The Dhaka University Studies, Part-F Vol. XV (1) : 59-92, June 2004

ALTERNATIVE DISPUTE RESOLUTION: HOW IT WORKS IN BANGLADESH*

Dr. Sumaiya Khair

1. INTRODUCTION

Bangladesh, one of the poorest countries in the world, hosts an estimated population of 133.3 million, of which 33.7 per cent are reported as living below the national poverty line.[1] Apart from evident deficiencies in food, housing, health care, education and job opportunities, endemic poverty of millions of Bangladeshis is manifest in the denial of their fundamental and legal rights which is precipitated by their lack of access to institutions established for the enforcement of those rights. People who are poor, weak and disadvantaged and more particularly women, face innumerable obstacles in accessing justice from the more formal state organs, which are plagued by corruption, delays, complicated procedures, exorbitant costs and class biases. In the circumstances, the common people prefer to resolve their problems and disputes at the community or local level in an informal way. In legal circles this is popularly known as `alternative dispute resolution' or simply ADR. The forms of these alternative methods may vary depending on the culture, practice and tradition of the people in particular contexts. While in some societies the practice has become redundant, in others, alternative dispute resolution continues to provide the local people in Bangladesh with a viable alternative to the formal legal system.

2. DIFFICULTIES IN ACCESSING JUSTICE

Access to justice has many dimensions of which the ability to reach the process of law is but one. The capacity to access the judicial process depends on myriad factors involving the parties,

---

* The article relies largely upon an assessment of ADR interventions based on experiences of NGOs under a Project funded by The Asia Foundation, Dhaka.

1. *World Development Indicators, 2003*, The World Bank, pp. 38 &58.

objectives, resource base and discords arising from the existing socio-economic and cultural context. Broadly speaking, access to justice connotes more than simple entry into formal courts of law but includes the ability to reach lawmakers, lawyers, law enforcing officials and the capacity to pay for these services.

The existing legal process in Bangladesh is cumbersome, time consuming and costly. The procedure for pressing charges is complex and generally beyond the comprehension of simple-minded poor people who have little knowledge, much less understanding, of their legal rights and privileges. The administration of justice is circumscribed in two ways: one, the substance of the laws is in itself incomprehensible to the poor and illiterate and is largely dependent on the production of documents of which the poor people have very little knowledge, and two, faulty and partial enforcement by law enforcing agencies which is more dependent on their servitude to people with money and political power rather than service to the community.

Moreover, the exorbitant costs of professional legal services place the formal legal system beyond the reach of the average citizen. Justice is meted out on the basis of power relations within the social structure, which means that service delivery is assured for those who command greater resources or benefaction in the society. Therefore, poverty is a fundamental obstacle that effectively impedes economically disadvantaged groups' access to justice.

For those who do reach the Courts, the corruption in justice delivery is enough to deter any further attempts in seeking legal redress. Apart from the enormous congestion in Courts which results from inordinate delays in disposal of cases and dispensing justice, procedural wrangles, multiplicity of appeals, revisions, reviews and remands are but some factors that leave litigants embittered and frustrated, not to mention worn out, physically, mentally and monetarily. Payment of bribes often becomes a deciding factor in the settlement of cases. Lawyers, in collusion with court officials, charge clients extortionate sums of money as fees and persuade court officials to change the dates of cases.

One of the major drawbacks of law and its enforcement mechanism is that women, especially when they are poor, remain largely outside the ambit of the legal system which has led even law enforcing agencies to trivialize women's problems. Owing to their upbringing and socialisation in a patriarchal society, most women do not perceive themselves as having any rights. Submerged in domestic activities, women are not aware of what law has to offer them. Even if they knew the parameters of law, they would not be able to deal with the complexities of the formal legal system. The fact that women are economically disempowered greatly reduces their potential for taking legal action and enforcing their rights in Courts. Moreover, culture and tradition demand that women mute their needs and be content to live with their problems instead of challenging them. In the circumstances, they are willing at the most to submit to procedures with which they can identify more easily instead of approaching the more formal legal system for conflict resolution.

3. IN SEARCH OF ALTERNATIVES: LOOKING BEYOND FORMAL MEASURES

Evidently, the philosophy of access to justice is rooted in roles, rules, procedures, arrangements; in other words, institutions, frameworks, objectives, values and ends.[2] An effective and efficient judicial system is fundamental to service delivery without which citizens are obstructed in the enjoyment of their rights and privileges. The judicial procedure in Bangladesh is adversarial by nature where the parties to the dispute are pushed towards a win-lose situation. While this process may well settle a dispute, but the inherent differences between the parties subsist, the competing interest of the parties remains unresolved and the interpersonal relationship of the parties becomes more hardened.[3] Moreover,

---

2. See Baxi, Upendra, 'Access, Development and Distributive Justice: Access Problems of the Rural Population, *Journal of the Indian Law Institute*, Vol.18, No.3, p.176.

3. Chandra, Sarvesh, 'ADR: Is Conciliation the Best Choice?', Rao, P.C., and Sheffield, William (eds.), *Alternative Dispute Resolution. What it is and how it works*. The International Centre for Alternative Dispute Resolution, 19— pp. 82-92, at p. 82.

since recourse to the formal legal system is costly, time consuming and largely inaccessible, particularly to the poor and the disadvantaged, when legal problems arise poor clients constantly look for viable alternatives to get out of quandaries and resolve their difficulties.

This section explores the various mechanisms utilised by people, both extra-judicial as well as within the formal legal and judicial system, in their quest for justice in speedy and inexpensive ways. Currently, there are three streams of ADR in Bangladesh: extra judicial or community-based initiatives, ADR in quasi-formal systems and finally, ADR in the formal legal system.

