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MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

„ Alternative Dispute Resolution in Bhutan: Potential and Challenges from an Access to Justice Perspective “

verfasst von / submitted by
Tshering Pelden

angestrebter akademischer Grad / in partial fulfillment of the requirements for the degree of
Master of Laws (LL.M.)

Wien, 2018 / Vienna 2018

Studienkennzahl lt. Studienblatt /
Postgraduate programme code as it appears on
the student record sheet:

A 992 628

Universitätslehrgang lt. Studienblatt /
Postgraduate programme as it appears on
the student record sheet:

International Legal Studies

Betreut von / Supervisor:

Prof. Christina Binder

ACKNOWLEDGMENTS

First and foremost, I would like to express my appreciation to the Austrian Development Cooperation Agency (ADC) for funding this scholarship. Without this scholarship this master program would not have been possible. This master program has not only upgraded my qualification but also helped me learn a lot during my stay in Vienna. Also I would like to thank the Royal Court of Justice for nominating me for this master program and for their unvarying support and encouragement.

This thesis would not have been completed without the constant guidance and support of my supervisor, Professor Christina Binder. I would like to thank my supervisor for taking out time to help and guide me despite her busy schedule. I am grateful for all the comments and support. It was a privilege to be working under such a highly learned and supportive Professor. I would also like to thank our program manager Mrs. Luxon Claudia for her constant help and encouragement.

Without the moral support and constant encouragement from my family I would not have been able to complete this thesis. So I would like to thank them for being my support system and my source of inspiration. This master program and this thesis would not have been possible without them.

I would also like to thank my seniors and colleagues back home who have spared their invaluable time to go through my draft and give comments and for helping me with the materials.

Last but not the least; I would like to thank my cohorts. Without these people I would not have survived through this master program. Thank you for being my family away from home.

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List of Abbreviations

Art	Article
ADR	Alternative Dispute Resolution
UN	United Nations
ACC	Anti-Corruption Commission
CCPC	Civil and Criminal Procedure Code
Sec	Section
BNLI	Bhutan National Legal Institute
CDB	Construction Development Board
UNCITRAL	United Nations Commission for International Trade
NYC	New York Convention
GNH	Gross National Happiness

Chapter 1: Introduction

1.1. Overview

This chapter will state the research methodology, the aims and objective of the thesis and the research questions. It will then provide a brief introduction on the topic of the thesis, ‘Alternative Dispute Resolution (ADR) in Bhutan and its Potential and Challenges from an Access to Justice Perspective’. In the course of introduction, this chapter will explain the overall content of the thesis, followed by the definitions and types of ADR. Context will be drawn on to discuss negotiation, mediation, conciliation, arbitration, neutral evaluation and settlement conferences and their fundamental principles and distinctive features.

1.2. Research Methodology

The research methodologies used are Descriptive, Comparative and Analytical Methods. It is descriptive because it describes the provisions of ADR Act of Bhutan, 2013 as it is under the topic procedures and subject matter of ADR in Bhutan. It is Comparative to the extent that it compares ADR to adjudication. However, the most important methodology followed is the Analytical Method. The main focus of this paper is to critically analyze whether ADR has the potential to promote access to justice in Bhutan. The Analysis is derived from the data gathered from the survey conducted by the Bhutan National Legal Institute and the Construction Development Board Facilitation Centre.

1.3 Aims and Objectives

The Aim and Objective of this thesis is to study and analyze the potential of ADR in Bhutan from an access to justice perspective. In furtherance of the object, the paper will analyze whether ADR has helped in guaranteeing access to justice to the disadvantaged group of people where the courts have failed. The thesis will further probe into the current problems related to ADR in Bhutan and the ways to overcome such problems.

1.4. Research Question

Whether ADR has the potential to enhance Access to Justice in Bhutan?

While attempting to answer the research question the following questions will also be taken into consideration.

1. What is ADR and how did ADR system start in Bhutan?
2. What is access to justice and how can ADR mechanisms help in enhancing access to justice?
3. Why do the people in Bhutan prefer ADR over adjudication?
4. What are the problems associated to ADR in Bhutan and what can be done to solve such problems?

1.5. Structure of the thesis

The thesis is broadly divided into five chapters. The first chapter is the introduction. It will briefly discuss about ADR in general, definition and types of ADR. The second chapter titled ‘ADR from an access to justice perspective’ will discuss the meaning of access to justice, access to justice as a component of rule of law and as a basic fundamental human right. This chapter will also cover the challenges to access to justice and the potential of ADR towards overcoming such challenges.

The third chapter titled ‘ADR in Bhutan and its potential’ will be completely focused on ADR in Bhutan. This chapter will discuss the background and development of ADR in Bhutan, the existing laws related to ADR and the bodies responsible for ADR in Bhutan. It will also cover the different types of ADR, the procedure for the different ADR methods and the subject matters of ADR. The reasons why people in Bhutan prefer settling their disputes outside the courts are also discussed under this chapter. To answer the thesis question that is whether ADR in Bhutan has the potential to promote access to justice, an analysis is made from the statistics collected from various sources based on certain indicators.

The fourth chapter, ‘Problems with ADR in Bhutan’ will discuss the challenges which are the impediments to an effective ADR system. The last chapter will wrap up the paper with the concluding remarks along with some recommendations which would help to solve the problems mentioned under the former chapter.

1.6. Introduction

Justice is the basis and aim of every civilized society.¹ Therefore, the people have been pursuing the quest for justice. Every democratic state is obliged to grant access to justice to its citizens as it is regarded a vital component of rule of law² and a fundamental human right. Denial of access to justice would be an infringement of fundamental rights and it would cause injustice. Every individual is born with some human rights which includes right to access to justice and it has been guaranteed in the Constitutions of various countries of the world at the national level and it has also been guaranteed in different international and regional documents.³ The courts have been given the duty to ensure the protection of these fundamental rights and the delivery of justice to the people.⁴ However, because of some reasons the courts have failed to perform this duty and therefore, access to justice has become an empty promise.⁵ The reasons for such failure includes undue delay in litigation, backloging of cases in courts, high cost for litigation, procedural complexities, corruption in the judiciary, etc. The courts are supposed to ensure access to justice to every individual without any discrimination on the grounds of sex, caste, religion, etc but in reality things work differently. Only the rich and powerful people can get access to justice through the courts while the underprivileged ones are somehow denied access to justice because of their financial, intellectual and physical incapacity. Only those who are able to bear the expenses and have the capacity to litigate are able to approach the courts to redress their grievances while those who do not have the means to do it are not able to get access to justice. ADR system is the solution for such underprivileged people to avail access to justice. Many countries consider ADR as an imperative element of their judicial system.⁶ ADR consists of a variety of processes like mediation, arbitration, negotiation, conciliation, etc which helps the disputing parties to resolve their disputes amicably thereby preserving the harmony within the society and without having to follow the adversarial and formal judicial process.

¹ S.B. Sinha, 'ADR and Access to Justice: Issues and Perspectives'

<<http://www.tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf>> accessed 2 August 2018.

² 'United Nations and the Rule of Law' <<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice>> accessed 10 July 2018.

³ Mohammad Saidul Islam, 'Efficiency and Effectiveness of Alternative Dispute Resolution Schemes Towards the Promotion of Access to Justice in Bangladesh' (2011) 8 IIUC
<<https://www.banglajol.info/index.php/IIUCS/article/viewFile/20405/14120>> accessed 10 July 2018.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

The European Commission in its green paper ‘ADR in civil and commercial law’ stated that the problem of access to justice can be solved by the use of ADR mechanisms.⁷ According to the Commission the reasons behind the failure to guarantee access to justice are: the increasing volume of cases brought before courts, the lengthy proceedings, the high costs incurred during such proceedings and the complex and technical obscurity of the litigation procedure.⁸ These factors impede the delivery of an effective and timely access to justice.⁹ Bhutan has been practicing ADR mechanisms before the formal judicial system was introduced. People used to and still now, settle their disputes outside the courts with the help of third neutral parties. For the Bhutanese people the harmony in the community is very important, to them losing in the community is better than winning in the court. This paper will therefore focus on whether ADR system has the potential to enhance access to justice to the people of Bhutan. Also it will focus on the challenges to an effective ADR system and the recommendations which if implemented would help in overcoming such challenges.

1.7. Definition of ADR

ADR is an umbrella term which refers to a number of various processes or methods that can be used to resolve disputes amongst the parties, outside the traditional method of litigation. ADR can be defined as any method aside from adjudication, in which a neutral third party helps the disputing parties to resolve the issues in dispute.¹⁰ The Black’s Law dictionary defines ADR as “a process adopted to end a problem before taking legal action.” It is a voluntary choice made by the parties concerned and it usually involves a third party who is elected in order to ensure the neutrality of the process. According to *Hilmond Investments v CIBC*,¹¹

"Modern systems of alternative dispute resolution, commonly referred to as ADR, are designed to help parties solve disputes efficiently without resort to formal litigation and with a minimum of judicial interference."

⁷ Commission of the European Communities, ‘ADR in civil and commercial law’

<<https://eurlex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52002DC0196>> accessed 25 July 2018.

⁸ Ibid.

⁹ Ibid.

¹⁰ World Bank, ‘Settling Out of the Court’

<<http://documents.worldbank.org/curated/en/320121468337243521/pdf/678050VP00PUBL0Setting0out0of0court.pdf>> accessed 11 July 2018.

¹¹ *Hilmond Investments v CIBC* 1996 135 DLR (4th) 471 (1996, ONT Court of Appeal).

In short, ADR can be defined as the various means of settling disputes outside the courts without having to go through the usual legal procedures. In the recent years methods of dispute resolution such as arbitration, mediation and negotiation which are an alternative to adjudication have gained recognition and have started attracting the attention of most of the people. The reasons behind such popularity include the perception of the people that ADR methods are less expensive, more efficient, and it often leads to more satisfactory results than resolving disputes through litigation. There are many types of ADR methods varying from one country to another.

1.8. Types of ADR

There are different types of ADR namely, negotiation, mediation, conciliation, arbitration, neutral conferences and settlement conferences. Amongst the different types of ADR processes, mediation, arbitration and conciliation are the most commonly used methods.

1.8.1. Negotiation

The Department of Justice of Canada has defined negotiation as any form of direct or indirect communication between the conflicting parties whereby they talk about ways to resolve the dispute.¹² In every case, the parties always try negotiating as the first move to resolve a dispute therefore negotiation is the paramount mode of dispute resolution.¹³ This form of ADR can be utilized either to settle an already-existing dispute or to prepare the foundation for a future relationship.¹⁴ Every negotiation process is distinctive in its own way because one negotiation process will be different from another process, be it in terms of subject matter of the dispute or the number of participants involved or the features of the process used.¹⁵ Moreover, it can also be applied within the context of other ADR methods such as mediation, arbitration, settlement conferences, etc.

¹² 'What is negotiation?' <<http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/03.html>> accessed 19 July 2018.

¹³ Legal Information Institute, 'Alternative Dispute Resolution' <https://www.law.cornell.edu/wex/alternative_dispute_resolution> accessed 19 July 2018.

¹⁴ Ibid.

¹⁵ Ibid.

1.8.2. Mediation

In mediation, an impartial or neutral person who is called a "mediator" helps the parties to discuss the issues of dispute and to reach a mutual settlement thereby resolving the dispute.¹⁶ In this method, the mediator does not resolve the dispute but helps the parties to have a discussion so that they can reach a mutual and an amicable settlement themselves. Hence, the parties have control over the outcome of the dispute settlement. Mediation is mainly helpful in cases where the parties have a relationship which they do not want to ruin. Therefore, it is the most appropriate ADR method to resolve disputes arising between family members, neighbors or business partners.¹⁷ The mediator will listen to what the parties have to say and help them communicate with each other to reach an effective and an amicable settlement thereby not causing any damage to their prior relationship. However, if one of the parties is reluctant and not so keen to cooperate or compromise or if one of the parties has more advantage because of post and power over the other party then mediation is not suitable.¹⁸ For example mediation will not be effective in cases where a party has a history of abuse or victimization.¹⁹

1.8.3. Conciliation

In this process a neutral third party called the "conciliator" seeks concessions from the parties by meeting them individually and such concessions would in turn facilitate in settling the dispute.²⁰ A conciliator will have professional expertise through his or her experiences and have knowledge of the subject matter of the dispute so he or she will be able to give advice regarding the issues.²¹ However, it is important to remember that a conciliator does not make the decision; he or she just suggests options for resolution.²² The disputing parties can choose to resolve their dispute by conciliation voluntarily or in certain cases the court orders

¹⁶ 'ADR Types and Benefits' < <http://www.courts.ca.gov/3074.html> > accessed 19 July 2018

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ World Bank, 'Settling Out of the Court'

<<http://documents.worldbank.org/curated/en/320121468337243521/pdf/678050VP00PUBL0Setting0out0of0court.pdf>> accessed 11 July 2018.

²¹ 'Types of Alternative Dispute Resolution'

<http://www.courts.justice.nsw.gov.au/Pages/cats/courtguide/alternate_dispute_resolution/types_adr/types_adr.aspx> accessed 19 July 2018.

²² Ibid.

the parties to conciliate.²³ In some cases conciliation is a part of requirement under the terms of the contract.²⁴ It is different from arbitration and mediation because unlike arbitration, conciliation is not legally binding and unlike mediation where the mediator meets the parties together the conciliator meets them separately.

1.8.4. Arbitration

This process generally involves using a neutral or an impartial person called an “arbitrator” to make a decision regarding the outcome of the dispute.²⁵ The arbitrator hears arguments and evidence from both sides and then makes a decision determining the merits of the case. Arbitration, unlike other ADR methods, has binding force. Once the parties have agreed to arbitration process the arbitral award given by the tribunal is final and binding upon the parties. However, if any of the parties is not happy with the decision made by the arbitrator he or she can appeal to a court or higher authority but it will be difficult as it would require the party to point a particular problem with the decision (example biasness or unfairness).²⁶ Arbitration is mainly suitable for cases in which the disputing parties believe that a third neutral party should make a decision regarding the result of their dispute.²⁷ The parties’ intention should be to avoid the complex court procedure and expenses of a trial. It is also appropriate for resolving disputes which involves complex subject matter and the parties require a well trained arbitrator who has experience in the respective subject matter of the dispute.²⁸ But if the parties want to maintain control over their dispute resolution process then arbitration is not suitable.

Arbitration is different from the other ADR methods like mediation and conciliation. Some of the main differences are²⁹:

²³ Ibid.

²⁴ Ibid.

²⁵ World Bank, ‘Settling Out of the Court’
<<http://documents.worldbank.org/curated/en/320121468337243521/pdf/678050VP00PUBL0Setting0out0of0court.pdf>> accessed 11 July 2018.

²⁶ ‘Types of alternative dispute resolution’
<http://www.courts.justice.nsw.gov.au/Pages/cats/courtguide/alternate_dispute_resolution/types_adr/types_adr.aspx> accessed 19 July 2018.

²⁷ Ibid.

²⁸ ‘ADR: Types and Benefits’ <<http://www.courts.ca.gov/3074.htm>> accessed 19 July 2018

²⁹ Government of New South Wales ‘Types of alternative dispute resolution’
<http://www.courts.justice.nsw.gov.au/Pages/cats/courtguide/alternate_dispute_resolution/types_adr/types_adr.aspx> accessed 19 July 2018.

- a) Before the process starts, the parties to the dispute have to agree that the decision of the arbitrator will be binding and enforceable;
- b) There is a strong requirement from the parties to produce evidence and facts related to the dispute;
- c) The arbitrator can be a single individual or a group of individuals;
- d) The arbitrator is a specialist in the subject matter or has legal knowledge; and
- e) The arbitrator will make the decision instead of the parties at the end of the process.

Besides the above mentioned ADR methods, there are two other types of ADR methods, neutral evaluation and settlement conferences. Unlike the above mentioned ADR methods, these two are not used that often.

1.8.5. Neutral evaluation

In this process, there is a neutral third person called an “evaluator”. The disputing parties are both given an opportunity to present the case before the evaluator who then gives his or her opinion on the strengths and weaknesses of each party's submissions (evidence and arguments).³⁰ The evaluator gives suggestions to the parties which he or she feels, if used, can help the parties to resolve the dispute amicably. The suggestions given by the evaluator is not binding but still the parties consider such suggestions and opinion of the evaluator and use it as a basis to negotiate a settlement for their dispute because usually the evaluator is an expert in field of the subject matter of the ongoing dispute. ADR like neutral evaluation is most appropriate for cases which involve technical subject matter and related issues which require special expertise.³¹ If there are major personal or emotional obstacles or hindrances from the parties’ side, then neutral evaluation may not be suitable.

