-894.

¹¹⁸ *Ibid.*, para. 2.

¹¹⁹ *Ibid.*, para. 4.

¹²⁰ *Ibid.*, para. 6.

¹²¹ *Ibid.*, para. 7.

¹²² *Ibid.*, para. 8.

change' by way of activating ODR through Online Court (OC).¹²³ The Group recommended a three-tier process: online evaluation, online-facilitation, and online adjudication.¹²⁴ These were further explained and elaborated at length with some modifications by Lord Justice Briggs in his interim and final reports.¹²⁵ Lord Briggs indicated that these courts are not 'mere digitisation of an existing court' but 'entirely new' ones meant to be used 'by litigants without lawyers' that he termed 'people's court'.¹²⁶ So, the three stages involved in the proposed Online Court of the UK are as follows:

- (a) After logging into the OC Service Portal, system software will guide the litigant through a process of analysis through a question-answer that will ultimately generate an online document like 'particulars of claims' to be confirmed by the litigant. The system will then email the document with the attached evidence to the defendant. The defendant will also go through a similar process to produce his defence. The purpose of this stage is to ascertain 'whether there is a dispute' at all and prepare a concise statement of claim or defence with evidence in the electronic form to be understood by the parties and the court and to be used during negotiation and trial.¹²⁷
- (b) The second stage is focused on conciliation and case management by some 'experienced, judicially trained and supervised' neutrals called Case Officers who will engage with the disputing parties and attempt to settle the dispute consensually. This process should be conducted online, but Case Officers may also use the telephone when necessary.¹²⁸
- (c) The final stage is the determination of the dispute by the judge. There is no default assumption that the trial must be held face-to-face. Instead, the judge may adjudicate either based on the documents on record, through telephone, or live streaming. The process is 'less adversarial, more investigative, and by making the judge his or her own lawyer'.¹²⁹

4.4. Normative Framework of a Court-annexed ODR Developed so far

Although the court-annexed ODR described above has been developed in three different jurisdictions, the overall operational framework of ODR seems almost identical. Considering the developments in those jurisdictions, the normative structure of a court-annexed ODR scheme in any country can be understood. Having analysed the abovementioned ODR models, several norms of a court-annexed ODR can be presumed. First, the nature of the suit is an important consideration. Only small or low-value claims are settled through the ODR system in all three jurisdictions. Second, a smart, separate, and dedicated online filing system (e-

¹²³ Civil Justice Council's Online Dispute Resolution Advisory Group, 'Online Dispute Resolution for Low-Value Civil Claims' (February 2015) 3-4.

¹²⁴ *Ibid.*, 19-20.

¹²⁵ Lord Justice Briggs, 'Civil Courts Structure Review – Interim Report' (December 2015), paras. 6.8-6.15 and Lord Justice Briggs, 'Civil Courts Structure Review – Final Report' (July 2016), paras. 6.108-6.114.

¹²⁶ Lord Briggs Interim Report, *supra* note 125, 6.3-6.5.

¹²⁷ *Supra* note 125: Lord Briggs Interim Report, 6.8-6.12; Lord Briggs Final Report, 6.108-6.111.

¹²⁸ *Supra* note 125: Lord Briggs Interim Report, 6.13; Lord Briggs Final Report, 6.113.

¹²⁹ *Supra* note 125: Lord Briggs Interim Report, 6.14-6.15; Lord Briggs Final Report, 6.114.

platform) must be developed to register the claims and progress with the proceedings. In BC, Utah, and the UK, smart systems called 'Solution Explorer', 'ODR System', and 'OC Service Portal' is being used respectively for such purposes. After registering the claim with the ODR system, some automatic systems serve the notice along with the particulars of claims to the respondent/defendant. Unlike traditional litigation, the particulars of claims and defence will not be written in plain language; instead, those are generated automatically following a guided filing and defending system. In this guided filing system, the parties answer pre-determined questions that ultimately generate their claims and defence and narrow down the disputed issues. In support of their claims and defence, there should be some system for uploading relevant documents. After the exchange of claim and defence, and disclosure of documents, the parties may settle without the intervention of any expert from the court. Third, a dispute resolution expert or trained facilitator or a judicially trained officer intervenes in the ODR proceeding if the parties fail to reach any settlement. Such an officer (human mediator) facilitates the parties to reach a settlement. In doing so, the officer corresponds with the parties through phone or virtual platform. If the mediation results in a settlement, the settlement terms are turned into an agreement, and the parties can sign it electronically. Such an agreement carries finality and is enforceable in court. If the mediation fails, the case goes to the court for a final determination using ICT tools.