Extra-Judicial or Community–based Initiatives

Justice delivery at local or community levels has always been preferred over formal courts, particularly by rural people. Travelling great distances, foregoing a few day's work and consequent earnings, spending money to marshal facts, engaging a lawyer and paying court fees and incidental expenses are some of the obvious factors that deter the poor from gaining meaningful access to the formal justice system. In the circumstances, there is a great demand amongst the people for an alternative dispute resolution system that would ensure due protection in the event of rights violation.

In Bangladesh extra judicial or community based ADR is commonly practiced through sh*alish* and more recently, through informal mediation. Bangladesh has a long tradition of community-based initiatives for settling local disputes through what is commonly known as '*shalish*'. The advent of NGOs has facilitated the conversion of the traditional *shalish* to the more *informal mediation* for settlement of disputes at local levels.

(a) Shalish

Shalish has traditionally been a principal mode of preserving peace and justice at local levels in Bangladesh. It is basically a practice of gathering village elders and concerned parties, exclusively male, for the resolution of local disputes. Sometimes Chairmen and elite members of the Union Parishad are invited to sit through the proceedings. *Shalish* has no fixed dimension and

its size and structure depend entirely on the nature and gravity of the problem at hand.

Local people have a tremendous faith in *shalish* as a first step towards seeking justice and settlement of disputes. The fact that the process saves time and money gives an added incentive to people to involve the community in settling their problems. It is a platform whereupon people air their grievances and introduce to the parties and audience present the various dimensions of law, rights and obligations. It provides people with the opportunity to learn from others' experiences and adopt strategies in the event of future crises in their own lives.

Although *shalish* members have the option of engaging in both mediation and arbitration processes in their attempts to assist disputants in reaching a mutually acceptable solution, arbitration remains the most commonly used method for dispute resolution in the traditional *shalish* system. Officiating members themselves decide how to address the problem. The process is far from tranquil; rather, it is wrought with tension and heated arguments. Although the decisions are not always fair and equitable, they nevertheless carry a great deal of weight within the community as, they are declared by established members of the village. Women are particularly vulnerable to extreme judgements and harsh penalties meted out by a system fraught with corruption, gender bias, power, money and influence. As mentioned earlier, the traditional *shalish* is composed exclusively of male members and as such, engenders an environment that discriminate against women disputants instead of playing a judicious role.

Although traditional *Shalish* as a method of dispute resolution has potential utilities, benefits and effectiveness, it is increasingly losing credibility on account of the arbitrary imposition of solutions upon reluctant disputants by powerful personnel of villages or local communities. Such 'solutions' are often fixed by the elite themselves to ensure the continuity of their leadership roles rather than in response to specific needs of the parties concerned. As such, *shalish* processes do not take into account the grievances of the parties, nor their desired solutions, but impose what is deemed

as correct and proper according to the officiating elites. These initiatives more often than not reflect and perpetuate the existing power relations within the community instead of making any meaningful contribution towards conflict resolution. The practice is also susceptible to manipulation by corrupt touts and local musclemen who, for a bit of money, may guide the pace and direction of the process in a certain manner by offering comments.

However, when a *shalish* is arranged and undertaken to resolve a conflict peacefully and amicably, the process does not project social power structures and patterns of domination. *Shalish* of such a nature can, in fact, become the most efficient, cost effective, socially acceptable and cohesive mode of sustaining community relationships.

(b) Informal Mediation

NGOs have attempted to remodel the traditional *shalish* by adopting a more innovative and moderate approach to dispute resolution in an effort to alleviate the common problems associated with the traditional system. NGOs prefer the mediation approach to resolve disputes whereby disputants are encouraged to express their own views without bias or fear. The NGO initiated *shalish* generally comprises a mediation committee, village elders, community leaders and others who have received some training in mediation services.

Mediation remains the primary mechanism for resolving disputes without resorting to formal courts. In view of the abject poverty and virtual inaccessibility of the poor to the legal system, mediation services provide more easily acceptable choices for settlement of disputes. In mediation, conflicts are resolved and consensus forged through participatory negotiating exercises under the keen supervision of the mediator. However, all disputes are not amenable to mediations. For those, particularly serious criminal matters, recourse to the formal legal system is the only available option.

In some instances, mediation is conducted by a formally constituted mediation committee comprising lawyers or trained individuals, who hear all cases of that area. In others, mediation is conducted by individuals who are selected by the disputants to represent

them. These mediators may be trained individuals, NGO workers or relatives/neighbours chosen by respective disputants. While NGOs play a monitoring role in their respective areas, they also ensure neutrality, at the same time representing the interests of a particular client.

The distinction between mediation and sha*lish* in its better forms is that while *shalish* essentially carries the characteristics of arbitration, in the sense that it aims towards a win-lose situation, mediation concentrates more on a win-win situation. In other words, whereas the parties in a *shalish* are bound by the decisions of the *shalishkars* (officiating individuals), mediation is conducted by actively engaging both parties in arriving at a mutual solution. There is no imposition on the parties who are allowed the space to decide for themselves the outcome of the process. This is why people prefer to have NGOs assisting in traditional *shalish* as it then assumes a more democratic dimension.[4]

ADR in the Quasi-Formal System

There are mechanisms at the local level for settlement of disputes through arbitration/conciliation. Legally mandated, these apparatuses are headed by local government personnel who dispense justice with the aid of nominees of the parties to the dispute.