1.8.6. Settlement conferences

In settlement conferences there is a neutral third party who is called a “settlement officer.”³² In this method of dispute resolution the parties and their respective attorneys meet with the settlement officer and discuss the possible ways to resolve their dispute.³³ The decisions are

³⁰ ‘ADR: Types and Benefits’ <<http://www.courts.ca.gov/3074.htm>> accessed 19 July 2018.

³¹ Ibid.

³² Ibid.

³³ Ibid.

not made by the settlement officers; all they do is offer their help to the disputing parties.³⁴ They assess the strengths and weaknesses of the case before them and help the parties in negotiating a mutual and an amicable settlement for their dispute.³⁵ Such methods of settlement conference are appropriate for cases where settlement is just an alternative.

Besides the types, the scope of ADR also varies from one country to another. In some countries only a small center is occupied for the ADR system while in other countries it involves a whole wide network of large centers.³⁶ It can also be classified based on the disputing parties involved. Some ADR might be between:³⁷

- Two individuals; or
- An employee and employer or a management; or
- Investors and the state (investment arbitration); or
- An individual and the government.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ World Bank, 'Settling Out of the Court'
<<http://documents.worldbank.org/curated/en/320121468337243521/pdf/678050VP00PUBL0Setting0out0of0court.pdf>> accessed 11 July 2018.

Chapter 2: ADR from an Access to justice perspective– an appraisal

2.1. Overview

The introductory part comprising of the definition and the different types of ADR has already been explained in the previous chapter. This Chapter will focus on access to justice, as in how ADR can help in promoting and strengthening access to justice. Access to justice is every individual's right guaranteed to them under the Constitutions of their respective countries. However, there are many barriers obstructing the people from availing this right. Those barriers will also be discussed under this chapter. The main focus of this chapter will be on how ADR can help in overcoming such barriers and to enhance access to justice.

2.2. Access to Justice

During his talk on 'Justice in our courts and the challenges we face' at the Empire Club of Canada, Rt. Hon. Beverley McLachlin (Chief Justice of Canada) said,

*"The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical."*³⁸

In 1978, the term "access to justice" was coined by Mauro Cappelletti & Bryant Garth and according to them the expression 'access to justice' consisted of two distinct elements:

"First, the system must be equally accessible to all, and second, it must lead to results that are individually and socially just."³⁹ The first element, equally accessible system means any aggrieved party must be empowered to bring a claim before any court. Factors like procedural rules, litigation costs, availability of legal aid, or access to legal representation which obstructs an aggrieved party especially the poor and disadvantaged ones from approaching the court must be removed.⁴⁰ The legal system must be accessible to every

³⁸ 'Inspirational Quotes on Access to Justice'

<<http://www.courts.ca.gov/partners/documents/InspirationalQuotes.pdf>> accessed 19 July 2018.

³⁹ Stephen Mayson, 'Improving Access to Justice: Scope of the Regulatory Objective (2012) Legal Services Institute <<https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-dunn-2012-access-to-justice.pdf>> accessed 23 July 2018.

⁴⁰ Nathy Rass-Masson, 'Effective Access to Justice'

<[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596818/IPOL_STU\(2017\)596818_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596818/IPOL_STU(2017)596818_EN.pdf)> accessed 8 August 2018.

aggrieved party without any kind of discrimination. The second element means that the legal system must be directed towards achieving results that are individually and socially just.

The principle of access to justice is a significant component and a basic principle of rule of law.⁴¹ The term “access to justice” means the ability of any person to access or use the legal system to uphold their rights and interests notwithstanding their income or status.⁴² Access to justice is about “access to procedures for making rights effective through state-sponsored public and fair dispute resolution processes. It implies equal access to authoritative enforceable rulings and outcomes that reflect the merits of the case in light of relevant legal principles.”⁴³ The notion of access to justice generally refers to the various instrumentalities through which the people can approach the courts or other administrative agencies to redress their grievances and to seek justice in a competent and an effective manner. Besides improving an individual’s access to courts or other ADR mechanisms it also includes ensuring just and equitable outcomes.⁴⁴ In 1994, the Commonwealth Government appointed an Advisory Committee on access to justice.⁴⁵ According to the Committee access to justice basically involves three elements⁴⁶:

1. Equal access to legal service;
2. National equity; and
3. Equality before law.

Apart from the above mentioned elements, an effective remedy, equality of arms and the delivery of just and equitable outcome are other important elements of access to justice. If the remedy is not effective then there is no point even if one gets access to the court or other ADR bodies. The remedy is what matters to an aggrieved person. Equality of arms means giving equal opportunities to the parties to be heard and to address their grievances. This is

⁴¹ ‘United Nations and the Rule of Law’ < <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice> > accessed 10 July 2018

⁴² Texas Access to Justice Commission, ‘What is access to justice?’ < <http://www.texasatj.org/what-access-justice> > accessed 19 July 2018.

⁴³ Hazel Genn, *Judging Civil Justice* (CUP 2009)

⁴⁴ UNDP, ‘Access to Justice’ < <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ACCESSTOJUSTICEUNDP/PRACTICE/ENOTE.pdf> > accessed 23 July 2018.

⁴⁵ Mohammad Saidul Islam, ‘Efficiency and Effectiveness of Alternative Dispute Resolution Schemes Towards the Promotion of Access to Justice in Bangladesh’ (2011) 8 IIUC < <https://www.banglajol.info/index.php/IIUCS/article/viewFile/20405/14120> > accessed 10 July 2018.

⁴⁶ Ibid.

an important element of access to justice because only when the parties are treated alike and given same opportunities without any discrimination, justice will be done. As Cappelletti & Garth mentioned earlier, the legal system must lead to results that are individually and socially just. Access to justice is not just about getting access to the court or to ADR mechanisms but it also includes getting a just and an equitable outcome.

One must understand that access to justice does not necessarily mean that the aggrieved party has to approach the court and the case has to be heard in a court of law.⁴⁷ The aggrieved party can even seek redress through bodies like institutions for human rights or ombudsman.⁴⁸ Under the international and European human rights law, access to justice entrusts the states to warrant to every individual their right to approach the court or any alternative dispute resolution body to obtain a remedy for the violation of their rights.⁴⁹ Access to justice enables an individual to enforce his or her other rights and to claim remedy for the infringement of their rights, therefore it is an enabling right.⁵⁰

Access to justice is very important because people will not have their rights if the laws are not executed or applied and if justice is not accessible then there will be injustice.⁵¹ This can result in a negative impact on individuals and will ultimately result in affecting the society as a whole.⁵² Access to justice as explained above is a component of rule of law and it is a part of the fundamental Human Rights.

2.3. Access to Justice and Rule of Law

The World Justice Project which is an independent, multidisciplinary organization working towards the advancement of the rule of law worldwide defines rule of law as comprising of the four universal principles⁵³;

⁴⁷ European Union Agency for Fundamental Rights, 'Access to Justice' <<http://fra.europa.eu/en/theme/access-justice>> accessed 11 July 2018.

⁴⁸ Ibid.

⁴⁹ Handbook on European Law relating to Access to Justice' <https://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf> accessed 8 August 2018.

⁵⁰ Ibid.

⁵¹ 'Access to justice; Why is it important for citizens?' <<http://www.rightforeducation.org/all-topics/law-governance/access-to-justice/>> accessed 19 July 2018.

⁵² Ibid.

⁵³ World Justice Project, 'What is Rule of Law?' <<https://worldjusticeproject.org/about-us/overview/what-rule-law>> accessed 20 July 2018.

- a) Accountability;
- b) Just laws;
- c) Open Government; and
- d) Accessible and impartial dispute resolution.

Access to justice is one of the fundamental principles of the rule of law.⁵⁴ The lack of access to justice would prevent the people from exercising their rights and from fighting against discrimination.⁵⁵ Under the principle of rule of law, the deliverance and accessibility of justice should be impartial and non-discriminatory. The principle of rule of law emphasizes on the right of every individual to equal justice without any form of discrimination.⁵⁶ The states have the responsibility to ensure just, transparent, efficient, non-discriminatory and accountable services in order to promote access to justice for everyone.⁵⁷ “The independence of the judiciary and the impartiality and integrity of the judicial system are the important prerequisites which are necessary for upholding the rule of law.”⁵⁸ The principle of rule of law requires the government to make just and fair laws and to provide equal opportunities for the people to access the judicial system when their rights have been infringed. Under the Constitution of Bhutan, the Judiciary is given the responsibility to administer the principle of rule of law and to enhance access to justice. Art 21 of the Constitution states,

“The Judiciary shall safeguard, uphold, and administer Justice fairly and independently without fear, favor, or undue delay in accordance with the Rule of Law to inspire trust and confidence and to enhance access to Justice.”

In order to comply with the principle of rule of law it is important for the government to be able to provide efficient and timely access to justice. For an effective functioning democracy the principle of ‘rule of law’ and ‘access to justice’ are two essential and interlocked prerequisites. Getting equal and effective access to justice would result in a positive connection between citizens and the justice system and this would build peoples’ confidence in the justice system.

⁵⁴ United Nations, ‘Access to justice’ < <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> > accessed 20 July 2018.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

2.4. Access to Justice and Human Rights

Access to justice has been widely acknowledged as a basic human right as well as a means to defend the other human rights which has been accepted universally under the international standards.⁵⁹ It is considered a vital part of human rights because “*injustice anywhere is a threat to justice everywhere*”.⁶⁰ Every individual is born with some human rights which are guaranteed under the fundamental rights in the Constitution of their respective countries and access to justice is one such human right. In almost every democratic country throughout the world, the right to access to justice is recognized and guaranteed as a fundamental human right in their respective Constitutions. The Constitution of Bhutan confirms that the Government shall be a Democratic Constitutional Monarchy⁶¹ in which the fundamental human rights⁶² and freedoms⁶³ shall be granted and equality before law and equal protection of law⁶⁴ are ensured and the right to a fair trial is guaranteed to everyone. Moreover, under the regional and International covenant also these rights have been guaranteed. The Universal Declaration of Human Rights of 1948 states that everyone is entitled to all the rights and freedoms which have been enumerated in the declaration irrespective of their race, color, sex, etc.⁶⁵ The African Charter on Human and Peoples Rights, 1981 also states that every individual shall be equal in the eyes of law and shall be entitled to equal protection of law.⁶⁶ It is evident from all these articles under the various instruments that access to justice has been recognized and guaranteed as a fundamental human right at the national, regional and international level. If the people whose rights have been infringed or who has been wronged are not able to get access to justice then it would cause injustice to such people. It is the responsibility of every state and government to ensure that the people are able to get easy and effective access to justice to redress their grievances and to get justice.

⁵⁹ American Bar Association, ‘Human Rights and Access to justice’
<https://www.americanbar.org/advocacy/rule_of_law/what-we-do/human-rights-access-to-justice.html>
accessed 19 July 2018.

⁶⁰ Mohammad Saidul Islam, ‘Efficiency and Effectiveness of Alternative Dispute Resolution Schemes Towards the Promotion of Access to Justice in Bangladesh’ (2011) 8 IIUC
<<https://www.banglajol.info/index.php/IIUCS/article/viewFile/20405/14120>> accessed 10 July 2018.

⁶¹ Constitution of Bhutan (adopted 18 July 2008) art 1(2).

⁶² Constitution of Bhutan, art 7.

⁶³ Constitution of Bhutan, art 7(2).

⁶⁴ Constitution of Bhutan, art 7(15).

⁶⁵ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 2.

⁶⁶ African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 3.

Since access to justice has been recognized and guaranteed as a fundamental right at the national, regional and international level, it is a keystone of all judicial or quasi-judicial mechanisms of human rights protection.⁶⁷ “The Basic Principles on the Independence of the Judiciary, the Guidelines on the Role of Prosecutors, the Bangalore Principles of Judicial Conduct and the Basic Principles on the Role of Lawyers”⁶⁸ characterize the minimum standards and the prerequisites that are essential to ensure an equitable access to justice.

All the states have been giving special emphasis to access to justice. In 2012, the UN during its General Assembly meeting adopted Resolution 67/1 whereby the international community exhibited their aspiration to assure the right to equal access to justice to every individual, including the vulnerable groups.⁶⁹ In the same year, the General Assembly also adopted another Resolution A/C.3/67/L.34/Rev.1 on Human Rights in the Administration of Justice and this resolution placed special emphasis on access to support services and legal advice which are primarily linked to access to justice.⁷⁰ The Johannesburg Declaration on the Implementation of the Principles and Guidelines of the United Nations on Access to Legal Aid in the Criminal Justice System which was adopted on 26 June 2014 encouraged the participating States to include access to justice and legal aid as objectives in their development agenda hitherto.⁷¹

The right of access to justice is also strongly considered on the agenda of the international human rights stakeholders. Many of the inter-governmental organizations like UNDP, International Federation for Human Rights, International Commission of Jurists, and non-governmental organizations like World Justice Project have been working vigorously to promote access to justice. They have been focusing on providing legal empowerment and assistance to the disadvantaged people and improving women’s access to justice.⁷²

Despite such emphasis given to access to justice at national, regional and international level it is still difficult to avail the right to access to justice. The courts are given the responsibility

⁶⁷ ‘Access to Justice and Human Rights’ <<http://fmdh-2014.org/en/acces-a-la-justice-et-droits-de-lhomme/>> accessed 8 August 2018.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

to guarantee the right to access to justice but there are many challenges hindering this access, especially for the destitute and the underprivileged groups. Such challenges will be explained under the next topic.

2.5. Challenges to Access to Justice

The legal system in every country provides its people the possibility to seek and obtain justice when their rights have been infringed and also provides a forum for redress when they have been wronged.⁷³ Therefore, every individual turns to the legal system of their respective countries to address issues like domestic violence, divorce, discrimination, and other issues.⁷⁴ But getting an easy and proper access to justice is not easy. Access to justice, despite being a right guaranteed to every individual is not easily accessible. There are certain obstacles in the way of access to justice. The obstacles will be explained hereunder.

2.5.1. Delay

Just as the age old saying states “justice delayed is justice denied” if there is no timely justice it is effectively the same as having no justice at all.⁷⁵ In almost every country one of the main factors for injustice is the delay in the judicial system which prevents timely delivery of justice. The courts take a lot of time (more than a year in most of the cases) to solve a case and to get a judgment pronounced. Sometimes, the cases go on for years and by the time the judgment is rendered the need for it is even over.⁷⁶ Some of the probable reasons for delay in the courts could be procedural complexities, increasing number of cases, etc. One of the main barriers to access to justice is the undue delay in the judicial system.

2.5.2. Costs

Access to justice is a right and it should not be denied as stated in the Magna Carta, “*To no one will we sell, to no one will we deny, or delay right or justice.*”⁷⁷ Every Constitution grants an individual the right to be treated equally and the right to equal protection of law without

⁷³ Texas Access to Justice Commission, ‘What is access to justice?’ < <http://www.texasatj.org/what-access-justice>> accessed 19 July 2018.

⁷⁴ Ibid.

⁷⁵ Justice delayed is justice denied < https://en.wikipedia.org/wiki/Justice_delayed_is_justice_denied> accessed 12 July 2018.

⁷⁶ K.M. Hassan, ‘ Alternative Dispute Resolution’ Bangladesh Institute of law and International Affairs (BILIA), p. 133

⁷⁷ Clause 40, Magna Carta.

any discrimination. However, in practice only the rich are able to get access to justice. It is not easy to get access to the courts of law because it would involve huge amount of money including the court fees, lawyers' fee, and other expenses which will be incurred from the day the case is filed till the day the judgment is rendered. And as already explained above a case basically take years to be decided so one can imagine how much it would cost till then. For the rich people it is not a problem since they can afford it. It is a problem for those underprivileged people who cannot afford all these expenses. Therefore, the cost factor makes it difficult to ensure equal access to justice to everyone.

2.5.3. Procedural Complexities

The court procedures are complicated for the layman and also it is not static, it keeps on changing.⁷⁸ Usually people do not have much knowledge about the legal system and the procedures so it creates problem for them when they approach the courts with their grievances. They are unable to understand how things work in the courts, so in most of the cases they are hesitant to approach the courts. Especially in developing countries like Bhutan, educated people might be able to understand the procedure by reading the procedures but the literacy rate is only 64.9%⁷⁹ which leaves the remaining 35.1% of the population illiterate. For the remaining 35.1% it will be really difficult to understand the procedure and this makes them reluctant to approach courts. Therefore, procedural complexity is another hindrance to access to justice.