5. PROSPECTS AND CHALLENGES IN APPLYING ODR NORMS IN THE CIVIL JUSTICE SYSTEM OF BANGLADESH

The preceding discussion reveals that an ODR system primarily follows three to four distinct but interrelated norms, such as determining suitable cases for ODR, initiating online filing and defence system with a secure negotiation facility, involvement of a trained mediator when and where necessary and final determination by the court. The following paragraphs will briefly demonstrate some prospects and challenges that may intervene while implementing ODR in the civil justice system of Bangladesh.

5.1. Prospects of Court-annexed ODR in Bangladesh

First, the fundamental difference between the civil justice system of Bangladesh and the three jurisdictions under evaluation (BC, Utah, and the UK) is the nature of the civil suits. In the latter case, relief is usually claimed in the form of pecuniary damages either for causing injury or breaching any contract or commercial commitments etc. On the contrary, litigations in Bangladesh are mainly of two types- money suits and suits other than money. Following the footsteps of other jurisdictions, money suits can similarly be brought under the domain of the ODR system. Since money suits include suits arising from commercial contracts, any suit regarding commercial transactions can also be brought under the ODR system. However, suits other than money, especially land litigations, are hard to bring under the ODR system because of their complex nature. In many cases, these suits may involve hundreds of parties¹³⁰ with

¹³⁰ The first author has the experience of judging some partition suits where there were more than 800 defendants.

many documents, some of which are as old as 40/50 or even a hundred years.¹³¹ Such complex cases may not be suitable for settlement through ODR or even ADR. In this connection, Mahbub surveyed to sort out the suits of civil nature suitable for ADR.¹³² He interviewed 43 judges of different civil courts and 41 civil court practitioners from 12 districts of Bangladesh on a set of questionnaires. The questions were in the MCQ form, having four options: 25% or 50% or 75%, or 100%.¹³³ In the end, he produced the following table and concluded that not all suits of civil nature are suitable for ADR:¹³⁴

Suitability of ADR with Civil Suits of Different Natures

Suits suitable for ADR	Suits moderately suitable	Suits not suitable for ADR
a. Specific performance of contract	a. Rectification of instruments	a. Declaration
b. Partition	b. Declaration of title with consequential relief	b. Recovery of possession
c. Dower	c. Redemption	c. Injunction
d. Maintenance	d. Pre-emption under statutory laws	d. Cancellation of instruments
e. Appointment of guardian		e. Rescission of contract
f. Restitution of conjugal rights		f. Easement rights
g. Dissolution of marriage		g. Pre-emption under Muslim law

The table shows that suits mainly relating to contract (including commercial transactions) and matrimonial matters have been considered suitable for ADR. Because these cases, perhaps, involve a limited number of parties and require the submission of a limited number of documents. For example, in a suit for dower, submitting only *Nikahnama*¹³⁵ could be sufficient. Similarly, in a suit for commercial transactions, the concerned contractual document could be sufficient. In addition, issues involved in these cases are generally fewer and narrower. Although the study classified suit for partition as suitable for ADR, in reality, it depends upon the level of complexity and volume of a particular suit. If the suit involves only the members of a unitary family and a limited property, it seems suitable for ADR. But if it is a partition suit of hundreds of acres of estate between hundreds of parties, it is difficult to be settled through ADR. Although empirical research is necessary to categorise the particular nature of cases suitable for ODR, it can initially be concluded that, like the other jurisdictions, money suits

¹³¹ In most land litigations, the parties are required to prove a strong 'chain of title' by submitting records of rights, registered deeds, rent receipts, and other documents. The first record of right in Bangladesh is the Cadastral Survey record, popularly known as the CS record, which was prepared from 1890 to 1940 under the Bengal Tenancy Act, 1885. The parties usually need to submit all documents starting from the CS record to prove the chain of title.