(a) The Village Courts Ordinance 1976

The Village Courts Ordinance 1976 has been promulgated for trial of certain cases in rural areas. Where a case is triable under this Ordinance by a Village Court, any party to the dispute may, in the prescribed manner, apply to the Chairman of the *Union Parishad* for the constitution of a Village Court for the trial of the case.[5] A Village Court so constituted shall comprise of a Chairman and two members to be nominated by each of the parties to the

---

4. Khair, Sumaiya, *Legal Literacy for Supporting Governance*. Bangladesh Country Study prepared for The Asia Foundation, commissioned by the Asian Development Bank, May 2000, pp. 23-24.

5. Section 4, *The Village Courts Ordinance, 1976*.

dispute. However, one of the two members nominated by each party shall be a member of the concerned Union Parishad. Moreover, the Chairman of the Union Parishad shall normally be the Chairman of the Village Court.[6]

A Village Court shall be constituted and shall have jurisdiction to try a case only when the parties to the dispute ordinarily resides within the limits of the union in which the offence has been committed or the cause of action has arisen.[7]

If the decision of a Village Court is unanimous or by majority of four to one, the decision shall be binding on the parties and shall be enforceable in accordance with the provisions of this Ordinance. However, if the decision of a Village Court is a by a majority of three to two, any party may, within thirty days of the decision, apply to either the Assistant Judge or Sub-divisional Magistrate as the cases may be, for setting aside or modification of the decision. The concerned authority may refer the dispute back to the Village Court for reconsideration.[8] Notwithstanding anything contained in any other laws for the time being in force, any matter decided by a Village Court shall not be tried in any Court, including a Village Court.[9]

(b) The Conciliation of Disputes (Municipal Areas) Ordinance 1979

The Conciliation of Disputes (Municipal Areas) Ordinance of 1979 provides for settlement of certain cases in municipal areas through conciliation. Where a case under this Ordinance is required to be settled through a Conciliation Board, any party to the case may apply to any Commissioner for ward within which the dispute has arisen for the constitution of a Conciliation Board for the settlement of the case. If the application is made in the prescribed form, the Commissioner shall proceed to constitute the

---

6. Section 5, *ibid.*
7. Section 6, *ibid.*
8. Section 8, *ibid.*
9. *Ibid.*

Conciliation Board in the prescribed manner within the prescribed time.[10]

A Conciliation Board shall comprise of a Chairman and two members to be nominated, in the prescribed manner, by each of the parties to the case. However, one of the two members to be nominated by each party shall be a commissioner of the *Pourashava* (municipal area) concerned. The Commissioner to whom an application is made under this Ordinance shall be the Chairman of the Conciliation Board.[11] If the decision of a Conciliation Board is unanimous by a majority of four to one, the decision shall be binding on the parties and shall be enforceable in accordance with the provisions of this Ordinance. One the other hand, if the decision is by a majority of three to two, any party may, within thirty days of a decision, apply to the Assistant Judge or Sub-divisional Magistrate for an order setting aside or modifying the decision. If the concerned authority is satisfied that there has been a failure in justice, he may set aside or modify the decision or direct that the case be sent back to the Conciliation Board for reconsideration. Notwithstanding anything contained in any other law for the time being in force, any matter settled by a Conciliation Board in accordance with this Ordinance shall not be tried in any Court.[12]

(c) The Conciliation (Municipal Areas) Board Act 2004

This new law replaced *The Conciliation of Disputes (Municipal Areas) Ordinance of 1979*. The Act empowers the municipalities to settle minor disputes in municipal areas through conciliation under the auspices of a five-member board with the municipal chairman acting as president. Under the new law the municipality conciliation boards are empowered to resolve disputes involving not more than Taka 25, 000. The limit was much lower in the earlier Ordinance of 1979.

---

10. Section 4, *The Conciliation of Disputes (Municipal Areas) Ordinance, 1979.*
11. Section 5, *ibid.*
12. Section 7, *ibid.*

ADR in the Formal Legal System

As pointed out by Justice Mustafa Kamal, former Chief Justice of Bangladesh, the purpose of alternative dispute resolution is not to substitute consensual disposal for adversarial disposal or to abolish or discourage informal mediation or arbitration outside the Courts. Rather, it is about making the process part and parcel of the formal legal system, preserving at the same time, the trial Court's statutory authority and jurisdiction to try the case should ADR fail.

Although extra-judicial initiatives like, *Shalish* and mediation by village elders and NGOs have indeed made commendable impact in specific contexts, these efforts, by themselves, have not been able to solve the civil Court's own particular problems, namely, backlog of cases, delay and expenses in litigation. In other words, the extra-judicial exercises have not actually benefited the formal Court system since the parallel application of informal mediation and formal adversarial system is unlikely to either reduce the huge backlog or lower the costs involved. In the circumstances, it would be useful to import some elements of consensual resolution into the formal judicial system in order to enable litigants or for that matter, potential litigants, to be assured of justice delivery wit speed and with less cost.[13] Initiatives in this area culminated in the practical application of ADR provisions in *The Family Courts Ordinance 1985* and the incorporation of ADR provisions in *The Code of Civil Procedure 1908* and *The Artha Rin Adalat Act 2003* respectively.

(a) The Family Courts Ordinance 1985

Provisions for mediation may be found in Sections 10 and 13 of *The Family Courts Ordinance 1985.*

---

13. Kamal, Justice Mustafa, 'Introducing ADR in Bangladesh', Keynote Paper presented at the National Workshop on *Alternative Dispute Resolution: In Quest of a New Dimension in Civil Justice Delivery System in Bangladesh*, under the auspices of Legal and Judicial Capacity Building Project, Ministry of Law, Justice and Parliamentary Affairs, GOB, Dhaka, 31 October, 2002, p. 3.