2.5.4. Backlogging of Cases

In most of the countries, the courts have set a certain time goal within which they plan to resolve the cases but under certain circumstances they are not able to do so. So backlog cases are such cases that the courts have not been able to decide within the specified time period that they themselves have set.⁸⁰ Backlog cases have become a serious issue in every judicial system. Every single day more number of cases is filed in the courts compared to the number of cases disposed off. The number of backlog cases is increasing every single day in the

⁷⁸ Clarkekiernan Solicitors, 'Civil law and procedure is complex' < <http://clarkekiernan.com/civil> > accessed 12 July 2018.

⁷⁹ Index Mundi, Bhutan Literacy < <https://www.indexmundi.com/bhutan/literacy.html> > accessed 12 July 2018.

⁸⁰ All Answers Ltd. 'Supreme Judiciary and the Backlog of Cases' <<https://www.lawteacher.net/free-law-essays/constitutional-law/supreme-judiciary-and-the-backlog-of-cases-constitutional-law-essay.php?vref=1>> accessed 12 July 2018.

courts. As a result the victim has to wait for years to get justice.⁸¹ These backlog of cases usually results in irksome delays in the adjudicating process. Therefore, backlogging of cases is another barrier which prevents a person from getting an effective and timely access to justice.

2.5.5. Corruption in Judiciary

The United Nations Development Programme and the U4 Anti-corruption Resource Centre stated that corruption in the judicial system is a major obstacle which bars an individual from getting access to justice.⁸² According to a survey conducted in 2013 by Transparency International (an anti-corruption organization) which covered 95 countries, globally one in four people admitted of bribing a court official.⁸³ In Bhutan, there are accusations of some court officials taking bribes.⁸⁴ The Anti-Corruption Commission (ACC) has forwarded a number of such bribery cases to the Chief Justice for further investigation and in few cases the judiciary has convicted some court officials.⁸⁵ Compared to other people those people who know or who can pay bribes to the court officials are always on the advantageous side. Usually the poor people are the ones who suffer injustice. Therefore, corruption is ruining the judicial system and is one of the major obstacles to access to justice.

These are some of the major challenges or barriers to access to justice. There are other obstacles too like non-availability of legal aid, lawyers' economic interest in the litigation, no separate courts for different subject matters, collapsing infrastructure, congestion in courts and prisons, lack of knowledge, lack of accountability, culture of impunity and diminishing confidence of the people in the effectiveness and competence of the administration of justice.⁸⁶

⁸¹ Ibid.

⁸² UNDP, 'Corruption remains a major stumbling block for justice sector reforms' <<http://www.asia-pacific.undp.org/content/rbap/en/home/presscenter/pressreleases/2016/04/08/corruption-remains-a-major-stumbling-block-for-justice-sector-reforms-undp.html>> accessed 12 July 2018.

⁸³ CMI, 'Reduce judicial corruption and improve access to justice for all' <<https://www.cmi.no/news/1698-reduce-judicial-corruption-and-improve-access-to>> accessed 12 July 2018.

⁸⁴ Dr. Tilman Hoppe, 'Judicial Integrity Scan Report'(2015) <<https://www.acc.org/bt/adb-oecd/sites/default/files/jisr.pdf>> accessed 6 August 2018.

⁸⁵ Ibid.

⁸⁶ Wahab Shittu, 'The Challenges of Access to Justice' <<https://guardian.ng/opinion/the-challenges-of-access-to-justice>> accessed 12 July 2018.

2.6. Potential of ADR towards Access to Justice

The development of ADR system is a crucial step towards an appropriate administration of civil justice, especially in developing countries like Bhutan.⁸⁷ ADR has been successful in opening the door to justice to the people irrespective of their caste, sex, class, etc., where the courts of law have failed.⁸⁸ Through the various methods of ADR people are able to resolve their disputes with an amicable settlement. When people go to court, they are aware that they are going to win all or lose all but when they opt for ADR they know that they may not get all that they want, but they will not lose everything either.⁸⁹ It is basically a win-win situation for both the parties unlike in case of litigation where it is inevitable for one party to win and the other to lose. In case of litigation the win-lose situation often destroys future relationship between the parties.⁹⁰ Whereas in case of ADR, which is a win-win situation for both the parties it not only resolves the dispute harmoniously but also safeguards the parties' future relationship.

When the parties approach the courts of law they have to follow the procedure set by the courts but in ADR they can avoid the formal process of the court. The parties and their appointed arbitrators or mediators can set the procedure themselves and settle for a process which is in the best interest for both the parties.⁹¹ They maintain the control over the process. If the parties face difficulties with technical issues arising out of the dispute they also have the choice to assign or appoint any expert as the third neutral party depending on the subject matter and the requirement of the dispute.⁹² This way, parties can escape all sorts of procedural and technical complexities. It will also boost the confidence of the parties which they usually lack when approaching the courts. Especially the rural populations will have better access to justice through the ADR system compared to litigation as it is conducted by people whom they can trust and in the language that they can understand, and also the

⁸⁷ Mohammad Saidul Islam, 'Efficiency and Effectiveness of Alternative Dispute Resolution Schemes Towards the Promotion of Access to Justice in Bangladesh' (2011) 8 IIUC
<<https://www.banglajol.info/index.php/IIUCS/article/viewFile/20405/14120>> accessed 10 July 2018.

⁸⁸ Ibid.

⁸⁹ Jitendra N. Bhatt, 'A Round Table Justice through Lok Adalat (Peoples Court) - A vibrant ADR in India' (2002) 1SCC 11

⁹⁰ Mohammad Saidul Islam, 'Efficiency and Effectiveness of Alternative Dispute Resolution Schemes Towards the Promotion of Access to Justice in Bangladesh' (2011) 8 IIUC
<<https://www.banglajol.info/index.php/IIUCS/article/viewFile/20405/14120>> accessed 10 July 2018.

⁹¹ Ibid.

⁹² P.C. Rao, *Alternative to Litigation in India*, (Universal Law Publishing Co. Pvt. Ltd. New Delhi), p.24

decisions are made in accordance to the rules which is known to all the people in the community.⁹³

In terms of ADR proceedings it is possible for the dispute to be resolved even in a single sitting which means the time and the energy of the parties will be saved and also the cost incurred will be minimized.⁹⁴ The settlement of disputes through ADR will also help in remedying the problem of crowded docket of cases in the courts. Another important plus point of ADR is the absolute maintenance of confidentiality. Privacy emphasizes human dignity and it is a basic human right.⁹⁵

In litigation the losing party is never satisfied so he will appeal and this chain of appeal and revision will never let the dispute get completely disposed off. On contrary, when a mutual settlement is reached the dispute is completely disposed off with very less chances of revival.⁹⁶ The parties have the discretion to withdraw the suit at any time from the courts and opt for a settlement through ADR and the decision from such proceeding will have the same weight-age as a judgment.⁹⁷ This will gain the confidence of the parties and will result in recognition of such methods by the parties. Also in the situation of armed conflict, because of the failure of the formal court system ADR often becomes more significant as they can play a vital role in the stabilization and reconciliation process in the post-conflict areas.⁹⁸ People can get better access to justice through ADR in such areas.

Because of the above mentioned advantages, the various ADR methods also promote the maximum participation of the people irrespective of gender, age, caste, religion, etc. Therefore, these advantages of ADR will enhance and strengthen the access to justice which the ordinary legal system fails to provide at times.

⁹³ Dr. Tilmann J. Roder, 'Informal Justice Systems: Challenges and Perspectives'
<<https://worldjusticeproject.org/news/informal-justice-systems-challenges-and-perspectives>> accessed 19 July 2018.

⁹⁴ Mohammad Saidul Islam, 'Efficiency and Effectiveness of Alternative Dispute Resolution Schemes Towards the Promotion of Access to Justice in Bangladesh' (2011) 8 IIUC
<<https://www.banglajol.info/index.php/IIUCS/article/viewFile/20405/14120>> accessed 10 July 2018

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Dr. Tilmann J. Roder, 'Informal Justice Systems: Challenges and Perspectives'
<<https://worldjusticeproject.org/news/informal-justice-systems-challenges-and-perspectives>> accessed 19 July 2018.

Chapter 3: ADR in Bhutan and its potential

3.1. Overview

Unlike the previous chapters which were quite general, this chapter will be completely focused on ADR in Bhutan. It will cover the background and development of ADR in Bhutan, the existing laws related to ADR, the bodies responsible for ADR in Bhutan, the different types of ADR, the procedure for the different ADR methods and the subject matters of ADR. The reasons why people in Bhutan prefer settling disputes outside the courts will also be discussed. An analysis will be drawn from the statistics collected from various sources to demonstrate that ADR has the potential to promote access to justice in Bhutan.

3.2. Background and development of ADR in Bhutan

Bhutan is a small landlocked country and is located on the southern slopes of the eastern Himalayas between two giant countries, China and India. It has a total population of approximately 7,79,666 people.⁹⁹ Since the first body of laws in Bhutan was codified only towards the end of 1950s, before that, the Bhutanese resolved their disputes mostly through mediation. One can therefore say that ADR is not a new concept in Bhutan. The history of ADR goes way before 1950s. Since the eighth century, the informal systems of dispute resolution were being practiced in Bhutan. The “negotiation of a border dispute between Sindhu Raja, ruler of Bumthang region and *Naoche*, King of a neighboring Kingdom in India by Guru Padmasambhava in the 8th century may be considered as the earliest recorded mediation process in Bhutan.”¹⁰⁰ Guru Padmasambhava arranged a meeting between the two kings to resolve their dispute and was eventually successful in settling the dispute. The mediation was held at a place called Nabji-korphu-Lhakhang (*mNah-sbis-dkor-phug Lhakhang*) in Trongsa.¹⁰¹ The two kings erected a stone pillar (*rDo-ring*) at the venue as a symbol of the successful mediation.¹⁰² Since then the concept of *Nangkha-Nangdri*, (Bhutanese terminology for mediation) as a form of informal dispute resolution mechanism or

⁹⁹ ‘Population and Housing Census of Bhutan’ 2017

<<http://www.nsb.gov.bt/publication/files/pub9wt9959wh.pdf>> accessed 10 August 2018.

¹⁰⁰ Tshering Wangchuk, ‘Mechanism To Resolve Future Commercial Dispute In The Region’ (2016).

¹⁰¹ Ibid.

¹⁰² Tshering Wangchuk (n 100).

ADR has been in practise and it has become an essential part of our Bhutanese custom and culture. Also the first King, Gongsar Ugyen Wangchuck earned international acclamation and respect for his exemplary mediation skills when he successfully mediated the territorial disputes between the Chinese Tibetans and the British and prevented a war.¹⁰³

The Bhutanese have always preferred to resolve their disputes outside the court through mediation rather than going to the court of law. ADR is not an unfamiliar practice in Buddhism and to the Bhutanese legal system.¹⁰⁴ The system of *Barmi*¹⁰⁵ – where the ordinary people resolve the problems of ordinary people, without involving the lawyers and other legal professionals is widely practiced in Bhutan. The embedded Buddhist value of “*the winner begets hate*” has been a fundamental foundation to boost compassion and harmony amongst the people in the Bhutanese society.¹⁰⁶ The age old concept of dispute resolution through mediation and reconciliation between conflicting parties outside the courts through the formal legal process has played an important and vital role since the 8th century. Even after the institution of the formal legal system and the establishment of the Court system in the early 1960s, mediation was still the cornerstone of dispute resolution in Bhutan.¹⁰⁷ The concept of ADR started developing and gaining more popularity with time, especially after the enactment of the Civil and Criminal Procedure Code (CCPC)¹⁰⁸ in 2001. In line with the provisions of the CCPC, the courts encouraged the people to resolve their disputes through negotiations. Under the CCPC the parties were given the liberty to opt to settle their disputes outside the courts through mediation either before or after instituting the suit in the court at any stage of the proceedings.¹⁰⁹ The adoption of the Constitution of Bhutan in 2008 was a major step towards the development of ADR in Bhutan. Article 21 Section 16 of the Constitution states,

“Parliament may, by law, establish impartial and independent Administrative Tribunals as well as Alternative Dispute Resolution Centres”.

¹⁰³ Michael Aris, *Raven Crown: Origins of Buddhist Monarchy in Bhutan* (Serindia Publications, 2005)

¹⁰⁴ Tshering Wangchuk (n 100).

¹⁰⁵ Mediator for mutual settlement

¹⁰⁶ Tshering Wangchuk (n 100).

¹⁰⁷ Bhutan National Legal Institute, ‘Mediation Training Impact Assessment’ (2016).

¹⁰⁸ Civil and Criminal Procedure Code of Bhutan (entered into force 23 July 2001) (‘CCPC’).

¹⁰⁹ CCPC, Sec 150

As a result the Parliament enacted and adopted the Alternative Dispute Resolution Act (ADR Act)¹¹⁰ in 2013 with the objective to encourage people to resort to alternative resolution of disputes through arbitration and negotiated settlement. The ADR Act facilitated the establishment of the Alternative Dispute Resolution Centre to administer the ADR processes and to achieve the objective of the Act. The Act lays down the procedure of arbitration and negotiated settlements.

Another major step towards the development of ADR in Bhutan is the establishment of the Bhutan National Legal Institute (BNLI). BNLI is a judicial training institute and was established under the Judicial Service Act of Bhutan, 2007 with the mandate to “create forum for legal and judicial discourse as well as to provide research support services to the judicial personnel for greater efficiency, fairness, access and productivity.”¹¹¹ The institute also provides assistance to bring about progress in the court administration and strives to create an environment for a litigant friendly justice system.¹¹² BNLI has been taking a lot of initiatives with the objective to promote mediation and with the ulterior motive to promote access to justice. In 2012, under the visionary and dynamic leadership of the honorable President of BNLI, Her Royal Highness Princess Sonam Dechan Wangchuck, the Institute has undertaken a comprehensive mediation training program for the local leaders.¹¹³ The main objective behind conducting such training program was to build up, revive and institutionalize the practice of mediation in Bhutan and to take justice nearer to the doorsteps of the people.¹¹⁴ The Institute has not only been organizing trainings but also has been actively and vigorously educating the public on the substantive and procedural laws of Bhutan. The Institute has been functioning actively with utmost effort to make access to justice to the public as accessible, easy and convenient as possible. Mediation has gained recognition and is widely used by the people in Bhutan to resolve their disputes. And as for the arbitration, the Construction Development Board (CDB) has been administering the arbitration proceedings in disputes arising out of contracts in construction businesses. The CDB

¹¹⁰Alternative Dispute Resolution Act of Bhutan (adopted 25 February 2013, entered into force 14 March 2013) (‘ADR Act’).

¹¹¹ ‘Bhutan National Legal Institute’ <<http://www.bnli.bt/index.php/about-us/vision-mission/>> accessed 15 July 2018.

¹¹² Ibid.

¹¹³ Bhutan National Legal Institute (n 105).

¹¹⁴ Ibid.

maintains their own list of arbitrators and has framed their own procedures and set of rules. The ADR Act mandated the establishment of a Centre for the ADR which should be the main body responsible to provide ADR related services but it was not established until this year. Earlier this year the Centre has been established and the Chief has also been appointed so this is also a major step towards the development of ADR in Bhutan.

All these steps undertaken by the government and the concerned Institutions have paved the way for the development of ADR in Bhutan. The report of the survey conducted by the BNLI on the mediation impact assessment and the stats of the cases resolved by CDB through arbitration which has been analyzed in the next chapter of this paper will help to demonstrate that ADR is developing in Bhutan and it has been effective in promoting access to justice to the people.