¹³² Dr. Sk. Golam Mahbub, *Alternative Dispute Resolution through Civil Courts in Bangladesh* (BIAC, Dhaka 2019) 30-80.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, 80.

¹³⁵ *Nikahnama* is a form describing the details of a marriage contract maintained at the Office of Marriage Registrar in Bangladesh.

including suits arising out of commercial transactions and suits of a less complex nature (as discussed above) in Bangladesh have prospects of settlement through the ODR system.

Second, currently, there is no online filing system in Bangladesh. As said earlier, the government has been actively considering starting the e-judiciary project, and establishing e-courts are within the plan. Unlike the UK, this project has not included any 'guided filing system' yet¹³⁶ which usually help generate and narrow down the particulars of claims, defence, and issues. There are perhaps several reasons for not including a guided filing system at this initial stage of digitization. One, for guiding the parties through some structured questions and answers, the legal principles for deciding a particular case need to be settled first. For settling these principles, research on the particular nature of the case and the decision of the Supreme Court are necessary. Two, parties usually claim several remedies under several substantive laws in most land litigations. For example, in a case for declaration of title, the plaintiff may claim a recovery of possession of the suit land that requires the court to frame and settle multiple issues of controversy. Hence, it is difficult to narrow down the issues just through questions and answers. Three, some legislative changes in CPC and Evidence Act, for instance, may be necessary to implement a guided filing system. However, the e-judiciary project is working to establish an online filing system (nothing in-depth has yet been disclosed) and an electronic system of service of notice to the defendants.¹³⁷ Short Message Service (SMS) through mobile phone and email will be electronic forms of service of notice to the other party for this purpose.¹³⁸ Tahura supported the use of mobile phones as a better solution than the current manual process.¹³⁹ Her support comes from the fact that the number of active mobile phone connections in Bangladesh is more than 15 crores (150 million). The number of internet users is more than nine crores (90 million), including more than eight crores (80 million) of mobile internet users, which make up 87.3 percent of the population.¹⁴⁰ Since the detailed thoughts and structure of the e-judiciary project have yet to be finalized, it is difficult to predict the prospect of a 'guided filing system' at this stage.

The e-judiciary project is meant for both civil and criminal courts. Although National Legal Aid Services Organisation (NLASO) is not within this project, DLAO has the most important role as a mediator. However, there is a recent and interesting development in the functioning of NLASO and its DLAOs. This development, to some extent, can be labeled as the initial stage of court-annexed ODR in Bangladesh. As discussed earlier, DLAO receives cases for mediation from two sources, firstly, from the civil courts under section 89A of CPC and secondly, through direct application of the litigants under the ADR Rules. To facilitate mediation in the latter case, the NLASO introduced an online application system requesting the DLAO of the concerned district to arrange mediation.¹⁴¹ The application portal proceeds

¹³⁶ The informal telephonic discussion was held on 23 August 2022 with a Subject Matter Expert working at the a2i (Aspire to Innovate) project in Bangladesh.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Tahura, *supra* note 41, 197.

¹⁴⁰ *Ibid.*, 196-97.

¹⁴¹ The online application system is available at <https://db.nlaso.gov.bd/Pages/OnlineApplications.aspx>., accessed 26 August 2022.

through three steps: preliminary information, the applicant's details, and the opposite party's details. The entire application needs to be completed through questions and answers. On the preliminary page, the applicant is asked to choose the nature and sub-nature of cases from a specified dropdown list. If the applicant has multiple claims, he can add those one-by-ones from that list. This system receives applications for all cases irrespective of their volumes and suitability for ADR. Although the application guides the applicant to choose some specific answers, it is not a kind of 'guided filing system' that generates particular of claims and narrows the dispute. It is instead an online application system to gather information about the dispute without processing them through software or machine learning tools. On the second and third pages, it asks for detailed information, including the means of correspondence (phone number and email) of the applicant and the opposite party. The application system also has the option of uploading documents in support of the applicant's claim and putting in an electronic signature. After receiving an online application, the DLAO registers the case in a cause list he maintains at his office. He sends notices to the parties, inviting them to a mediation session through postal service, SMS, phone calls, and email. The online functioning of DLAO has been developed till the stage of service of the summons, and the rest of the process continues manually.