According to Section 10 of the Act when a written statement is filed, the Family Court shall fix a date ordinarily of not more than thirty days for a pre-trial hearing of the suit. On the date fixed for pre-trial hearing, the Court shall examine the plaint, the written statement (if any) and the summary evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties. At the pre-trial hearing, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties. If no compromise or reconciliation is possible, the Court shall frame the issues in the suit and fix a date for recording evidence.

Section 13 of the Act provides that after the close of evidence of all parties, the Family Court shall make another effort to effect a compromise or reconciliation between the parties. If such compromise or reconciliation is not possible, the Court shall pronounce judgement either at once or on some future day not beyond seven days of which due notice shall be given to the parties or their agents or advocates and, on such judgment a decree shall follow.

Where a dispute is settled by compromise or conciliation, the Court shall pass a decree or give decision in the suit in terms of the compromise or conciliation agreed to between parties.[14]

(b) The Code of Civil Procedure 1908

Provisions for alternative dispute resolution have recently been incorporated in *The Code of Civil Procedure 1908* by an amending Act titled *The Code of Civil Procedure (Amendment) Act of 2003*. Sections 89A and 89B provides for mediation and arbitration as alternate means of settling disputes.

Mediation:

Section 89A of the said Act provides that after filing of the written statement, if all the contesting parties or their pleaders are in attendance in the Court and are willing to try and settle their dispute/s through mediation, the Court may

---

14. Section 14, *The Family Courts Ordinance 1985*.

— adjourn the hearing and mediate in order to settle the dispute/s, or

— may refer the dispute/s to the parties or their pleaders, or

— may refer the dispute/s to a mediator from the panel prepared by the District Judge in accordance with sub-section 10[15]

for undertaking efforts for settlement through mediation.

Mediation under this Act has been defined as flexible, informal, non-binding, confidential, non-adversarial and consensual dispute resolution in which the mediator shall facilitate compromise of disputes in the suit between the parties without directing or dictating the term of such compromise.[16]

Within ten days from the date of reference by the Court to mediate, the parties shall inform the Court in writing as to whether they have agreed to try and settle the dispute through mediation and the name of the mediator. If they conform to these requirements then the mediation shall be concluded within sixty days from the day on which the Court is so informed, unless the Court extends the period on its own motion or upon the joint prayer of the parties. In any event, the extension shall not exceed thirty days. However, if the parties should fail to inform the Court of their decision to mediate following the reference by the Court, the suit shall proceed for hearing by the Court.[17]

---

15. Sub-section 10 of Section 89A of *The Code of Civil Procedure (Amendment) Act 2003* provides that for the purposes of this section, the District Judge shall, in consultation with the President of the District Bar Association, prepare a panel of mediators (to be updated from time to time) consisting of pleaders, retired judges, persons known to be trained in the art of dispute resolution, and such other person or persons, except persons holding office of profit in the service of the Republic, as may be deemed appropriate for the purpose, and shall inform all the Civil Courts under his administrative jurisdiction about the panel:

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

16. Explanation 1, Section 89A, *The Code of Civil Procedure (Amendment) Act, 2003.*

17. Section 89 A (4), *ibid.*

Once the mediation proceeding is complete, the mediator shall submit to the Court through the pleaders a written report containing the result of the mediation. Should a compromise be reached, the terms of such compromise shall be reduced to writing in the form of an agreement, bearing signatures or left thumb impressions of the parties as executants as well as signatures of the pleaders and the mediator as witnesses. The Court shall thereupon pass an order or decree in accordance with relevant provisions of Order XXIII of T*he Code of Civil Procedure 1908*.[18] When the Court itself mediates, it shall make a report and pass an order in a similar manner.[19] No appeal or revision shall lie against any order or decree passed by the Court in pursuance of settlement of disputes between the parties in accordance with the aforementioned provisions.[20]

When a mediation initiative undertaken by the Court itself fails to resolve the dispute, the same Court shall not hear the suit, if the Court continues to be presided by the same judge who led the mediation initiative. In that case, the suit shall be heard by another Court of competent jurisdiction.[21]

The proceedings of mediation shall be strictly confidential. In the circumstances, all communications made, evidence adduced, admissions, statements or comments made and conversation held between the parties, their pleaders, representatives and the mediator shall be deemed privileged and shall not be referred to and admissible in evidence in any subsequent hearing of the same suit or any other proceeding.[22]

Arbitration:

Section 89B of *The Code of Civil Procedure (Amendment) Act 2003* provides that at any stage of the proceeding, if the parties to

---

18. Section 89A (5), *ibid.*
19. Section 89A (6), *ibid.*
20. Section 89A (12), *ibid.*
21. Section 89A (9), *ibid.*
22. Section 89A (8), *ibid.*

a suit apply to the Court for withdrawal of the suit on the ground that they will refer the dispute/s in the suit to arbitration for settlement, the Court shall allow the application and permit the suit to be withdrawn. Thereafter, the dispute/s shall be settled in accordance with *Shalish Ain 2001*. However, if for any reason, the arbitration proceeding does not take place or an arbitral award is not given, the parties shall be entitled to re-institute the suit so withdrawn.[23]

(c) The Artha Rin Adalat Act 2003

The Artha Rin Adalat Act of 2003 also talks of settlement of disputes in alternative ways. It provides for both Settlement Conference and Arbitration. However, only one of the prescribed methods may be adopted to resolve disputes through alternative ways; in the event one method is followed and it fails, the other means cannot be used.[24]

Settlement Conference

According to Section 21(1) of the Act, if the Court deems it proper, it may, keeping pending all proceedings of the suit, convene a Settlement Conference after the submission of written statement by the defendant for settlement of dispute in an alternative way. The Court may ask the parties to the suit, their representatives and their lawyers to be present at the Settlement Conference, which shall be presided over by the Judge of the Artha Rin Adalat.