3.3. Existing laws related to ADR in Bhutan

The following are the legislations and the regulations which are related to ADR in Bhutan.

i) Civil and Criminal Procedure Code (CCPC), 2001

Chapter 23 of the CCPC (Adjudication without proceedings) deals with negotiated settlement. Section 150 of the CCPC grants the parties the liberty to take the assistance of a *Chimi, Gup, Chipon, Mang-mi or Barmi* (all these people are from the same community as the parties), at any stage of the proceedings, to resolve their dispute and to reach a mutual and an amicable settlement of a civil case in accordance with the requirement of the CCPC. In civil cases, it is completely up to the parties whether they want to seek the help of a *Jabmi* or not, to proceed with the attempt for a negotiated settlement.¹¹⁵ Section 150.2 of the CCPC allows the parties to request the Court for adjournment in case they wish to make an attempt to resolve their dispute through negotiated settlement. If the parties are able to reach a mutual settlement then an agreement is drawn and it is signed by the mediator and the concerned parties, affixed with a legal stamp and then submitted to the court.¹¹⁶ After receiving the agreement the Court grants the parties a time period of ten days to raise any objection with regard to the validity or the terms of the agreement.¹¹⁷ If the objection is found legitimate and

¹¹⁵ CCPC, Section 150.1

¹¹⁶ CCPC, Section 150.3

¹¹⁷ CCPC, Section 150.6

reasonable then the court can nullify the agreement. The parties can request the court to nullify the agreement if they feel that the agreement is not in their own interest. The reason behind the ten days time frame is to ensure that the agreement was made voluntarily and without any form of coercion or intimidation. If the agreement is nullified then the proceedings will resume. Along with the parties the court can also declare an agreement null and void if such agreement is inconsistent with any existing laws of the country and thereafter resume hearing.¹¹⁸

ii) Alternative Dispute Resolution Act, 2013

The ADR Act was enacted by the Parliament of the Kingdom of Bhutan on 25th February, 2013 with the objective to encourage the people to resolve their disputes through ADR methods like arbitration and negotiated settlement. Another objective is to recognize and enforce the arbitral awards and the result of the negotiated settlements.¹¹⁹

The ADR Act in total consists of 13 chapters and altogether 182 articles. It is quite similar to the neighboring country India's Arbitration and Conciliation Act, 1996 as well as the ADR statutes of other countries.¹²⁰ The ADR Act regulates both arbitration and negotiated settlement which is used as a collective term for mediation and conciliation.

The first Chapter covers some of the basic introductory provisions, and the second chapter mentions about the establishment of the Bhutan Alternative Dispute Resolution Centre (Centre), which is "an independent and non-governmental body".¹²¹ A Chief Administrator is appointed for a period of five years by the National Judicial Commission as the head of the Centre. The subsequent chapters regulate arbitration (including both the domestic and international commercial arbitration) and negotiated settlements. All the provisions of the Act are based on the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law.¹²² The Model was adopted on 21st June 1985 and later amended in

¹¹⁸ CCPC, Section 150.8

¹¹⁹ ADR Act, Preamble

¹²⁰ Morek Rafal, 'ADR at the Foot of the Himalayas' (2012) <<http://mediationblog.kluwerarbitration.com/2012/07/09/adr-at-the-foot-of-the-himalayas/>> accessed 15 July 2018.

¹²¹ Ibid.

¹²² 'UNCITRAL Model Law on International Commercial Arbitration' <https://en.wikipedia.org/wiki/UNCITRAL_Model_Law_on_International_Commercial_Arbitration> accessed 15 July 2018.

2006. It is not binding but the legislators usually take the model law as a reference and incorporate it into their domestic law.¹²³

The Act covers the following:

- Preliminary (Chapter I);
- Bhutan Alternative Dispute Resolution Centre (Chapter II);
- General provisions (Chapter III);
- Composition of arbitral tribunal (Chapter IV);
- Jurisdiction of arbitral tribunal (Chapter V);
- Conduct of proceeding (Chapter VI);
- Interim measures (Chapter VII);
- Arbitral award (Chapter VIII);
- Termination of arbitral proceedings (Chapter IX);
- Recourse against arbitral award (Chapter X);
- Recognition and enforcement of arbitral awards (Chapter XI);
- Negotiated Settlements (Chapter XII); and
- Miscellaneous (Chapter XIII)

iii) Geog Yargay Tshogchung Chathrim, 2002

According to Article 11(15) of the Geog Yargay Tshogchung Chathrim 2002,¹²⁴ the *gup* (elected head of a *gewog*¹²⁵) has the duty to mediate and conciliate disputes of a minor civil nature which has been referred to him or her by the people in the *gewog*. The same article also empowers the *gup* to delegate this responsibility to mediators or conciliators of good standing in the community. In practice, the *gup* often appoints a *tshogpa* (elected

¹²³ Ibid.

¹²⁴ Gewog Yargay Tshogchung Chathrim (adopted in 2002, entered into force on 22nd July 2002).

¹²⁵ An administrative division.

representative of a *chiwog*) to mediate disputes at the village/*chiwog* level. The *tshogpa* is the initial point of contact for mediation in most of the *chiwogs*. The *gewog* office is notified only when the dispute is of a more serious nature and the *tshogpa* feels that it needs higher degree of formality or when the mediation at the *chiwog* level fails to resolve the dispute.¹²⁶

iv) Construction Arbitration Facilitation Centre Arbitration Rules of Procedure (CAFC Arbitration RoP), 2016

After acceding the Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹²⁷ which is commonly known as the New York Convention, Bhutan enacted and adopted the ADR Act in 2013. The ADR Act mandated the establishment of an ADR Centre but the Centre was not operative. So in 2015, during the 93rd Lhengye Zhungtshog (Council of Ministers) sessions, the government appointed the CDB as an interim institution to facilitate arbitration to resolve disputes arising out of matters related to construction till the Centre become operative.¹²⁸ Accordingly, the CDB drafted the CAFC Arbitration RoP in 2016. The CAFC Arbitration RoP is divided into four parts.¹²⁹ Part I (General Provisions) includes communication, choice of language, waiver of right to object, rule of confidentiality, venue of the arbitration, cost and fees of arbitration, disclosure of documents and other evidences, interim measures, appointment of experts and applicable laws. Part II (Constitution of Arbitral Tribunal) lays down the procedure for the appointment and termination of arbitrators. Part III (Arbitration Procedure) covers the process for the submission of dispute to arbitration which includes notice of arbitration and registration with the centre and also the process for the arbitration proceedings like the submission of claims and counter-claims, oral hearings, closure of hearings and the making of the arbitral award. The last part, part IV (Post award process) deals with the setting aside of the award and recognition and enforcement of awards where the award is not set aside.

¹²⁶ Duffy J, 'Nangkha Nangdrik in the Land of the Thunder Dragon: Psychology, religion and the potential of mediation in the Kingdom of Bhutan' (2002) *Asian Journal of Comparative Law*, p1-27

¹²⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 1958, entered into force 7 June 1959).

¹²⁸ 'Construction Arbitration Facilitation Centre Arbitration Rules of Procedure 2016'
<https://www.google.at/search?q=%27Construction+Arbitration+Facilitation+Centre+Arbitration+Rules+of+Procedure%27+2016&rlz=1C1CHBD_enAT782AT782&oq=%27Construction+Arbitration+Facilitation+Centre+Arbitration+Rules+of+Procedure%27+2016&aqs=chrome..69i57.340j0j7&sourceid=chrome&ie=UTF-8> accessed 17 July 2018.

¹²⁹ Ibid.

v) Bench Book for Judicial Process

The Royal Court of Justice published the Bench book on the 6th of November 2008 to be used as an instrument to help the courts, judges, registrars and the other judicial staff in the advancement of the cause of justice.¹³⁰ It ensures the fulfillment of the prerequisites of Rule of Law like greater procedural fairness, better competency and also contribution in the establishment of a transparent, fair and an effective judicial system.¹³¹

Section 9 of the Bench Book for Judicial process deals with the preliminary hearing, which is the first hearing after the registration of a case in the court of law. According to Section 9(s) the Bench has the responsibility to inform the parties that at any stage of the proceedings, it shall be open to them to avail mutual settlement in civil cases in accordance with section 150 of the CCPC and that they may request for an adjournment in accordance with section 150.2 of the CCPC. This is to inform the parties that they can still try to resolve the dispute outside the court through negotiation or mediation. Litigation is more time consuming and more costly than settling disputes through ADR mechanisms therefore, the courts also encourage the parties to settle their disputes outside the courts so that access to justice is not jeopardized.

3.4 Bodies responsible for ADR in Bhutan

i) CDB

The CDB is the body endowed with the responsibility to deal with arbitration when the subject matter is related to construction. The CDB acts as a neutral third party between the disputing parties in the process of dispute resolution.¹³² Within the CDB they have a section called the Construction Arbitration Facilitation Centre which supervises the works related to arbitration. It does not get directly involved in the dispute settlement process but just offers arbitration related services to all those people who are in the construction industry to resolve their disputes arising out of contracts.¹³³ The facilitation centre helps the parties in the selection of qualified arbitrators by maintaining a list of independent, competent, trained and

¹³⁰ Judiciary of Bhutan, 'Bench Book for Judicial Process'

<<http://www.judiciary.gov.bt/publication/publication.php>> accessed 15 July 2018.

¹³¹ Ibid.

¹³² Construction Development Board, 'Arbitration' <<http://www.cdb.gov.bt/web/arbitration>> accessed 15 July 2018.

¹³³ Ibid.

certified arbitrators.¹³⁴ It usually deals with disputes between “one or more contractors, or between contractors and their sub-contractors, or contractors and the government agencies, or between joint venture partners and any other service providers registered with the CDB.”¹³⁵

The arbitration process under CDB is not mandatory and it depends solely upon the decision of the parties concerned. It is usually aimed at assisting the participants in the construction industry to resolve their disputes in an effective and speedy manner. In order to avail the services of the facilitation centre the parties to the contract can either insert an arbitration clause in their contracts or following a dispute, submit the dispute for arbitration by submitting an application made on mutual agreement to the facilitation centre.¹³⁶

ii) ADR Centre

The legal basis for the establishment of the ADR Centre can be found in Art 4 of the ADR Act of Bhutan which states,

“There shall be a Centre established in the name as Bhutan Alternative Dispute Resolution Centre, which is an independent body, having a distinct legal personality, and capable of doing all such things and entering into all transactions as are incidental or conducive to the exercise or performance of its functions under this Act.”

The Centre is headed by a Chief Administrator who has the responsibility to manage the affairs and business of the Centre and to frame relevant policy.¹³⁷ The Centre serves as a neutral, efficient and reliable dispute resolution service centre. Under Art 15 of the ADR Act the Centre has to carry out the following functions:

- (1) Carry out executive and secretarial functions;
- (2) Provide required facilities to assist in the dispute resolution proceeding;
- (3) Appoint arbitrator(s);
- (4) Provide relevant information and expertise in the field of ADR to the stakeholders;
- (5) Provide training to the people who are involved in the ADR mechanisms;
- (6) Register the request for arbitration and keep record of the arbitral awards;

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ ADR Act, art 5.

- (7) Certification of an arbitrator who is trained by the Centre;
- (8) Accreditation of other qualified arbitrators;
- (9) Facilitation of the negotiated settlement;
- (10) Propagate information regarding ADR to the public; and
- (11) Create network with International ADR bodies.

The Centre has the power to lay down the procedure, upon request from the parties¹³⁸ and frame the code of ethics for the arbitrators and negotiators.¹³⁹ It can also levy fees for its services¹⁴⁰ and for the arbitrators.¹⁴¹ It also issues guidelines and samples for the drafting of arbitration clauses and agreements.¹⁴² Till this year the Centre was not established and most of the functions of the Centre were carried out by the CDB and BNLI. However, this year, the Centre was established and a Chief has also been appointed. The Centre is operative now.

iii) BNLI

The BNLI was established under the Judicial Service Act of Bhutan, 2007 and the institute started to function from 25th February 2011.¹⁴³ It is a training institute which creates the forum for legal and judicial discourse and also provides services related to research to the judicial personnel. It aims to improve the administration of the legal system and strives to achieve a litigant friendly justice system.¹⁴⁴ The Institute has been working arduously to promote access to justice for those people who cannot get access to justice because of their physical, intellectual or financial incapacities. Therefore, with the objective to make access to justice accessible, easier and effective the Institute has decided to take justice closer to the doorsteps of the people. Since 2012, the Institute has been conducting trainings for the local government leaders on mediation skills and techniques. Also it has been trying to maintain uniformity in the practice of mediation throughout the country. Till June 2016 they have trained 205 *Mangmis* (elected representative of gewog), 130 female local leaders including

¹³⁸ ADR Act, art 16(1)

¹³⁹ ADR Act, art 16(6)

¹⁴⁰ ADR Act, art 16(2)

¹⁴¹ ADR Act, art 16(3)

¹⁴² ADR Act, art 16(5)

¹⁴³ 'Bhutan National Legal Institute' <<http://www.bnli.bt/>> accessed 22 July 2018.

¹⁴⁴ NAMATI, 'Bhutan National Legal Institute' <<https://namati.org/network/organization/bhutan-national-legal-institute/>> accessed 16 July 2018

Gewog Administrative Officers (GAO) and 718 *Tshogpas*.¹⁴⁵In May, 2017 another group of 91 local leaders were trained by the institute.¹⁴⁶ Those who underwent the training stated that the training was very useful to them. According to them the training has helped them learn new strategies to mediate which they can now use while mediating between disputing parties.¹⁴⁷ BNLI has been actively taking initiatives to promote ADR and to strengthen access to justice. So far it has made a lot of contributions in the field of mediation and it is still continuing to do so.

3.5. Different Types of ADR in Bhutan

The ADR Act of Bhutan is the primary legislation which deals with ADR in Bhutan. Under the ADR Act, there are two different types of ADR namely, arbitration and negotiated settlement. Negotiated settlement covers both mediation and conciliation. Arbitration and mediation are the most popular and commonly used ADR methods in Bhutan.

a) Arbitration

Article 181 (2) of the ADR Act defines arbitration as “*any process by which an arbitrator appointed by parties or by the Centre, as the case may be, adjudicates the disputes between the parties and gives an award by applying the provisions of this Act insofar as they refer to arbitration.*” Arbitration is further divided into two, domestic arbitration and international commercial arbitration.

i) Domestic arbitration

This type of arbitration as the name itself indicates is the one in which all the parties are either citizens of the Kingdom of Bhutan¹⁴⁸ or is a body corporate or a company or a business entity or an association which is incorporated in Bhutan or the control over such entity is exercised in Bhutan.¹⁴⁹

¹⁴⁵ Bhutan National Legal Institute (n 105).

¹⁴⁶ Nima Wangdi, ‘91 Gups Attending Mediation Training’ <<http://www.kuenselonline.com/91-gups-attending-mediation-training/>> accessed 16 July 2018.

¹⁴⁷ Palden Tshering, ‘Paralegals Hone Mediation Skills’ <<http://www.kuenselonline.com/paralegals-hone-mediation-skills/>> accessed 15 July 2018.

¹⁴⁸ ADR Act, art 44(1)

¹⁴⁹ ADR Act, art 44(2)

ii) International Commercial Arbitration

This type of arbitration relates to disputes which arises out of legal relationships, whether it is contractual or not but is commercial in nature and where at least one of the parties is a citizen of a country other than Bhutan.¹⁵⁰ Also if one of the parties is a body corporate or a company or business entity or an association which is incorporated in any country other than Bhutan or the management is controlled by any country other than Bhutan¹⁵¹ or if one of the parties is the Government of a foreign country¹⁵² then it is an international commercial arbitration.

b) Negotiated settlement

Mediation and conciliation has been defined collectively under the term “negotiated settlement” which means “*a process, whether referred to by the expression ‘conciliation’, ‘mediation’ or an expression of similar import, whereby parties request negotiator to assist the parties to settle dispute arising out of or relating to a contractual or other legal relationship, amicably.*”¹⁵³

Similar to arbitration negotiated settlement is also classified into domestic and international negotiated settlement.

i) Domestic negotiated settlement

In domestic negotiated settlement, the dispute settlement process is conducted in accordance with the laws in force in Bhutan.¹⁵⁴

ii) International negotiated settlement

International negotiated settlement can be used only in those disputes which arise from relationships that are commercial in nature irrespective of it being contractual or not.¹⁵⁵

¹⁵⁰ ADR Act, art 45(1)

¹⁵¹ ADR Act, art 45(2)

¹⁵² ADR Act, art 45(3)

¹⁵³ ADR Act, art 163

¹⁵⁴ ADR Act, art 164

¹⁵⁵ ADR Act, art 165

3.6. Reasons for using ADR in Bhutan

a) Buddhism and ADR

Majority of the population in Bhutan are Buddhist therefore, they have always considered settling disputes out of the courts as more advantageous and of higher values than approaching the courts to seek for retribution and sanctions.¹⁵⁶ Settling disputes out of the courts with the help of mediators (popularly known as *Barmis*) is deeply rooted and influenced by Buddhism. Generally the mediators or *Barmis* are the *Gups*, *Mangi Aps* (village elders), retired officials or a monk who is in-charge of the community monastery.¹⁵⁷ While trying to resolve the disputes between the parties by persuading them to reach an amicable settlement, the mediators use their experiences which they have acquired over time and through social standing. In Bhutan, mediation has been an effective and an efficient way to get to the bottom of the conflict and to reach a settlement by compromise. Mediation not only prevents the parties from fighting but also prevents hostility thereby preserving peace and harmony in the community.