Third, in all three jurisdictions (BC, Utah, and the UK), an experienced and judicially trained officer facilitates mediation later in the ODR process. Bangladesh is well-equipped to deploy such well-trained mediators. As said earlier, judges work as the mediator in court-annexed mediation. Additionally, DLAO being a Judge has the experience of presiding over the court for at least five years. These judge-mediators are also trained in computer literacy and information technology.¹⁴² Although virtual appearance at the mediation session has never occurred, it is not unfeasible in Bangladesh now. During the lockdown for COVID-19, the courts in Bangladesh were operational, although on a limited scale, over virtual platform using free Zoom and email.¹⁴³ Therefore, the mediators of court-annexed mediation in Bangladesh are judicially trained and technologically sound enough to conduct ODR.

If the above categorical discussion is considered as a feasibility study based on the norms of ODR, it can be noticed that Bangladesh's Judiciary has the prospect and necessary strength to start ODR, at least through the system of e-application to DLAO. Bangladesh has some small or low-value cases to be settled through ODR¹⁴⁴, its Legal Aid Office has partially started operating 'a kind of ODR application', it has a pool of experienced and trained judge-mediators, and it has already gone through an experience of operating online court during the COVID-19 pandemic. The problem is that all these developments have taken place sporadically. Hence, the virtual court system that started during COVID- 19 was not sustainable and returned to the manual system immediately in the post-pandemic period. Tahura observed insufficient time allocated for planning and preparing the virtual movement, and the resultant system that was

¹⁴² Computer literacy and information technology are within the training curriculum of the Judicial Administration Training Institute in Bangladesh. See https://jati.gov.bd/it_training_facility, accessed 26 August 2022.

¹⁴³ The first author of this article personally worked as a judge of the virtual court in the district of Tangail, Bangladesh.

¹⁴⁴ For example, the pending money loan cases are 21,243; family cases are 75,356, and cheque dishonour cases are 248,336 as on September 2022. See Bangladesh Supreme Court's Report on Case Statistics, *supra* note 4.

temporarily developed could have been more user-friendly.¹⁴⁵ Despite the criticisms, the virtual system received widespread support.¹⁴⁶

5.2. Challenges and the Way Outs

The prospects discussed above would be successful if Bangladesh could address some challenges. First, initiating massive research and contribution from the Supreme Court to classify low-value cases suitable for ODR is necessary. Similarly, efforts are also required while introducing a 'guided filing system' because this system will generate concise claims and defences through an online platform with AI enabled software and will serve as a filtering window. Consequently, the parties may feel that their access to justice is being narrowed down. Additionally, 'when it comes to innovation, there almost always will be resistance' for different reasons including uncertainty about the new system and risk of giving up the status quo.¹⁴⁷ Hence, a befitting 'response strategy' should be devised beforehand in anticipation of possible resistance. Further, apart from research and contribution, the mandate from the Supreme Court of Bangladesh will give credibility and authority to the process, which view is also supported by David Larson.¹⁴⁸