For the purposes of this Act `Settlement Conference' shall mean conference comprising the parties, their lawyers and their representatives and presided over by the Judge of the Artha Rin Adalat for disposing of the suit in an informal, non-binding, confidential, non-adversarial manner on the basis of mutual cooperation and understanding of all concerned. During the process the Court shall simply play the role of a facilitator.[25]

---

23. Section 89B (1), *ibid.*
24. Section 23, *The Artha Rin Adalat Act, 2003*..
25. Section 21, Explanation, *ibid.*

The venue, procedure and functions of the Settlement Conference shall be determined by the Judge. The entire procedure shall be conducted in camera and the proceedings shall be strictly confidential. Any suggestions made, advice given, evidence adduced, admissions, statements or comments made and conversation held between the parties, their lawyers and representatives and the settlement judge shall be deemed privileged and shall not be referred to and admissible in evidence in any subsequent hearing of the same suit or any other proceeding.[26]

The Court shall explain the points of disputes before the parties, their lawyers and their representatives and shall endeavour to arrive at a solution. However, the Court shall not in any event exert any influence on the parties to accept his own proposal for settlement.[27] The process of settling the dispute shall be completed within sixty days of the Court's order to this effect, unless the Court extends the period on its own motion or upon written representation of the parties showing sufficient cause for period not exceeding thirty days.[28]

Should the dispute be settled at the Settlement Conference, the term and conditions of the settlement shall be recorded in the form of an agreement and signed by the parties as executants and by their lawyers and representatives as witnesses. Once these formalities are complete, the Court shall pass an order or decree in accordance with the relevant provisions of Order XXIII of T*he Code of Civil Procedure 1908.*[29] No appeal or revision shall lie in the higher Court against any order or decree passed by the Court for the settlement of dispute at the Settlement Conference.[30]

If the initiative fails and the Judge of the aforesaid Court is not transferred in the meantime, the next hearing of the suit shall not

---

26. Section 21 (8), *ibid.*
27. Section 21 (2), *ibid.*
28. Section 21 (5), *ibid.*
29. Section 21 (4), *ibid.*
30. Section 21 (10), *ibid.*

take place. The suit shall be transferred for hearing to any other Court of competent jurisdiction and the next hearing shall resume from its previous position in such a manner as though no efforts were taken to settle the dispute through a Settlement Conference.[31] If, for any reason, the suit cannot be transferred to a Court of competent jurisdiction, the District Judge may appoint any other judge under his jurisdiction to that Court on an *ad-hoc* basis for the hearing of the suit.[32]

Arbitration

Section 22 (1) of *The Artha Rin Adalat Act 2003* provides that where no order has been given for settling the dispute through the Settlement Conference, the Court may, after submission of the written statement, keeping pending all subsequent proceedings, refer the suit to the lawyers engaged by the parties or where no lawyers have been engaged, to the parties themselves, for settlement of the dispute through arbitration. If the parties agree to try and settle the dispute through arbitration, it shall be binding upon the Court to refer the suit for arbitration.

Once the suit is so referred the lawyers engaged for the suit in consultation with the parties may appoint a lawyer who is not engaged by any party to the suit or a retired judge or a retired official of a bank or financial institution or any other competent person as Arbitrator for settling the dispute. However, no person who is occupying an office of profit in the service of the Republic shall be eligible for appointment as Arbitrator.[33]

The parties are required to communicate to the Court within ten days of the Court order for arbitration whether they have agreed to settle the dispute through arbitration and the identity of the person engaged as Arbitrator. If the parties fail to communicate to the Court the prescribed terms within the given time, the order for

---

31. Section 21 (6), *ibid.*
32. Section 21 (7), *ibid.*
33. Section 22 (2), *ibid.*

arbitration shall be cancelled and all subsequent proceedings of the suit shall commence in such manner as though the arbitration order had never been passed.[34]

The Court shall not specify any procedure for the settlement of the dispute nor shall it fix any remuneration for the lawyers. All this shall be mutually decided and agreed upon by the parties, their lawyers and the Arbitrator.[35] The arbitration process shall have to be completed within sixty days of the Court's order. However, the time period may be extended for a period not exceeding thirty days if the Court so chooses, either on its own initiative or upon the request of the parties.[36]

Strict secrecy shall be maintained throughout the process. Accordingly, all discussions held and advice given, evidence adduced, admissions, statements or comments made and conversation held between the parties, their pleaders, and the Arbitrator shall be confidential and shall not be referred to and admissible in evidence in any subsequent hearing of the same suit or any other proceeding.[37]

The Arbitrator shall keep the Court informed about the progress of the arbitration process by reporting to the Court without violating the confidentiality of the parties.[38] If the dispute is settled, the terms and conditions of such settlement shall be reduced to writing in the form of an agreement bearing the signatures or left thumb impressions as the case may be, of the parties as executants and the lawyers and the Arbitrator as witnesses.[39] The Court shall pass an order or decree on the basis of the aforesaid report in accordance with the provisions of Order XXIII of *The Code of Civil Procedure 1908*.[40] No appeal or

---

34. Section 22 (4), *ibid.*
35. Section 22 (3), *ibid.*
36. Section 22 (4), *ibid.*
37. Section 22 (9), *ibid.*
38. Section 22 (5), *ibid.*
39. Section 22 (6), *ibid.*
40. Section 22 (7), *ibid.*

revision shall lie in the higher Court against the order of this Court if the dispute is settled through arbitration.[41] Where the initiative for arbitration fails, the Court shall resume the hearing from the previous stage in such manner as though no attempt had ever been made to settle the dispute through arbitration.[42]