According to Buddhism, people are not evildoers by nature. Buddha believed that many people get involved into evil acts because of their ignorance and since it is because of their ignorance they should not be cursed or condemned forever.¹⁵⁸ As per Buddha, instead of cursing and condemning those wrongdoers we should instead try to correct them and make them realize that what they did was wrong.¹⁵⁹ Just like Buddha, Abraham Lincoln also noted: *“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time.”*

Even after the court system evolved in Bhutan, the people continued to use mediation to resolve their disputes. They approached the courts only when mediation failed to resolve their conflicts. This is a testimony to the fact that the Bhutanese have always considered approaching the courts as a last resort. Buddhism has a very strong impact on the people and

¹⁵⁶ Tshering Wangchuk, ‘Alternative Dispute Resolution (Out of Court Settlement/Medation), Nangkha Nandig in Bhutan’

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

it is one of the reasons why the people in Bhutan still prefer to settle their disputes in their community through mediation.

b) Community Vitality and ADR

Bhutan is known to other countries for its concept of Gross National Happiness (GNH). GNH is the philosophy that guides the government of Bhutan towards development so it is often described as “*development with values*.” The idea of GNH is to accomplish development and progress in those fields which are necessary for a happy and a comfortable life.¹⁶⁰ Under the principle of GNH there are nine domains 1) living standards, 2) Education, 3) Health, 4) Environment, 5) Community Vitality, 6) Time-use, 7) Psychological well-being, 8) Good Governance and 9) Cultural resilience and promotion. ADR methods such as mediation not only reduce the number of cases from the courts but also help in preserving peace and harmony and in reinforcing one of the nine domains of GNH, i.e. the community vitality.¹⁶¹ Community vitality refers to the dealings and the relationship between the people living within the community; it includes volunteering, sharing, family hood, safety, harmony, unity and the duration of stay in the community.¹⁶² The various methods of ADR help the parties to reach an amicable solution through mutual compromises based on their needs and interests.¹⁶³

For a small country like Bhutan the system of adversarial litigation is not recommendable and not appropriate. The focus on the material development and the disruptive results of adjudication of disputes will deteriorate the sense of community and unity amongst the people, creating division within the communities.¹⁶⁴ Therefore, people are often encouraged to settle their disputes outside the courts amicably in order to enable them to go back to their

¹⁶⁰ Gross National Happiness Centre, ‘WHAT IS GNH?’ <<http://www.gnhcentrebhutan.org/what-is-gnh/>> accessed 16 July 2018.

¹⁶¹ Lobzang R. Yargay, ‘The Mediation in Bhutan: Saving faces and Raising Heads’ (2015) 4 Bhutan Law Review < <http://www.bnli.bt/wp-content/themes/bnlitemplate/uploads/BLR/volume4.pdf>> accessed 12 July 2018.

¹⁶² Jigmi Y Thinley, ‘What Is Gross National Happiness?’ <<http://www.bhutanstudies.org.bt/publicationFiles/ConferenceProceedings/RethinkingDevelopment/4.Rethinkingdev.pdf>> accessed 16 July 2018.

¹⁶³ Ibid.

¹⁶⁴ Jigme Y Thinley (1998) ‘Values and Development: Gross National Happiness’, Speech delivered at the Millennium Meeting for Asia and Pacific in Seoul, Republic of Korea 30 October –1 November.

community as friends and not as foes.¹⁶⁵ Even for the people themselves they prefer settling their disputes outside the court.

Bhutan, being a small country is a society in which the people are integrated into strong and interconnected communities. In the rural areas every year people excitedly wait for the annual village rituals where everyone gathers at each other's place and then eat, drink and dance together. There is the tradition whereby when someone from a household falls sick the neighbors instantly show up to offer a helping hand. Sometimes they even volunteer amongst themselves to help in the farms during the time of plantation and harvest. When there is a famine or outbreak of any diseases in the community they all get together and find ways to tackle such mishaps. People consider that disputes and disagreements will disturb the social harmony within the community so they try to avoid it as far as possible.¹⁶⁶ However, if disputes arise they try to resolve it amongst themselves rather than going to the courts. Bhutan is also a relatively high 'power-distance culture', so the people listen to the senior members of the society and this fortunately makes it easier for the parties to reach an amicable solution.¹⁶⁷ The age-old tradition is whenever a dispute arises and seems to threaten the peace and harmony in the community, the senior members meet together to resolve them. While trying to convince the disputing parties to reach a negotiated settlement the elders usually apply the customs, moral values and ethics.¹⁶⁸ Reconciliation is not so complicated in the Bhutanese community. They often settle over some compensation and sometimes even an apology do wonders. People are of the thinking that if they have to live together in a community they will have to make some compromises at times. For them losing in the community is much better than going to the courts and winning.¹⁶⁹ The harmony and peace in the society is more important for the people so sometimes the disputes are 'dissolved' rather than 'resolved'.¹⁷⁰ In Bhutan we have a popular saying that "a close neighbor is better than a

¹⁶⁵ Lobzang R. Yargay, 'The Mediation in Bhutan: Saving faces and Raising Heads' (2015) 4 Bhutan Law Review < <http://www.bnli.bt/wp-content/themes/bnlitemplate/uploads/BLR/volume4.pdf> > accessed 12 July 2018.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

distant relative.”¹⁷¹ When one is in need of help the neighbors would show up sooner than one’s distant relatives. The sense of belongingness and the unity amongst the people to preserve the harmony in their community is another reason why people choose to settle their disputes through ADR mechanisms rather than approaching the court.

c) Time-saving

Just like in any other country, the courts in Bhutan are also bogged down with cases. Every day new cases are instituted but it is difficult to render the same number of judgments. This results in the multiplication of cases.

The table below shows the number of cases registered in the Supreme Court, High Court and the respective district and sub-district courts in 2017.

Sl. No.	Court	No. of cases registered
1	Bumthang	232
2	Chukha	243
3	Dagana	248
4	Gasa	29
5	Haa	116
6	High Court	397
7	Lhuentse	101
8	Mongar	240
9	Paro	542
10	Pema Gatshel	133
11	Punakha	370
12	Samdrup Jongkhar	192
13	Samtse	283
14	Sarpang	144
15	Supreme Court	40

¹⁷¹ Ibid.

16	Thimphu	1770
17	Trashigang	206
18	Trashi Yangtse	76
19	Trongsa	107
20	Tsirang	139
21	Wangdue Phodrang	409
22	Zhemgang	53
23	Dorokha	66
24	Gelephu	262
25	Jomotsangkha	24
26	Lhamoizingkha	64
27	Lingzhi	10
28	Nganglam	141
29	Panbang	60
30	Phuentsholing	683
31	Sakteng	28
32	Samdrupcholing	54
33	Tashichoeling	93
34	Sombeykha	52
35	Thrimshing	35
36	Wamrong	42
37	Weringla	16

Source: Annual Report 2017, Judiciary of Bhutan.

The figures in the table might seem very small compared to other countries where each day the courts get thousands of cases but one must remember that Bhutan is a small country and based on the above statistics, the calculated ratio of the human resource working in the courts to the number of cases registered is quite high. The increase in the workload of the court officials affects the efficiency of the courts. More cases will be pending and it will take more time to get a judgment. Despite the efforts made by the judges and the court officials to dispose off a case as soon as possible, it still takes a lot of time. People usually get frustrated

having to wait for months and sometimes years to get their dispute resolved. On the other hand, resolution of disputes through ADR does not take much time. In mediation process, the parties select a mediator and they meet at the time and place decided. The mediator persuades the disputing parties to compromise and reach a mutual settlement and an agreement is drawn accordingly. This type of dispute resolution process does not take much time unlike litigation where there are lots of procedures to be followed besides the heavy caseload. It saves the time of the parties and also indirectly helps in reducing the caseload on the courts. Time is important for everyone therefore, people prefer settling their disputes through ADR because it is time-saving.

d) Cost effective

If a person approaches a court he or she has to pay the court fees and the fees for the lawyers if they want to be represented by a lawyer. Luckily in Bhutan the court fee is minimal (Ngultrum¹⁷² 50 for each party) and they usually handle the cases themselves. The issue is not the court fees. Since it takes months and at times years to get the judgment, within that span of time parties have to visit courts often and make multiple written submissions. As mentioned in the previous chapter around 35% of the population in Bhutan is illiterate so they cannot write the submissions themselves. They have to pay the private legal personnel for such written submissions. In one case they will have to make at least five to ten submissions (including their own submissions and rebuttals). This will cost them quite some money. In Bhutan agriculture is the primary source of income for most of the people and they depend fully on their harvest. When they have to attend the hearings they miss their work in the fields. To a farmer single day fieldwork matters a lot to them. They will not just be missing one day but till the day of judgment they will have to miss a couple of days of fieldwork. This will certainly affect their harvest and production. Also some people have to travel to the courts so they incur additional transportation costs as well. All such expenses when added up become a large sum. Litigation causes financial burden on the parties.

On contrary, in case of mediation they do not have to submit any such submissions, it is mostly oral and the parties have the liberty to decide the time and venue according to their own convenience and this saves both time and money of the parties. According to the

¹⁷² Currency of Bhutan.

Bhutanese law, if the mediator is successful in negotiating a dispute then he or she is entitled to a fee. But, in most cases the mediators do it for free, they do it *pro bono* for the benefit of the community as a whole. The whole process is speedy so most often the dispute gets resolved way sooner than compared to in courts.

Also, in litigation the losing party will not be satisfied so there are chances of appeal. In such cases the cost will keep on multiplying with successive appeals and revisions and this will make litigation a costly affair. In mediation the parties are both satisfied so there would not be appeal or revision. Therefore, in terms of costs, mediation is a better option than adjudication. This is one of the main reasons why people try to resolve their conflicts through mediation and approach the courts only as a last resort.

e) win-win situation

When it comes to litigation there is a “decider” who is the judge and the judge is not one of the parties.¹⁷³ He or she makes the decision based on the submissions and evidences submitted to him or her by the parties. In litigation it is inevitable for one party to win and for the other to lose. In mediation, the parties are “decider” themselves.¹⁷⁴ The mediator just helps the parties to find a way to resolve the dispute but does not decide the merits of the case. Since it is an entirely voluntary process, the parties have control over the end result. If any of the parties want to stop the mediation process or feel that a deadlock has been reached meaning the method is not working anymore, then he or she can quit and approach the court or if the mediation has taken place after the institution of suit then he or she can just request the court to resume proceedings.¹⁷⁵ But if the parties are successful in reaching an amicable settlement then both of them can walk away as winners.¹⁷⁶ The settlement is reached only with the consent of both the parties so they compromise amongst themselves. The compromise somehow makes both the parties win over the other party in a way. The parties may not have won completely but they usually agree for a settlement which is satisfactory for both parties. It also prevents the parties from ruining their future relationships and creating animosity. ADR methods help the parties to maintain peace and harmony in the

¹⁷³ Bruce H Aydt, ‘Mediation-The Alternative for “Win-Win”’ (2001)

<http://pcbor.com/images/PDFs/Mediation_Win-Win_Article.pdf> accessed 16 July 2018.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

community. In the process of dispute resolution through ADR mechanisms no one loses and this creates a win-win situation.¹⁷⁷ Therefore, another reason why people in Bhutan prefer settling their disputes out of courts is because of this win-win advantage.

f) Confidentiality

In Bhutan people avoid going to the courts as far as possible because there is a social stigma of going to court.¹⁷⁸ People who are seen going to courts or are seen in the vicinity of the courts are perceived as those not getting along with others.¹⁷⁹ Bhutan being a small country with small population, everybody knows everyone and it does not take much time for news to reach everyone. People are concerned about their reputation and image so they do not want to be seen as people who do not get along with others or who is always involved in disputes. People feel it is better to settle the disputes outside the courts where they can just schedule a meeting and settle the disputes without letting the others know. Especially in matrimonial and family related cases, the requirement for the maintenance of confidentiality in the ADR methods is another reason for choosing ADR over litigation. When it comes to arbitration which mostly happens in cases of contractual disputes in the construction business, confidentiality is very important because the parties do not want to tarnish their reputation in the market and spoil their future business. The obligation on the arbitrators, parties and the ADR centre to maintain confidentiality of any information related to the arbitral proceedings under Art 90 of the ADR Act is an advantage for the parties as they can safeguard their reputations.

g) Flexibility

In litigation the proceedings have to be carried out in accordance with the procedural law applied by the courts of law. The time for hearings and submissions are decided by the courts and the venue depends on the jurisdiction. Everything is pre-scheduled and the parties have to anyhow comply with it. In this way litigation lacks flexibility but on contrary ADR

¹⁷⁷ 'Settlement of Disputes through ADR System Creates Win Win Situation' (17 March 2014) <<http://www.dailyexcelsior.com/settlement-of-disputes-through-adr-system-creates-win-win-situation-justice-nijjar-2/>> accessed 17 July 2018.

¹⁷⁸ Kristen DeRemer, "The Bhutanese Pledge: A Shared Commitment Towards Eliminating Violence against Women" (2017) <<http://renew.org.bt/wp-content/uploads/2017/08/RENEW-National-Symposium-“The-Bhutanese-Pledge-A-Shared-Commitment-Towards-Eliminating-Violence-against-Women”-2016-2017.pdf>> accessed 17 July 2018.

¹⁷⁹ Ibid.

proceedings are flexible. The parties and the selected mediators or arbitrators have the discretionary powers to make any decision related to the proceedings be it the time or the venue. The flexible nature of the ADR methods makes it more preferable to the people.

These are the reasons why people in Bhutan prefer to settle their disputes outside the courts. The procedure for the ADR methods are less complex than compared to the court procedures. The procedure for the ADR methods will be explained in the next topic.

3.7. Procedure of ADR

Under Art 4 of the ADR Act, Bhutan Alternative Dispute Resolution Centre (Centre) is established. The Centre is an independent body and has a distinctive legal personality.¹⁸⁰ According to Art 16(1) of the ADR Act the Centre is given the power to lay down the procedure to administer arbitration and negotiated settlement when the parties have agreed to refer it to the Centre.

The procedure of ADR can be classified under two sub-topics, procedure for arbitration and procedure for negotiated settlement.

3.7.1. Procedure for arbitration

The procedure for arbitration involves several steps. It will be explained step-wise hereunder:

i. Notice of arbitration

The arbitral proceedings begin on the day when the respondent receives the notice of arbitration.¹⁸¹ According to Art 87 the notice of arbitration should include:

- (a) A requirement that the dispute has to be referred to arbitration;
- (b) The concerned parties' names and addresses;
- (c) A reference to an arbitration clause or an agreement;
- (d) A reference to the dispute inciting contract;
- (e) Nature of the claim and the amount involved, if any;
- (f) The relief or remedy the parties are seeking;
- (g) A suggestion for the number of arbitrators if not agreed hitherto;
- (h) Proposal regarding the appointment of arbitrators; and
- (i) A notice of such appointment of arbitrator.