Second, achieving the capability to run ODR in a country like Bangladesh is a great challenge. Apart from the challenge of developing the relevant software and/or ODR platform, Tahura identified some other challenges to successfully implementing the technology-based justice system including deficiencies in technical infrastructure, shortage of technically competent personnel, and limited budgets for ongoing maintenance and operating costs.¹⁴⁹ She also mentioned that Bangladesh initiated several pilot projects that did not positively influence court proceedings; they all failed for various reasons.¹⁵⁰ Regarding technical infrastructure, Samad found that, in this era of technology, the civil courts across the country do not have computers and internet access, although the judges are well acquainted with modern technology.¹⁵¹ He identified the lack of proper technical infrastructure as one of the causes for the failure of a project introduced earlier for maintaining an online cause list at each court.¹⁵² However, equipping only the courts and DLAO with technical infrastructure is not sufficient to overcome the challenges; the judiciary needs competent personnel to operate the system too. There is no office of an IT officer in the district court. The staffs who operate the computers at the courts are simply typists. In the past, two digitization projects, namely, the 'online cause list pilot project' and 'witness deposition recording project,' were failed primarily due to a lack of skilled and technologically sound court staff.¹⁵³ There are some challenges from the perspectives of litigants and lawyers too. Although the common masses of Bangladesh increasingly use mobile phones and mobile internet, most of their techno-literacy is below the

¹⁴⁵ Tahura, *supra* note 41, 191.

¹⁴⁶ *Ibid.*

¹⁴⁷ Larson, *supra* note 34, 100.

¹⁴⁸ *Ibid.*, 100.

¹⁴⁹ Tahura, *supra* note 41, 198

¹⁵⁰ *Ibid.*

¹⁵¹ Md Atickus Samad, *Civil Justice System in Bangladesh: Status, Impediments and Accelerating Strategies* (unpublished PhD thesis 2017) Institute of Bangladesh Studies, University of Rajshahi, 151-52.

¹⁵² *Ibid.*, 152.

¹⁵³ Tahura, *supra* note 41, 198

level of filing an online ODR application that may be construed as ‘digital exclusion’.¹⁵⁴ The DLAO of the district Kurigram confronted the same problem when the NLASO introduced the online application system. He, thereafter, trained some employees of several Non-Governmental Organizations (NGOs) who assist the common people in lodging online applications.¹⁵⁵ NLASO also allows the concerned online application to be filled out through any media, including NGO staff, elected local representatives, government offices, and even Facebook.¹⁵⁶ In addition, people may use the local Union Digital Centre to avail of governmental services.¹⁵⁷ Despite the techno-illiteracy, litigants were found optimistic about acquiring the required knowledge once the technology would be incorporated into the court system. Like the litigants, some lawyers also suffer from techno-inertia. That is why, while attempts were made to adopt virtual hearings to dispose of bail petitions during the pandemic, the first protest came from the lawyers in Bangladesh.¹⁵⁸ Due to colossal protests, the Ministry of Law and the Supreme Court touted the virtual hearing as ‘temporary’ to adapt to the new normal.¹⁵⁹ Apart from the lawyer's protests, there were other limitations, such as the lack of uninterrupted electricity and high-speed internet connection.¹⁶⁰ Moreover, establishing and operating ODR needs a state budget. The current national budget allocates only 0.34 percent to the Bangladesh Judiciary, which needs to be revised to adopt the technology.¹⁶¹ Besides, expenses to implement the use of technology may vary over its lifecycles, including costs to development, purchasing, operation, maintenance, and management.¹⁶² Policymakers in Bangladesh usually focus on the initial expenses and do not reckon a long-term cost for ongoing system maintenance.¹⁶³ Observing Bangladesh Judiciary's digitalization trends, Tahura commented that Bangladesh had moved one step ahead and then two steps backward.¹⁶⁴ Such a trend is a big challenge to implementing ODR in Bangladesh.

As indicated earlier, there are issues relating to ‘digital exclusion’. It is true that technology has huge potential to administer quicker, cheaper and hassle-free justice; similarly it is also undeniable that ‘digital exclusion’ can also serve as a problem for a great number of people. The question is whether mass population of Bangladesh has the ability to navigate through a smart ODR system. Though there is no empirical study in the context of Bangladesh, a study conducted by JUSTICE in the context of the UK reveals that older people with less education or uneducated, socially vulnerable groups are more susceptible to exclusion.¹⁶⁵ Besides, there are questions relating to access to digital device and internet, digital skills,

¹⁵⁴ ‘Preventing Digital Exclusion from Online Justice’ (JUSTICE, April 2018) <https://justice.org.uk/our-work/assisted-digital/>, accessed 18 March 2023.