4. MAJOR ISSUES ON THE ADR AGENDA

Law often plays a critical role in reinforcing the vulnerability of disadvantaged groups within a given society. In Bangladesh law in many ways plays a key role in designating power relations along lines of age, gender, class and so on. The inherent difficulty within the legal system of Bangladesh is not so much the lack of laws, but the absence of proper implementation. Ignorance and impoverishment, not to mention expensive and cumbersome legal procedures, effectively impede poor citizens' right to equity and justice. Although the poor as a whole are vulnerable to exploitation, the vulnerability of a poor woman in Bangladesh assumes different dimensions having far-reaching implications. A poor woman in Bangladesh is subjected to dual hierarchies, one, on account of her gender and, two, her impoverishment. Having very little access to material resources women lack autonomy and decision-making power, which precipitates their disempowerment within the family, community and the wider society. It is said that three factors are instrumental in sustaining women's subordination and powerlessness: discriminatory laws, gender-biased Court judgements and the ignorance of the law and the law-making processes.[43] In the circumstances, it is common for women, like other disadvantaged groups, to seek out alternative methods of rights redress and conflict resolution with which they can relate without difficulty rather than submit to the formal legal system which tends to be elitist in nature.

---

41. Section 22 (11), *ibid.*

42. Section 22 (8), *ibid.*

43. Hasan, Fatema Rashid, `Limits and Possibilities of Law and Legal Literacy: Experience of Bangladesh Women', *Economic and Political Weekly* October 29, 1994, p.69.

While land and property disputes form a significant part of ADR activities NGOs, marital disputes and incidences of violence against women predominate the ADR agenda as the major cross-cutting legal issue affecting the beneficiaries. Although spousal violence often arises out of the most trivial of causes, like delay in cooking and serving food to the man of the house, dowry demands form a common ground for inciting violence against women within the family. Although prohibited by T*he Dowry Prohibition Act 1980*, the practice of demanding dowry is rampant and is now rooted in the socio-economic and cultural background of the people. This practice encourages multiple marriages, i.e. polygamy, as a means of acquiring more money with each successive marriage. Since *Muslim Law* permits men to have four wives at a time, the man may marry again by or without divorcing his existing wife/wives. Divorce leaves in its wake problems of maintenance and custody, which form crucial aspects of ADR interventions. Other legal issues include child marriages, lack of marriage registration which makes it easier for men to shirk their marital and legal responsibilities, arbitrary divorces, denial of inheritance rights and so on. Traditionally backward, illiterate and economically dependent, rural women are incapable of tackling complex legal problems let alone resolve them equitably. The entire scenario is compounded by normative ideology that perceives women as inferior and unequal in the economic, social and cultural context.

In case of land and property disputes problems arise mainly due to delays and difficulties in transferring title, falsifying documents, encroaching upon land by neighbours or others and so on. A lot of these problems are not simply the result of red tape, but the laws themselves. There is a perceptible reluctance amongst rural families to part with shares belonging to orphans or children of divorced parents. In the circumstances, ADR initiatives play an effective role in ensuring equitable distribution of resources amongst legitimate heirs. Such initiatives appear to have been similarly effective in ensuring rights of the fishing community over water bodies. Criminal offences are in principle not dealt by ADR initiatives but are referred to formal courts. However, cases, for

example, of petty theft are often disposed of in an informal way subject to mutual consent of the parties.

Mediation appears to be the single most favourite method of resolving disputes at the local level and the most widely used of ADR mechanisms amongst the implementing partners. Mediation has the objective of resolving disputes locally, within a reasonable time and is geared towards a win-win solution. This process of dispute resolution is favoured by the majority of the rural poor for its neutrality and promptness in arriving at decisions, which is congenial for both parties to the dispute. Since the bulk of the population in Bangladesh are poor and illiterate and as such, are unable to seek justice in courts, mediation services provide poor people the advantage of free legal assistance. The NGOs combine mediation services with legal aid in their attempts to aid citizens in the redress of their rights. Where organisations lacked the legal grounding and expertise, legal aid services were provided through the network and partnership developed with legal organisations under respective programmes.

5. BEST PRACTICES: ASSESSING THE IMPACT OF ADR

ADR activities have established viable alternatives for conflict resolution amongst citizens by providing them with the means of recourse, alternative to courts, for vindication of their rights. On the basis of experiences of a few NGOs dispensing informal mediation services and the developments in the Family Court, this section assesses the overall impact of ADR interventions in relevant areas.

Impact of Community Mediation

i. Transformation of the traditional Shalish

The process of *shalish* in its customary form invariably operated for and by the powerful people in society. Having socio-economic leverage and political clout they manipulated *shalish* processes in their favour. Represented frequently by a body of men, *shalish* traditionally worked to the detriment of women and the poor, as judgements were arbitrary, opinionated, harsh and one-sided.

The introduction of legal services by NGOs has developed an

altogether new system of administering justice and conflict resolution. Working parallel to traditional systems, the organisations have remodelled the traditional *shalish* by replication of mediation services. Under the new system mediators take special care to ensure satisfaction of both parties by providing them the opportunity of expressing their views and experiences and airing their grievances. Disputants are given the space to express their concerns freely and without hindrance or interruption. It is the disputants who are given the option of identifying solutions acceptable to both. The neutrality maintained throughout the process convinces the parties of the fairness of decisions. This is a principal reason why people have more confidence in the NGO supervised mediations. Although mediation does not necessarily undermine the formal legal system, it has acquired considerable credibility and popularity amongst the rural people as a means of accessing equitable justice. This has been the outcome of continued commitment and faith of community members, sound communication skills in dealing with people during programme interventions and an overall dissemination of knowledge about law and human rights by implementing partners.

ii. Cost effective justice delivery

As far as cost effective and timely service delivery are concerned the most prevalent extra-judicial measure appears to be community mediation. In the absence of an effective and efficient court system, it is better if states widen the parameters of the machinery of justice by developing methods of dispute resolution that would ensure quality and accessibility. Mediation conducted by NGOs have many advantages, chief among them being informality, speed, absence of backlog, economy, privacy, harmony and easy accessibility.