¹⁸⁰ ADR Act, art 4

¹⁸¹ ADR Act, art 86

ii. Composition of the Arbitral Tribunal

Art 52 of the ADR Act accords the parties the liberty to agree on the procedures for the appointment of the arbitrator(s). The number of arbitrators has to be always an odd number.¹⁸² Within thirty working days from the date of receiving the request for arbitration, the parties have to decide on the number of arbitrators.¹⁸³ If they are unable to concur on the number then the Centre after consulting with the parties, has to appoint three arbitrators.¹⁸⁴ Each party will appoint an arbitrator of their choice and the two appointed arbitrators will appoint the third presiding arbitrator.¹⁸⁵ Upon the failure of the parties to appoint an arbitrator the Centre will make the appointment.¹⁸⁶ Except for domestic arbitration, the arbitrator can be of any nationality.¹⁸⁷ With regard to the qualification of the arbitrators the parties have the discretion but if the Centre is appointing the arbitrators then it should appoint independent and impartial arbitrators.¹⁸⁸ The arbitrators have to communicate their acceptance to the concerned party¹⁸⁹ and have the responsibility to disclose any sort of conflict of interest.¹⁹⁰

iii. Registration of the arbitration

After the composition of the arbitral tribunal the arbitration has to be registered with the Centre.¹⁹¹

iv. Determination of Procedure

The parties are free to agree on the procedure to be followed by the arbitral tribunal regarding the conduct of the proceedings¹⁹² but if they are unable to decide then the arbitral tribunal themselves can conduct the proceedings in the manner they find appropriate.¹⁹³

¹⁸² ADR Act, art 48

¹⁸³ ADR Act, art 53

¹⁸⁴ ADR Act, art 53

¹⁸⁵ ADR Act, art 54

¹⁸⁶ ADR Act, art 56

¹⁸⁷ ADR Act, art 51

¹⁸⁸ ADR Act, art 60

¹⁸⁹ ADR Act, art 63

¹⁹⁰ ADR Act, art 64

¹⁹¹ ADR Act, art 79

¹⁹² ADR Act, art 92

¹⁹³ ADR Act, art 93

Besides determining the procedure for the arbitral proceedings, the arbitral tribunal can also decide on the admissibility and relevancy of the evidence.¹⁹⁴

v. Venue

The parties can decide the venue for the proceeding. In case they have not been able to decide then the arbitral tribunal can select the venue. While selecting the venue, the appropriateness of the place to hear the witnesses, experts and the parties and to inspect dispute related objects has to be taken into consideration.¹⁹⁵

vi. Language

The parties have the liberty to agree on the language to be used in the arbitral proceeding but if they cannot agree then the decision is made by the arbitral tribunal.¹⁹⁶ Upon deciding the language to be used in the proceeding, the subsequent written submissions and hearings, the arbitral award and decisions related to the proceeding has to be in the chosen language.¹⁹⁷

vii. Cost of Arbitration

The cost of the arbitration will be mentioned in the arbitral award.¹⁹⁸ While calculating the costs, factors like the amount involved in the dispute, intricacy of the subject matter and time taken to complete the proceedings have to be taken into consideration by the tribunal.¹⁹⁹ The parties have to pay the fees and expenses of the arbitrators jointly and severally.²⁰⁰

viii. Claim

The actual arbitral proceeding commences with the submission of the statement of claim by one of the parties to the other party and the arbitral tribunal.²⁰¹ The statement of claim has to be in writing and contain the following²⁰²:

- (1) The concerned parties' names and addresses;
- (2) Facts which supports the claim;

¹⁹⁴ ADR Act, art 94

¹⁹⁵ ADR Act, art 96

¹⁹⁶ ADR Act, art 97

¹⁹⁷ ADR Act, art 98

¹⁹⁸ ADR Act, art 138

¹⁹⁹ Ibid.

²⁰⁰ ADR Act, art 139

²⁰¹ ADR Act, art 100

²⁰² Ibid.

- (3) The conflicting issues;
- (4) The entreated relief or remedy;
- (5) Any relevant statements or documents or any other evidence.

ix. Counter-claim and defense

After getting a copy of the statement of claim the respondent has to submit a counter-claim which should be in writing as well.²⁰³The counter-claim will include the following²⁰⁴:

- (1) A reply to the statement of claim;
- (2) Any counter-claim;
- (3) Statement of facts and legal points supporting the reply and the counter-claim; and
- (4) The statements, documents or any other evidence.

According to Art 102 of the Act, unless the arbitral tribunal opposes, the parties can either amend or supplement the claim or the counter-claim during the course of the arbitral proceeding.

x. Oral hearings and proceedings with written submissions

If the parties have not decided or if they do not oppose, then the arbitral tribunal can decide whether to conduct the hearings in the form of oral hearings or in the form of written submissions.²⁰⁵ Whenever there is any hearing or any meeting of the arbitral tribunal a prior notice has to be given to the concerned parties.²⁰⁶

xi. Closure of hearings

Once the parties inform the arbitral tribunal that they do not have any further proof or witnesses to produce or any more submissions to make, the tribunal will then declare the closing of the hearings.²⁰⁷

xii. Award

When the arbitration is a domestic arbitration, the arbitral tribunal has to apply the substantive law of Bhutan²⁰⁸ but in case of international commercial arbitration the tribunal

²⁰³ ADR Act, art 101

²⁰⁴ Ibid.

²⁰⁵ ADR Act, art 103

²⁰⁶ ADR Act, art 104

²⁰⁷ ADR Act, art 113

²⁰⁸ ADR Act, art 127

can apply the substantive law which has been agreed upon by the parties.²⁰⁹ However, if the parties fail to agree on the applicable laws, then the arbitral tribunal has to apply the law which is determined by the conflict of law rules and which it finds appropriate.²¹⁰ A method of simple majority is used to make the award or the decision of the arbitral tribunal.²¹¹

According to Art 133 of the Act, if during the proceedings the parties reach an amicable settlement and decide to withdraw from or terminate the arbitral proceedings then the tribunal upon request from such parties will terminate the proceedings and record the settlement as an arbitral award.

The award has to be in writing and has to be signed by the respective arbitrator.²¹² When the arbitral tribunal comprises of more than one arbitrator, majority of the tribunal members' signatures will be enough, howsoever it should mention the reasons for those missing signatures.²¹³

Art 137 of the Act enlists the content of an award. The award should state the reasons, date of the award and the venue of the arbitral tribunal. A copy of the award is given to the parties and the Tribunal. After receiving the award and within ten working days of the receipt of the award, if any of the parties feel that any correction or clarification is required then the party can request the arbitral tribunal to make such necessary corrections or clarifications.²¹⁴ The other party has to be given a notice. Usually the requests are made with regard to the following matters:

- (1) Correction of any clerical or typographical errors or errors in computation;²¹⁵
- (2) Clarification of a point or of a specific part of the award;²¹⁶ or
- (3) Making an additional arbitral award for the unresolved claims.²¹⁷

xiii. Setting Aside of Award

Art 149 of the Act grants the parties an opportunity to request the High Court to set aside an award by submitting an application. The application has to be submitted within thirty and

²⁰⁹ ADR Act, art 128

²¹⁰ ADR Act, art 129

²¹¹ ADR Act, art 131

²¹² ADR Act, art 135

²¹³ ADR Act, art 136

²¹⁴ ADR Act, art 143

²¹⁵ ADR Act, art 143(1)

²¹⁶ ADR Act, art 143(2)

²¹⁷ ADR Act, art 143(3)

ninety working days calculated from the date on which the party making such an application received the arbitral award for domestic arbitration and international commercial arbitration respectively.²¹⁸ The Court has the discretionary power to entertain an application even after the expiry of the specified time period but within fifteen more working days if it is satisfied that the applicant had reasonable and sufficient grounds for the failure to submit the application within the time-frame.²¹⁹

Under Art 150 of the ADR Act, the High Court can set aside the arbitral award under the following grounds:

- (a) Incapacity of any of the parties to enter into the arbitration agreement;²²⁰(example unsound mind or minor)
- (b) The invalidity of the arbitration agreement under the law which the parties agreed upon or under the domestic law;²²¹
- (c) Failure to give notice of the appointment of an arbitrator or of the arbitral proceeding;²²²
- (d) If the award deals with a dispute which does not fall within the terms of the submission to arbitration, or if it contains decisions on matters which is beyond the scope of the submission to arbitration;²²³and
- (e) If the arbitral tribunal is not composed or if the arbitral procedure was not carried out in accordance with the agreement of the parties or with the Act;²²⁴

The Court can also set aside the award if it finds that the subject-matter of the dispute is not capable of being settled by arbitration or if the award is contrary to the public policy.²²⁵

xiv. Enforcement of Domestic Award

Once the time period for making an application to set aside the award has expired or the High Court has dismissed such application, the award is confirmed and it shall have the binding

²¹⁸ ADR Act, art 152

²¹⁹ Ibid.

²²⁰ ADR Act, art 150(1)(a)

²²¹ ADR Act, art 150(1)(b)

²²² ADR Act, art 150 (1)(c)

²²³ ADR Act, art 150 (1)(d)

²²⁴ ADR Act, art 150(1)(e)

²²⁵ ADR Act, art 150(2)

force of a judgment.²²⁶ The court is given the duty to enforce the award in accordance with the provisions of the CCPC of Bhutan as if it were a decree of the Court.²²⁷

Recognition and Enforcement of Foreign Award

When it comes to the recognition of foreign award it shall be governed by those international conventions, multilateral or bilateral agreements which concerns the recognition and enforcement of arbitral awards entered into by the Kingdom of Bhutan.²²⁸ A foreign award shall be recognized as binding and the High Court is responsible for the enforcement of the award in accordance with the CCPC.²²⁹

The party while applying for the enforcement of the award has to submit a duly certified copy of the award and the arbitration agreement if the agreement is in writing.²³⁰

3.7.2. Procedure for Negotiated Settlement

The most common type of negotiated settlement in Bhutan as stated earlier, is the mediation. There are two different procedures for mediation. Mediation in Bhutan might occur before approaching the courts of law or once after the litigation has commenced, therefore in the Bhutanese context mediation is both²³¹:

- (a) an alternative to the formal judicial system but not a part of the judicial system and it is conducted by “ordinary people” rather than lawyers or legal professionals; and
- (b) a part of the judicial system but somehow in a limited manner. In this case the parties to law suits are given an opportunity by the courts after the commencement of the litigation. The Court assists the parties in settling their disputes through mediation with the objective to help them find a solution which is in their own best interest (Court ordered mediation or Court initiated mediation).

According to the CCPC and the Penal Code of Bhutan²³² all categories of offenses can be negotiated and settled out of the court, except for criminal cases (for example theft, battery, armed robbery, murder, rape, treason, etc.) which are non-compoundable offences and

²²⁶ ADR Act, art 156

²²⁷ Ibid.

²²⁸ ADR Act, art 158

²²⁹ ADR Act, art 159

²³⁰ ADR Act, art 160

²³¹ Tshering Wangchuk, ‘Alternative Dispute Resolution (Out of Court Settlement/Medation), Nangkha Nandig in Bhutan’

²³² Penal Code of Bhutan (entered into force 11 August 2004)

therefore they must be brought before a duly constituted court of law.

i) Mediation Prior to Registration of a Case

When a conflict arises in the community or a society, the mediators try to solve the dispute once it becomes evident to them that there exists a problem between the parties. As a basic principle, the disputing parties have the liberty to choose any suitable person for the purpose of mediating their dispute. The chosen mediator then attempts to resolve the dispute in such a way that is conducive to an amicable settlement for all the parties involved in the dispute. Usually the wrongdoer or the offender is made to pay compensation to the injured party for the damage he or she has inflicted upon the injured party. In the process the wrong-doer is also made to realize their mistake and persuaded to seek forgiveness from the injured party. This positively leads to a re-conciliation between the two parties and prevents animosity. Such process mainly makes the wrong-doer feel remorseful towards the injured party for his or her behavior and action. This also prevents the wrongdoer from committing the offense again thereby reducing recidivism. The process often leads to an amicable and mutual settlement of the dispute. Once the parties to the dispute have come to a settlement, a settlement agreement is made in writing, which is known as a *genja*. The process not only saves time for both the parties but also prevents possible animosity, which often arises in the traditional legal proceeding.

ii) Mediation after the case has been registered in a court of law

In our Bhutanese legal system there is the concept of settlement of all civil cases by a consent judgment. Once a case has been filed in a court of law, the presiding judge is required to grant an opportunity to the parties to make an attempt to negotiate and to try and resolve the case in an amicable manner. However, one must not forget that this is applicable only for civil cases. There is no scope for mediation or any form of ADR in criminal cases. At any stage of a civil proceeding, it is open to the parties to try negotiating and coming to a mutual settlement by seeking the help of the mediators. Since the concerned parties have the discretionary power to select the mode of reconciliation they can choose to make efforts to resolve cases by mutual agreement with or without the assistance of mediators.

The procedure for this kind of settlement is quite simple and unsophisticated. It is necessary for the parties concerned to submit a joint petition to the court of law thereby requesting for

an adjournment in the proceeding stating that they want to make an attempt to resolve the dispute through mutual settlement. Once the parties have achieved an amicable and a mutual settlement they then draw an agreement accordingly. The agreement has to be signed by the disputing parties along with the witnesses (one witness from each party's side) and the mediator and they also have to affix a proper judicial stamp. Once the agreement is signed the parties must submit it to the Court for its judicial sanction. The Court gives the parties a time frame of ten days from the date of the submission of the agreement before rendering a summary judgment. Within this time period, the parties can either nullify or raise any objection to the validity of such agreement. If any valid objection is raised then the agreement will be considered null and void and the proceedings will resume from where it was adjourned. Furthermore, the Court can also declare such agreement null and void despite of it being drafted with the mutual consent of the concerned parties, if the agreement contradicts the existing laws of the country and the court can resume the proceedings. The reason behind granting the ten days time period is to ensure that the agreement is drawn with the consent of both the parties and not because there was coercion or intimidation from either side of the parties. If no objection is raised within that period then the court drafts the summary judgment on the basis of the mutual agreement which becomes enforceable under law. If any of the parties does not comply with the terms of the agreement then the other party can approach the court for the enforcement of the judgment.

3.8. Subject Matters of ADR

The list of subject matter of ADR will be pretty non-exhaustive so the best way out is to list the matters which shall not be subjected to ADR. This has to be again classified under four sub-topics;

3.8.1. Subject Matter of Domestic Arbitration

The following cannot be the subject matter of domestic arbitration²³³:

- (a) Disputes which relates to the rights and liabilities of criminal acts;
- (b) Matrimonial disputes like divorce, judicial separation, restitution of conjugal rights, child custody;
- (c) Guardianship;

²³³ ADR Act, art 46

- (d) Insolvency and winding up;
- (e) Testamentary;
- (f) Subject of inheritance;
- (g) Subject of taxation; or
- (h) Such other matters which are against public policy, morality or any other existing provisions of the law for the time being in force in Bhutan.

3.8.2. Subject Matter of International Commercial Arbitration

Under the international commercial arbitration, only those dispute which arises out of the relationships which are commercial in nature, whether contractual or not, can be the subject matter of the arbitration. There cannot be arbitration on matters relating to insolvency and winding up, taxation and other matters which are against the public policy, morality or any other existing provisions of the law in force in Bhutan.²³⁴

3.8.3. Subject Matter of Domestic Negotiated Settlement

Except for the criminal offences which are non-compoundable offences, all civil disputes can be negotiated. The criminal offences must be brought before a duly constituted court of law. Disputes that are related to the following subject matters can be subjected to domestic negotiated settlement:

1. Footpaths and access to roads;
2. Drinking water and irrigation;
3. Irrigation channel and walls;
4. Crops damaged by livestock;
5. General land issues;
6. Land boundaries and fruit trees grown on the boundary of two plots of private registered land;
7. Inheritance;
8. Monetary;
9. Matrimonial.

²³⁴ ADR Act, art 47

3.8.4. Subject Matter of International Negotiated Settlement

Similar to international commercial arbitration, Art 165 of the ADR Act allows only those disputes which arise out of the relationships which are commercial in nature, whether contractual or not, to be the subject matter of the international negotiated settlement. There cannot be negotiated settlement for those matters relating to insolvency and winding up, taxation and other matters which are against the public policy, morality or any other existing provisions of the law in force in Bhutan.

3.9. Potential of ADR towards Enhancement of Access to Justice in Bhutan.

A nation-wide survey was conducted by the BNLI with the assistance of the Royal Court of Justice and the local government in 2015. BNLI has been giving a lot of importance to mediation as it is one of the mandates of the Institute. Not only has the Institute been conducting dissemination programs to create awareness on laws in Bhutan but also it has been training a lot of people (especially the local headman) on mediation. Therefore, the objective of the survey was to assess whether the trainings and the dissemination programs have yield any fruitful results and to examine the overall impact of mediation in Bhutan. The key findings of the survey can be evaluated from the following tables.

Table 1: This table manifests the list of the Dzongkhags (districts) which have resolved the highest number of disputes through mediation and litigation with regard to different subject matters.