¹⁵⁵ An informal telephonic discussion was held on 23 August 2022 with the DLAO of the district of Kurigram.

¹⁵⁶ Online application (n 141).

¹⁵⁷ Union Digital Centre <https://a2i.gov.bd/publication/union-digital-centres/>, accessed 27 August 2022; See also Sekander Zulker Nayeem, Institutional barriers in accessing civil justice system (The Daily Star, 22 October 2019) www.thedailystar.net/law-our-rights/law-vision/news/institutional-barriers-accessing-civil-justice-system-1817101, accessed 27 August 2022.

¹⁵⁸ Tahura, *supra* note 41, 198.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, 199.

¹⁶¹ *Ibid.*, 198

¹⁶² *Ibid.*, 199.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*, 200.

¹⁶⁵ JUSTICE, *supra* note 154, 7-9.

confidence and motivation.¹⁶⁶ Richard Susskind commented that these ‘hard to reach’ people remain excluded from the traditional system too.¹⁶⁷ Yet, to reduce the ‘digital exclusion,’ Susskind supported the ‘assisted digital’ approach adopted in the courts of England and Wales.¹⁶⁸ To make sure their services ‘can be used by everyone’ they propose to help users through face-to-face assistance, a telephone service, and a web chat facility.¹⁶⁹ Users can complete paper forms too, which are sent to the court offices who then convert them into digital format.¹⁷⁰ In addition, practical help can come from the voluntary sector and from lawyers who provide *pro bono* services.¹⁷¹ Though we suggested that ‘digital exclusion’ in Bangladesh can be minimised to some extent with the help of Union Digital Centre and NGOs, the core initiative, however, must come from the government through more investment in installing ICT-driven court offices, providing technical staff support to the users, initiating skills development programmes and piloting.

6. CONCLUSION

This paper has explored the potential of integrating the ODR scheme as a gateway to Bangladesh's formal justice delivery system. Recognising the huge case backlog and the unsuccessful attempts of the authority to contain it, the authors of this paper found that ODR, if implemented successfully, can potentially bring positive changes in the process of administration of justice by ensuring cost and time-effective justice in Bangladesh. Examining ODR schemes in three different jurisdictions, the paper has tried to depict the normative framework of an ODR system that involves three to four norms. Starting with lodging complaints through the ODR platform, this system engages the disputing parties in the negotiation process initially by themselves and then under the supervision of a trained facilitator requiring the involvement of the court as a last resort.

We have noticed the potential of ODR in Bangladesh, but there are particular challenges too. On the one hand, we have experienced, skilled, and dedicated judges-mediators and DALOs who have successfully conducted virtual courts and mediation during the COVID- 19 pandemic. On the other hand, there are issues relating to designing and implementing the ODR system, selecting dispute types, allocating funds and receiving continued support for the project, establishing technical infrastructures, ensuring uninterrupted electricity and high-speed internet, staffing competent personnel, techno-literacy of the mass-population, and reducing ‘digital exclusion.’ Understandably, change in technology is rapid, complex, extensive, and ongoing.¹⁷² Hence, the new system should be carefully adopted and handled ‘with skill and competence’ so that it may not ‘frustrate efforts’.¹⁷³ Despite the challenges, COVID- 19 pandemic and judicial

¹⁶⁶ *Ibid.*, 38.

¹⁶⁷ Richard Susskind, *Online Courts and the Future of Justice* (OUP 2019) 218.

¹⁶⁸ *Ibid.*, 219.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Katsh and Rabinovich-Einy, ‘The Present and Future of Digital Justice and the “Moving Frontier of Injustice”’ (n 36) 172.

¹⁷³ Tahura, *supra* note 41, 204.

workforces in Bangladesh give the courage to be optimistic for ODR, and therefore, 'we should be seeking improvement rather perfection in modernizing our court systems.'¹⁷⁴

¹⁷⁴ Susskind (n 167) 220.