The most tangible gain from mediation services is the lesser cost in disposing of disputes. This leads to a general enhancement of material circumstances of disputants. There are numerous examples of clients whose financial circumstances have improved, even if on a modest scale, as a result of mediation processes. There are instances where women have been provided with maintenance or

dower or simply taken back by their husbands who treat them better than before. Although these small victories are not necessarily sustainable for an indefinite period of time, they nevertheless offer the clients a measure of choice in the absence of realistic alternatives.

Moreover, since disputes submitted to mediation are resolved more swiftly than those submitted to the formal judicial system, this, in some ways, assists the judicial system by actually reducing the burgeoning caseloads of courts. When cases, which need not be taken to court, are informally settled, the quality of formal justice is also enhanced as judges are then in a position to devote more time to cases that must be heard in courts.

iii. Enhanced knowledge base

One of the significant impacts that have emerged from ADR interventions is the increased level of awareness and sensitivity about law and rights amongst citizens. Training imparted by legal NGOs to local level ADR committees provide an excellent opportunity for them to acquire knowledge of the legal rights and wrongs in respect of specific issues. The *shalish* sessions are also educational in themselves in the sense that all the people present and participating have the opportunity of learning what protection they have under the law. Similarly, they are acquainted with the risks and liabilities of circumventing the law. While beneficiaries may not exactly have become legal experts, they have certainly acquired substantial knowledge about specific legal issues that impinge on their daily lives. Most importantly, they are aware about the gaps between law, culture and practice and recognise the need to respect the rule of law at all events.

Women have benefited from this knowledge in more intense ways as they stood to suffer the most in the absence of legal knowledge. For example, in cases where legal provisions have been misapplied, like pronouncement of three *talaks* without going through the required procedure, knowledge of the law helped couples get back together without having to endure the hassles of separation. Again, where divorced couples wanted to remarry, knowledge of the law gave them the option of doing so without going through

an intermediate marriage as was the norm in *hilla* marriages. Women now know what their rights are and where to go in the event of violation of their rights. On the other hand, men and influential people also know their obligations and the limits to their power.

iv. Attitudinal and behavioural change

ADR programmes have wrought changes in the attitudes of citizens in ways that enable them to take control of their own lives and make their own decisions. Steeped in traditional misconceptions, the general trend among rural people was to cling to age-old customs even when it came to dispensing justice. Far from democratic, traditional biases impinged sharply on disadvantaged groups more particularly, women and the poor. The advent of community legal services has helped citizens reassess their situation and plan their future accordingly. For example, legal awareness and access to community justice have contributed to a reduction in child marriages and dowry demands. Similarly, polygamy, spousal violence and arbitrary divorce also show a downward trend as more and more people realise their rights and their potential to achieve equitable justice at the local level. Initiatives like family planning also seem to have greater effect as a result of legal services as men are increasingly consulting their wives in planning their families.

Thus, legal interventions at the community level have led people to make educated choices about their lives. In the same way, alternative dispute resolutions have initiated a shift in the attitude of men who have come to accept, albeit grudgingly, that, women have to be treated equitably. Women are also coming out of their shells and articulating their demands publicly. They resist oppression in ways hitherto unknown to them, much less practiced. Thus, ADR initiatives bring forth distinct changes in behavioural patterns amongst beneficiaries.

Mediation processes also bring changes in the attitude of the mediators. They do not regard themselves as judges; rather, they consider their services as essential for settling disputes and maintaining a social balance. They no longer look at women as a

gendered entity but as individuals vested with rights and in need of protection. This has facilitated the neutral operation of sha*lish* at the local level.

The impact of mediation as an ADR mechanism is strongly felt amongst the village elite and the U*nion Parishad* leaders. They are convinced about the credibility of the modified *shalish* and often refer cases to implementing partners for settlement. In many cases the Chairmen of the local Arbitration Council requests implementing partners and ADR committees to settle matters that had originally come before them for settlement. This indicates not only the acceptance of ADR across boards but also signifies a change in attitude of locally elected personnel about their roles in governance. Corruption and misuse of power are also curbed as the implementing partners' role as watchdog of people's rights and providers of local justice is well known.

v. Participation of women in decision-making

One of the distinct features of the modified *shalish* is the inclusion of women as mediators and active contributors to the process of dispensing justice. The selection of a cross section of individuals, including women, by implementing partners for training has altered the customary composition of *shalish,* which originally consisted of senior male members only. The present scenario sees a departure from this stereotypical arrangement as women and younger people are increasingly officiating as mediators. There are instances where women participate in dispute resolution through group mobilisation. In others, women are not official members of the implementing organisations but are selected by the parties. During mediation, women who are non-members are also seen to interject, protest and rebut motions. In any case, the thrust is on active participation by women thereby engendering an enabling environment for equitable dispensation of justice.