Sl. No.	Subject Matter/Issue	Highest no. of cases resolved by a Dzongkhag through mediation	Number of cases mediated	Highest no. of cases resolved by a Dzongkhag through litigation	Number of cases litigated
1	Footpaths and access to roads	Chukha	141	Mongar	21
2	Drinking water and irrigation	Trashigang	145	Punakha	11
3	Irrigation	Mongar	64	Paro	12

	channel and walls				
4	Crops damaged by livestock	Mongar	198	Trashigang	8
5	General land issues	Bumthang and Tsirang	40		
6	Land boundaries and fruit trees grown on the boundary of two plots of private registered land	Trashigang	303	Paro	21
7	Inheritance	Mongar	729	Paro	761
8	Monetary	Trashigang	422	Thimphu	2012
9	Matrimonial	Mongar	777	Thimphu	895
10	Miscellaneous	Trashigang	513		

Source: Mediation Training Impact Assessment Report, BNLI (2016)

Table 2: This table shows the statistics of the disputes resolved through mediation and litigation in individual Dzongkhags respectively.

Sl. No.	Dzongkhag(s)	Number of disputes mediated	Number of cases litigated	Total
1	Bumthang	378	362	740
2	Chukha	1357	1439	2796
3	Dagana	677	581	1258

4	Gasa	208	81	289
5	Haa	509	380	889
6	Lhuentse	296	1124	1420
7	Mongar	2997	1241	4238
8	Paro	665	2958	3623
9	Pemagatshel	313	1575	1888
10	Punakha	351	960	1311
11	Samdrup Jongkhar	438	764	1202
12	Samchi	807	831	1638
13	Sarpang	347	1073	1420
14	Thimphu	160	3762	3922
15	Tashigang	2545	1046	3591
16	Tashiyangtse	693	327	1020
17	Trongsa	786	392	1178
18	Tsirang	384	288	672
19	Wangdue	1089	1147	2236
20	Zhemgang	316	603	919
	Grand Total	15316	20934	36250

Source: Mediation Training Impact Assessment Report, BNLI (2016)

Table 3: This table shows the statistics of the cases resolved regarding different subject matters through mediation and litigation respectively.

Sl. No.	Subject Matter/ Issues	Number of cases resolved through		Total
		Mediation	Litigation	
1	Footpaths and access to roads	830	110	940
2	Drinking water and irrigation	820	64	884
3	Irrigation channel and walls	404	37	441

4	Crops damaged by livestock	1039	44	1083
5	General land issues	223	73	296
6	Land boundaries and fruit trees grown on the boundary of two plots of private registered land	1495	19	1514
7	Inheritance	1808	4496	6304
8	Monetary	2056	9735	11791
9	Matrimonial	3048	2646	5512
10	Miscellaneous	3593	3892	7485
Total		15316	20934	36250

Source: Mediation Training Impact Assessment Report, BNLI (2016)

Table 4: This table shows the statistics of cases facilitated by the Construction Arbitration Facilitation Centre, CDB for arbitration.

Sl. No.	Financial Year	Number of cases facilitated
1	2014-2015	34
2	2015-2017	43
Total		77

Source: Construction Arbitration Facilitation Centre, CDB, Bhutan.

Key Findings from the tables

- Total number of cases (as of 2012- 30th June 2015) - total of 36,250 were resolved through mediation as well as litigation;
- Number of cases mediated – Out of total 36,250 cases, 15,316 cases were resolved through mediation (out of the court settlement);

- Number of cases litigated – Out of total 36,250 cases, 20,934 cases were resolved by litigation (Settlement by the court).
- Number of cases arbitrated from 2014-17 – 77 cases.

Analysis

The potential of ADR (mediation and arbitration) in Bhutan can be analyzed from the tables above. The tables 1, 2 and 3 illustrate the total number of cases resolved by the local leaders through mediation and by the courts through litigation for different subject matters while table 4 shows the statistics of the cases facilitated by the Construction Arbitration Facilitation Centre, CDB for arbitration. The tables show the statistics of the cases resolved through the formal and informal dispute resolution methods.

It is evident from the tables above that ADR is an effective alternative to adjudication to provide access to justice in Bhutan. Out of the total 36,250 cases resolved, 15,316 cases which make up 42.25% of the total cases were resolved through mediation. The percentage of the cases resolved through litigation is more than that resolved by mediation but one has to also acknowledge that mediation has helped in reducing the caseload of courts in Bhutan. The workload of the court officials have been reduced by almost half because of the ADR methods. This will improve the efficiency of the courts and the court officials in delivering better judgments and services to the parties. As for arbitration, since the initiation of the Facilitation Centre, it has facilitated 77 cases. The statistics shows that many people settle their disputes outside the court through mediation and arbitration which shows that people consider ADR methods an efficient alternative to adjudication. The potential of ADR in enhancing access to justice can be assessed based on the following indicators or factors:

1. Equality before law

One of the fundamental elements of access to justice is the equality before law. To assess the potential of ADR to promote access to justice one must evaluate whether ADR mechanisms have been able to give equal protection of law and equal treatment to all the people. In Bhutan there is no discrimination of any sort be it sex, caste, religion, etc in the ADR system. Art 7(15) of the Constitution of Bhutan states,

“All persons are equal before the law and are entitled to equal and effective protection of the law and shall not be discriminated against on the grounds of race, sex, language, religion, politics or other status.”

While resolving disputes through ADR methods there is no discrimination made between the disputing parties, they are all treated the same and are given the same treatment.

2. Equal accessibility to legal services.

The courts in Bhutan are not easily accessible to the old aged and the physically challenged people. For instance, unlike the courts in developed countries our courts do not have elevators, waiting rooms and toilets for the handicapped people. There are no special provisions for them. These make approaching the courts difficult for such people. Also factors like cost, delay and the procedural complexities act as an obstacle for the poor and the illiterate people from accessing justice through courts. Somehow the rich and the educated people are always on the advantageous side. However, when it comes to ADR it is different. Even the poor, illiterate and the physically challenged people are able to have access to the legal services as ADR mechanisms are not costly and complex. As can be seen from Table 2, in places like Mongar, Tashigang, Trashiyangtse, Gasa, and Trongsa the number of cases resolved through mediation is almost twice the number of cases resolved through litigation. These places are mostly inhabited by people who rely on agriculture and most of them are illiterate. On contrary, in places like Thimphu (capital) and Paro which are two of the most developed cities in Bhutan, the number of litigated cases is more than twice the number of mediated cases. In these two places people are mostly educated so they understand the court procedures. This shows that the uneducated and the weaker sections of people from the rural areas find it easier to resolve their disputes through mediation. The access to justice which they could not avail from the courts they could avail through the ADR mechanisms. We have people from all walks of life participating in ADR methods including women, people from villages, old aged people, and physically challenged people. This shows that ADR guarantees equal accessibility to everyone and thus promotes access to justice.

3. Delivery of timely and effective remedy

When one approaches the court of law it usually takes him or her months and sometimes even years to get the remedy they pleaded for. One of the main reasons why people in Bhutan prefer ADR is because of the timely and effective remedy they are able to derive from the ADR processes. As explained above the courts in Bhutan are bogged down with cases so they fail to render timely and effective remedy. To an aggrieved party timely justice is very important. A delayed justice is equal to denied justice. The figures in the tables show that the people have been getting effective remedy when they settle their disputes outside the court and that is why the percentage of cases mediated is almost 50% of the total cases resolved. If they were not able to get effective remedy through ADR they would have chosen litigation but the findings of the BNLI assures that mediation has been able to provide effective remedy and that is why almost 50% of the disputes were resolved through mediation. Also in case of ADR the parties come to a mutual settlement so it is a win-win situation for both. This is more effective and preferable than a win-lose situation in litigation. Also because of ADR the workload on the court officials have decreased almost by half as explained above. The decrease in workload improves the efficiency of the court officials and helps them in delivering timely and effective remedies to the disputing parties. Therefore, ADR indirectly, also helps the courts to render effective and timely remedy. ADR has been able to deliver effective and timely remedy to the people so it has the potential to promote access to justice.

4. Equality of arms

This principle refers to giving equal opportunities to the parties to submit their claims and to be heard during the proceedings. In Bhutan, the most commonly used ADR methods are mediation and arbitration. In both the methods the mediators and the arbitrators listen to the disputing parties and give them equal opportunities to present their arguments and evidence. Art 89 of the ADR Act states that the arbitral tribunal has to act fairly and impartially. During the proceedings, the tribunal has the responsibility to give all the parties equal opportunity to be heard and to present their arguments. The parties are treated equally and each party gets equal opportunity to address their grievances or issues. This shows that ADR fulfils the element of equality of arms and thus it has the potential to promote access to justice.

5. Just and equitable outcome

Access to justice is not just about giving equal and easy access to courts and ADR bodies but also about delivering just and equitable outcome. If the ADR methods are able to give just and equitable outcome to the disputing parties then one can say that ADR has the potential to promote access to justice. In Bhutan, the disputing parties have been practicing mediation instead of going to the Courts for years because of its benefits. In case of litigation the losing party is never satisfied and he or she feels the judgment is not fair whereas in mediation the parties compromise and reach a mutual settlement so the outcome is an equitable one for both the parties. Since the parties make the decision by compromising, the outcome is somehow fair for both of them. ADR methods result in just and equitable outcome which is another essential element of access to justice.

Looking at the analysis of ADR based on the above mentioned factors or indicators it can be concluded that ADR has the potential to improve access to justice in Bhutan.

Chapter 4: Challenges to ADR in Bhutan

4.1. Overview

As can be seen from the tables in the previous chapter, there is no doubt that ADR is efficient and has the potential to promote access to justice in Bhutan. However, there are some weaknesses or challenges which are the impediments to an effective ADR system. These challenges affect the promotion of effective access to justice through ADR mechanisms. This chapter will discuss the challenges or problems related to ADR in Bhutan.

4.2. Non-binding Nature of Negotiated Settlements

Unlike in case of adjudication or arbitration which results in judgment and arbitral awards which are binding, negotiated settlements does not result in binding decisions. Because of this non-binding nature of negotiated settlement people do not take it seriously. For example, in case of a negotiated settlement between two disputing parties regarding the repayment of certain sum, because of its non-binding nature the party which agreed to pay earlier might not pay after the settlement. In such cases the aggrieved party has to start a new settlement procedure all over again or approach the court because the former settlement has failed to redress his or her grievances. Only when the negotiated settlement is submitted to the court and a judgment is rendered based on such agreement, it becomes enforceable otherwise it does not have binding power. In some cases after the settlement, the parties do not comply with the terms of the agreement which they have drafted with mutual consent and this result in injustice to the other party. Some people feel that despite the numerous benefits of settling disputes out of the court it is safer to approach the court because that way they can at least be assured of getting justice in the end rather than going for ADR methods where you never know whether the other party will keep their promises or not. There is always an uncertainty with regard to the compliance of the agreement by the other party. If the other party does not comply then the injured party has to approach the court and start the process *ab initio*. This will take away all the benefits that the party was supposed to derive from the ADR mechanism (example cost-cutting and time-saving). Because of this non-binding nature of the negotiated settlement, a just and equitable outcome is not possible. The aggrieved party's grievances are still not redressed. The non-binding nature of the negotiated settlement will prevent an aggrieved party from getting an effective remedy and if he or she is not able to get

an effective remedy then there is no access to justice as access to justice is not just about getting access to legal system but also getting an effective and just outcome. Instead of promoting access to justice it might end up creating more injustice to the parties.

4.3. Lack of Knowledge and Awareness amongst the People

Despite the intensive efforts made by the BNLI and other related agencies to educate the people about the ADR mechanisms and the benefits of settling disputes outside the courts, some people are still unaware of it. Bhutan being a mountainous country the settlements are scattered all over. Some places still do not have roads and electricity so it is difficult to reach the people living in such places. People living in such places are not so familiar with the ADR mechanisms and the related procedures. They rely on their own orthodox and primitive methods of dispute resolution in the community. One of the major problems in such disconnected communities is that people are mostly ignorant about what kind of disputes can be resolved by mediation. They even conduct mediation for some criminal acts which they should be forwarding to the courts instead.²³⁵ Some activists for gender rights have mentioned about incidents where the village headman resolved cases pertaining to sexual assaults through mediation instead of forwarding the matter to the courts.²³⁶ The victims were only given some compensation in certain cases while in others the culprit just apologized.²³⁷ When told it was wrong the mediators justified their act saying that their primary responsibility as mediators in such cases was to keep the family together in spite of the assaults and the wishes of one or both of the spouses.²³⁸ This shows the ignorance and lack of knowledge about what kind of disputes can be mediated. This ignorance will hamper the effective delivery of justice. If a criminal case which should be forwarded to the court is instead mediated, then it would cause grave injustice to the victim. Instead of helping the victim get justice, the use of ADR mechanism to resolve such criminal cases would do injustice. Access to justice includes delivery of effective remedy but when criminal cases are mediated then instead of delivering effective remedy to the victims they are made to settle for

²³⁵ Stephan Sonnerberg, 'Building Capacity without Losing Capacity: Legal Change and Dispute Resolution in Bhutan' (2016) Druk Journal < <http://drukjournal.bt/building-capacity-without-losing-capacity-legal-change-and-dispute-resolution-in-bhutan/>> accessed 17 July 2018

²³⁶ *ibid*

²³⁷ *ibid*

²³⁸ *ibid*

some compensation which is injustice. Also the outcomes resulting out of such mediation are not just. Therefore, the lack of awareness amongst the people and the mediators is another challenge to ADR in promoting access to justice.

4.4. Inadequate Roles Played by the Legal Professionals

Majority of Bhutan's lawyers work for the civil service (as registrars in Judiciary, prosecutors in the Office of Attorney General or as legal officers in the different ministries) leaving only a minority of private lawyers who render their professional services privately. Those who have knowledge of laws and procedures are all working for the government and under the Civil Service Rules they cannot practice privately during their term of service. The legal professionals cannot play adequate role in such ADR processes and this is why we have scarcity of legal personnel in the field of ADR. Those people who mediate between disputing parties are all common people who do not have law background. Their knowledge about ADR is based on their experiences as mediators and the techniques they learned from the trainings conducted by the BNLI, so they do not have the required legal knowledge. This lack of legal knowledge can create trouble at times. For example they might mediate disputes relating to a criminal offense which is against the law. They might not be able to render an effective and just remedy thereby causing injustice to the parties. Therefore, similar to lack of knowledge, the shortage of legal personnel in the field of ADR is also a major challenge to ADR promoting access to justice.

4.5. Lack of funding

BNLI has been conducting trainings for the local leaders on mediation skills and techniques. Even the CDB has been conducting trainings for the arbitrators. Such trainings are very important for an effective dispute resolution through mediation and arbitration but it cannot be conducted without incurring any expenses. For such trainings they will have to recruit skilled resource persons and make arrangements for the venue, training materials and other necessary arrangements. Such arrangements will cost quite a lot of money. BNLI and CDB have been incurring such expenses to train the mediators and arbitrators with the hope that it will at least benefit the people. So far the foreign countries and agencies have been kind enough to help the institutes in organizing such trainings. This may not always be the case in future though. If the donors stop providing the funds, then the institutes will not be able to

carry out further trainings. If the mediators and arbitrators are not well trained then it would result in ineffective remedies and unjust outcomes. Therefore, the lack of funding might be another challenge towards ADR promoting access to justice.

4.6. Shortage of experts

Till now in Bhutan, mediation has been used for resolving only domestic disputes related to subject matters like monetary, matrimonial, inheritance, etc so the heads of the local government have been able to resolve it without much problem. However problems would arise if the dispute is at an international level. International commercial arbitration and international negotiated settlements would involve technical and more sophisticated subject matters which will have to be dealt by professionals and experts and in Bhutan we have shortage of such trained experts. Such shortage of experts will create difficulties in resolving technical disputes. If there are no experts then the parties will not be able to get an effective remedy and deprivation of an effective remedy would curtail access to justice. Also a mediator or an arbitrator who is not able to understand the technicality of the subject matter of the dispute himself cannot be expected to help the disputing parties to resolve such dispute. Therefore, in order to enhance access to justice we need experts who are able to understand the subject matter and deliver effective remedy to the disputing parties.

4.7. Under-use of other ADR methods

Mediation is the most common ADR mechanism used in Bhutan, leaving the other mechanisms underused. According to the ADR Act, the ADR centre is the main body which should supervise and provide services related to dispute resolution outside the courts. Till few months ago there was no Centre and the responsibility was delegated to the CDB. CDB deals with arbitration but its scope of arbitration is only limited to construction disputes arising out of contracts. The number of cases arbitrated is very less compared to the cases mediated as seen in the previous chapter (cases mediated – 15,316; cases arbitrated – 77). Instead of just focusing on mediation it is equally important to focus on arbitration and other ADR methods. More ADR methods would mean more options to get access to justice and to resolve the disputes. If the disputing parties feel that the ADR method is not appropriate for their dispute then they can opt for another method. Currently in Bhutan, mediation and arbitration are the only used ADR methods. For some disputes these two methods are not

appropriate. For example, for cases which involve technical subject matter and related issues neutral evaluation is the most suitable method as such dispute requires special expertise. Limited options of ADR methods mean limited accessibility to access to justice. Therefore, the under-use of other ADR methods is another challenge to an effective ADR promoting access to justice.

4.8. Inadequate Functioning of the Appropriate Institution

Until this year the ADR Centre which is the main body responsible for supervising and providing ADR related services was only present in the ADR Act but not established. The CDB has been carrying out the function instead of the Centre. CDB did a commendable job so far but ADR not being its primary responsibility it could not focus entirely on ADR. They have been supervising and dealing only with the arbitral proceedings arising out of contractual disputes with regard to construction businesses. The scope of ADR under the CDB's supervision was very limited which left the other methods of ADR kind of neglected. In the absence of a proper institution responsible for the ADR system, people have been resolving their disputes within their community without any proper guidance and this has often resulted in ineffective remedies and unjust outcomes causing injustice to the parties. So far the inadequate functioning of the ADR institutions and the absence of the Centre has been a hindrance to an effective access to justice but now with the establishment of the Centre, this problem might be resolved and the potential of the ADR might increase further.

4.9. Inequality

For an ADR proceeding to bear effective results, it entails the parties to have the aptitude to bargain productively for their own needs and interests.²³⁹ There is high risk of a disputing party being susceptible when there is an uneven power correlation, especially if the party is not represented.²⁴⁰ Some people will be rich and be able to hire someone to represent them while some would not be able to afford it. This will certainly hamper the bargaining process between the disputing parties.

The weaker party will have to settle for things which are not in his or her own interest because of the other party being rich and powerful. This hinders the parties from being

²³⁹ 'Improving Alternative Dispute Resolution' <file:///C:/Users/Dell/Desktop/Chapter+4,+Chapter+5.pdf> accessed 22 July 2018.

²⁴⁰ Ibid.

treated equally before law and from getting equal protection of law which are the main elements of access to justice. Because of such inequalities the weaker sections people are not able to derive an effective and just remedy which means their right to equal access to justice is jeopardized. Therefore, inequality is another challenge to an effective ADR promoting access to justice.

These are some of the challenges which prevent the ADR system from enhancing access to justice. The various ways to overcome such challenges and to help ADR in promoting access to justice will be discussed in the next chapter.

Chapter 5: Conclusion and Recommendations

5.1. Overview

The impediments towards an effective ADR as explained in the previous chapter can be removed if certain recommendations are implemented. This chapter will discuss the recommendations which will enhance access to justice through an effective ADR system.

5.2. Concluding remarks

The right to access to justice has been recognized as a fundamental right at the national, regional and international level. The responsibility to guarantee and promote this right has been placed upon the courts. However the courts because of reasons like undue delay, cost factor, complex procedures, etc have failed to fulfill this duty. Especially the underprivileged and the people from weaker sections of the society have been affected because of such failure to guarantee access to justice. To such underprivileged and vulnerable sections of people ADR is the means to get access to justice and to redress their grievances. ADR mechanism is a consensual approach to make the disputing parties resolve their disputes amicably without following the formal adversarial system. It has a lot of benefits; it is cost effective, expeditious and provides effective remedy. It not only maintains confidentiality and helps in maintaining peace and harmony in the society by removing animosity but also helps in combating the crisis of backlogging of cases. These benefits make ADR promote access to justice along with the courts. The ADR system is not a new phenomenon in our country. People have been resolving their disputes through the informal ADR process of mediation before the institution of the formal legal system and the establishment of the Court system in the early 1960s. Even after the institution of formal legal system, informal dispute resolution mechanism like mediation has been the mainstay of dispute resolution. In Bhutan ADR has proved to be an effective alternative to guarantee the people right to access to justice. The stats and the public comments are in favor of ADR and shows that ADR has the potential to promote access to justice.

Most of the time the ADR system has been able to render effective and timely access to justice but factors like non-binding nature of the negotiated settlements, people's lack of knowledge, lack of funding, inadequate roles played by the legal personnel, shortage of experts, inadequate functioning of the Centre and under use of some ADR methods have

been creating obstacles in rendering effective access to justice. In order to overcome such obstacles and to make ADR an effective method to promote access to justice the following recommendations might be considered.

5.3. Recommendations for an Effective ADR system

5.3.1 Facilitating ADR Processes through Education.

Most of the people are aware of the benefits of resolving their disputes through ADR methods. Most of them have the knowledge but there is still scope for educating the legal personnel, the Judiciary, and the people about the ADR system especially with regard to the following²⁴¹:

- The different methods of ADR and their procedure;
- Circumstances under which the different types of ADR are appropriate;
- The stage of the proceeding at which the dispute should be referred to ADR.

The reason for disseminating the people on the above mentioned topics is to improve their understanding of the ADR methods and procedures. If this is achieved the people involved will be able to evaluate which ADR process is suitable for their respective disputes and they are more likely to have a positive experience of resolving their disputes through ADR.²⁴² The probability of the dispute getting resolved and the parties using ADR again is very high because they will have the confidence in the process.²⁴³ It is also important to educate the people about when ADR may not be appropriate. When it comes to legal personnel like lawyers and court officials it is important to educate them on when ADR is and is not appropriate. Educating people on ADR is the most effective way to improve the ADR system and to enhance access to justice.

5.3.2. Participation of Ministries, NGOs and Local Government Bodies

One of the major impediments towards an effective ADR system is the lack of knowledge and awareness amongst the people about the ADR system. BNLI has been trying to educate the general public on the laws and procedures in Bhutan but BNLI being a single agency it is

²⁴¹ 'Improving Alternative Dispute Resolution'
<<http://www.lawreform.vic.gov.au/sites/default/files/Chapter%2B4%2C%2BChapter%2B5.pdf>> accessed 22 July 2018.

²⁴² Ibid.

²⁴³ Ibid.

difficult for them. Different institutions like the ministries, the NGOs, the local government bodies, the media and other civil societies can all play significant roles in creating awareness and promoting the effectiveness of the ADR mechanism and thereby strengthening the access to justice in Bhutan.

5.3.3. Need for Additional ADR Options

In Bhutan, the methods through which the disputing parties have been resolving their disputes outside the courts have been somewhat limited.²⁴⁴ The ADR Act which is the primary legislation on ADR specifies only arbitration and negotiated settlement which covers mediation and conciliation. Most of the people resolve their disputes through mediation or arbitration but mediation has always been the most common ADR method used in Bhutan. There is a variety of other ADR methods available like neutral evaluation, settlement conferences, conciliation, etc that would enable the parties to resolve the disputes more efficiently and effectively. In order to improve the effectiveness of ADR the existing limited options for methods of ADR should be expanded.²⁴⁵

The main challenge will be to facilitate the use of such optional methods and for that the parties and the other relevant people should have a proper understanding and experience of the various processes.²⁴⁶ Parties need to have confidence in such processes and a comprehensive knowledge of their relative strengths and weaknesses. If the parties do not find a suitable ADR method to resolve their dispute they can change to another method and continue to change till they find the most suitable method. More methods would mean more choices for the parties to get an effective remedy. Even if one method does not work another will definitely work so they can still settle their disputes outside the courts amicably and get an effective remedy.

5.3.4. Hybrid Dispute Resolution Processes

The ADR Act should consider including hybrid dispute resolution processes like med-arb and arb-med in their list of ADR methods along with arbitration and negotiated settlement. These hybrid dispute resolution methods should be encouraged and promoted. The US,

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

through their experience of adopting the hybrid dispute resolution processes suggests that hybrid processes can be very effective like other ADR methods and it can be an alternative to the usual dispute-resolution approaches.²⁴⁷ According to them, these hybrid processes have the possibility of a more flexible and final dispute resolution.²⁴⁸ The process involves less time, expenses and hassle when compared to litigation and can help people in getting easy access to justice.

5.3.5. The need for compulsory referral to ADR

The referral of a dispute to ADR before approaching the court must be made mandatory for the parties. Laws and regulations must be enacted with provisions which make it compulsory for the disputing parties to refer their disputes to ADR before approaching courts. The parties might protest saying that it is against their will but in certain cases it might be worthwhile. Usually ADR is completely consensual so it is up to the parties whether they want to approach the courts or resolve their disputes outside the court through ADR methods. There are times when people are reluctant in the beginning but later when they are able to understand the issues and resolve their disputes amicably they realize that it was in their best interest. In such situations it turns out that it was a wise decision to make it compulsory for them to refer to ADR first. There is no harm in doing so because if this does not work they can still approach the courts. Justice Spigelman, Chief Justice of NSW commented,

“One matter that appears somewhat counter intuitive is the conferral upon courts of a power to order mediation. This was once thought to be pointless because it appeared unlikely that a party who was ordered to mediate would be prepared to enter such negotiations in a co-operative manner. That has proven to be false. Reluctant starters have often proved to be willing participants in the negotiation process. It appears that many litigants have either not understood, or not been advised by their lawyers about, the weakness in their case, or have adopted a negotiating posture from the outset that they could not possibly lose. A formal order of the court requiring mediation has

²⁴⁷ Ibid.

²⁴⁸ Ibid.

*overcome 259 such inhibitions and has proven particularly successful in a number of spheres of jurisdiction.”*²⁴⁹

Making referral to ADR compulsory before approaching courts would be another way to improve the effectiveness of ADR in promoting access to justice.

5.3.6. Data and Research

The concerned institutions dealing with ADR has to research and follow up on the trainings and the impacts of such trainings. They need to collect data which determines how effective ADR is when it comes to resolving disputes, reducing the time and cost of proceedings, providing justice and helping the courts in managing their caseloads.²⁵⁰ Such data will help the institutions to assess whether ADR related trainings have been effective in meeting their aims and objectives. The donors who provide the institutions with the fund for such trainings will feel content if the data indicates that the trainings have had a good impact. They will be encouraged to help further. It will also make it easier to seek for funding when you have a positive impact assessment report with the necessary data and information. Fund is important so if you have the required fund and resources it will also help ADR system in promoting access to justice.

5.3.7. Appointment of Ombudsman

People have been able to resolve their disputes through mediation arising out of subject matters like matrimonial, monetary, inheritance, etc and contractual disputes in construction businesses through arbitration. However, when it comes to administrative disputes there has not been much done in this field. The courts in Bhutan still lack the flexibility and the efficiency to remedy the wrongs of the modern administrative actions.²⁵¹

Like in the Scandinavian countries the appointment of an ombudsman would be effective in resolving administrative disputes. According to the Ombudsman Committee of the International Bar Association, ombudsman has been defined as “an Office provided for by the Constitution or by action of the Legislature or Parliament and headed by an independent,

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Lobzang R.Yargay, ‘Ombudsman: Introducing a Potent ADR Tool whose Time may Have Come for Bhutan’ (2016) 6 Bhutan Law Review <
<http://www.bnli.bt/wpcontent/themes/bnlitemplate/uploads/BLR/volume6.pdf>> accessed 22 July 2018.

high level public official who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports”²⁵²The appointment of an ombudsman will provide an alternative means to resolve administrative disputes between the citizens and the public officials.²⁵³ With the transition of our government to a parliamentary democracy with decentralized governance the appointment of ombudsman has become important. The appointment of ombudsman will help in resolving administrative disputes and to promote access to justice.²⁵⁴

5.3.8. Building Expertise

As mentioned in the previous chapter, Bhutan lack experts for resolving disputes in which the subject matter is technical and sophisticated. Educating and training the mediators and arbitrators would help in building expertise. This will prepare us for the international-level disputes as well. The subject matter for the international disputes will undoubtedly be technical and very much sophisticated so it would require experts to resolve it. Building expertise will not only help in improving the effectiveness of ADR at national level but also at the international level. Also if the mediators and arbitrators are well trained then this would help them in rendering effective remedy and just and equitable outcome which are essential to promote access to justice.

These recommendations, if successfully implemented, can help in improving the ADR system by helping it overcome the challenges it face while enhancing access to justice. As a result the ADR system can promote effective and timely access to justice.

²⁵² Charles Ferris, ‘Brief on the office of the ombudsman’
<file:///C:/Users/Dell/Downloads/IOI%20Canada_Occasional%20Paper%2006_Charles%20Ferris_Brief%20on%20the%20Office%20of%20the%20OM_EN_1980%20(1).pdf > accessed July 22, 2018

²⁵³ Lobzang R.Yargay, ‘Ombudsman: Introducing a Potent ADR Tool whose Time may Have Come for Bhutan’ (2016) 6 Bhutan Law Review <
<http://www.bnli.bt/wpcontent/themes/bnlitemplate/uploads/BLR/volume6.pdf>> accessed 22 July 2018.

²⁵⁴ Ibid.

Abstract

The system of mutual and amicable resolution of disputes outside the courts through the various Alternative Dispute Resolution (ADR) modalities is inherent in every society. ADR system has been prevailing and practiced before the institution of the court system. The ADR mechanisms are more advantageous than litigation as it reduces cost, saves time, avoids procedural complexities, prevents the docket explosion of cases in the courts and most importantly it encourages the disputing parties to resolve their disputes mutually and amicably thereby preserving peace and harmony in the society. ADR methods have also enabled those people to get access to justice who were not able to approach the courts because of their physical, intellectual or financial incapacities. Because of these advantages, ADR has been introduced in the justice delivery system of almost every country.

In Bhutan special emphasis has been given to the ADR mechanisms in the recent years to avoid the problems associated with the adversarial litigation system and to guarantee to every citizen the fundamental right of access to justice. In this paper an attempt is made to provide a broad idea about the challenges to access to justice in our legal system and to explain the potential of ADR in enhancing access to justice by analyzing the different ADR methods and assessing its impact in Bhutan. This paper will also present some recommendations for an effective ADR system which would promote access to justice for everyone irrespective of their sex, class, caste, religion or income.

Key words: Alternative Dispute Resolution, Access to Justice, Mediation, Arbitration, Negotiated settlement, Litigation.

Abstrakt

Außergerichtliche gegenseitige und gütliche Streitbeilegung durch verschiedene alternative Streitbeilegungsverfahren (*Alternative Dispute Resolution, ADR*) ist jeder Gesellschaft inhärent. Das ADR-System wurde vorwiegend praktiziert, noch bevor Gerichtssysteme eingeführt wurden. ADR-Mechanismen weisen gegenüber Rechtsstreitigkeiten einige Vorteile auf. Sie sind kostengünstiger, sparen Zeit, komplizierte Verfahren sowie eine Flut an gerichtsanhängigen Fällen werden vermieden und die Streitparteien werden vor allem dazu ermutigt, ihre Streitigkeiten einvernehmlich beizulegen und so Frieden und Harmonie in der Gesellschaft zu bewahren. ADR-Methoden haben auch jenen Menschen Zugang zu Gerichten ermöglicht, denen dieser aufgrund physischer, intellektueller oder finanzieller Situationen verwehrt war. Aufgrund dieser Vorteile wurden ADR in fast jedem Land in das Justizsystem aufgenommen.

In Bhutan wurde den ADR-Mechanismen in den letzten Jahren besondere Aufmerksamkeit geschenkt, um Probleme mit dem System der Prozessführung zu vermeiden und jedem Bürger das Grundrecht auf Zugang zur Justiz zu garantieren. In dieser Arbeit wird versucht, eine Vorstellung von den Herausforderungen zu vermitteln, die mit dem Zugang zur Rechtspflege in unserem Rechtssystem einhergehen sowie das Potenzial der ADR insbesondere für einen verbesserten Zugang zur Justiz zu erläutern, indem unterschiedliche ADR-Methoden analysiert und deren Auswirkungen in Bhutan bewertet werden. Die Arbeit enthält zudem Empfehlungen für ein effektives ADR-System, das den Zugang zur Justiz für jeden, unabhängig von Geschlecht, Klasse, Kaste, Religion oder Einkommen fördert.

Schlüsselbegriffe: Alternative Streitbeilegungsverfahren, Zugang zu Gerichten, Mediation, Schiedsverfahren, Verhandlungslösung, Prozessführung.

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