Experiences of NGOs reveal that women, whether project staff, field workers or *shalish* members, have not only wrought considerable changes in the traditional *shalish* but also have imported qualitative changes within the community and family. While not retiring entirely from the traditional system of dispute

resolution, women are increasingly using their collective strength in voicing their demands and ensuring for themselves the benefits of law and justice. Women disputants speak more freely when there are women mediators and this ensures a transparent process of communication between parties and *shalish* committees. Women mediators are confident and assertive and are committed to protecting women from exploitation. This, together with the knowledge that they can hold their male kinsmen accountable for injustices done to them, have given rural women some degree of autonomy in determining their own futures. This is evidenced by the secondary changes that have occurred as a result of ADR interventions. For instance, there is a marked disinclination amongst people to agree to marriage proposals with dowry demand as they are aware of the consequences. This has resulted in a reduction of marital violence and polygamy. In cases of divorce, maintenance and dower money have been successfully recovered in many cases.

vi. Ensuring gender justice

ADR initiatives by NGOs have made considerable headway in respect of protecting women's rights in the family and outside. Legal issues pertaining to women have been communicated through training and legal literacy programmes. Under these initiatives women have been encouraged to identify the forum of their choice for justice delivery. Women's issues, which have gained prominence in the *shalish* process, are no longer trivialised. Women now have a forum for pressing their demands without inhibitions. With the introduction of ADR initiatives women have been able to access an alternative system of justice, which in essence restored their faith in the community.

Whereas previously women suffered in silence on account of their inaccessibility to the formal legal system, the NGO assisted *shalish* has given them the opportunity of challenging the injustices done to them in more familiar settings. Problems are resolved in presence of all and upon consensus of both parties. Consequently, there is a reduction in hostilities and aggression between parties as both realise the obligation they incur as a result of involving the

community in decision-making. The fact that the primary beneficiaries of ADR activities are women, demonstrate that women's issues are being taken seriously after all. The involvement of women in mediation facilitates the process, as it is women who can identify more easily with the difficulties faced by women clients. Moreover, ADR activities appear to have equipped the community with a new sense of justice, which is manifest in their attempts to ensure the rule of law in justice delivery.

vii. Development of negotiating strength through collective bargaining

All mediations involve intense negotiation between disputing parties. Mediation workers strive to engage disputing parties in active negotiation in an attempt to engender an environment within which balanced debate about the issue in question may emerge. The process is participatory and democratic since both parties are given ample opportunity to give their views and articulate their demands without fear or intimidation. The exercise strengthens the bargaining capacities of disputing parties by engaging them in an objective dialogue. The success of negotiation, however, depends upon a host of factors. While flexibility of the mental condition of the parties is fundamental to any negotiation, prevalent socio-cultural and economic contexts are equally important in arriving at just and realistic solutions. For example, a female client having been mistreated by her husband and his family may well choose to go back as she has very limited options. She is illiterate, unemployed and her parents/ family will not/can not take her back. In the circumstances, she may prefer to stay with her husband even at the risk of continued maltreatment. At this stage it becomes a matter of choosing between two evils for clients.

The other benefit women derive from ADR activities is the opportunity to bargain for their rights and privileges in a collective way. Poverty and oppression impinge more sharply on women, particularly when they are on their own. It is found that women respond to crises in more effective ways when they have other women to rely on. Their collective strength helps them develop

strategies that enable them to brave and overcome the daily challenges of life. The sharing of experiences in a group lessens women's feelings of alienation and reassures them that they are not alone in the struggle for existence. There is a visible increase in the presence and participation of women in mediation processes. Backed by collective power, women are thus able to withstand oppression and secure their rights and privileges.

However, although the most significant advantage of mediation is the continued involvement of the parties in the negotiation process, it is only right to find out whether the disputants are indeed satisfied with the results and whether they actually believe in the fairness of the results. Apart from the outcome, the perception of the process itself is important in ascertaining the benefits of the initiative. In this regard participation by parties is vital for a successful negotiation. Unless disputants can be induced to participate in the process on an equal footing and share in the decision-making and outcome, the purpose of mediation would be undermined. It is important to remember that mediation processes are more effective when there is a discreet sanction force behind the initiatives. In other words, the fact that in the event of one party refusing to be bound by mediation decisions, the implementing partners are prepared to assist the other party in court is enough to compel parties to agree to abide by the decisions arrived at through mediation.

viii. Community participation and ownership

The community on the whole benefits from mediation services provided by the implementing partners. Local level *shalish*, which requires the involvement of the community at large, instils a deep sense of responsibility and ownership amongst individuals to resolve their own problems and control their own destinies. An individual who believes that s/he can obtain meaningful and enduring relief through a relatively neutral, cheap, expeditious and above all, accessible forum is more likely to rely on community support rather than resort to self help. This effectively reduces the need for State intervention and instead enables individuals to regulate their lives in a more constructive and meaningful fashion.

In other words, community participation transforms the traditional village *shalish* in ways that give individuals a renewed sense of hope, well-being and empowerment. The community on the whole also benefits from the lessons learnt as a result of participating in and witnessing mediation processes. The knowledge of rights and wrongs gleaned from these sessions by other members of the community come in handy when it comes to settling their own conflicts when the situation arises. Moreover, the involvement of the entire community increases the accountability of both mediators and disputing parties whereby their commitment to the cause is ensured.

Impact of ADR in the Quasi-Formal System

Although state mandated local justice systems are headed and operated by personnel in local governance, have backing of the Government and have necessary structures and functionaries in place, these systems are virtually redundant. The fact that the *Union Parishad* personnel have, over the years, been far more occupied with making personal gain rather than dispensing justice has made their offices practically defunct as far as resolution of conflicts at the local level are concerned. This is also evident from the fact that disputes brought before the Conciliation Board or the Village Court are often referred to the NGO assisted ADR committees for resolution. The alleged preoccupation of the local government organs with issues other than dispute resolution has gradually deviated their focus from justice dispensation to other areas of service. Consequently, the local population sees these bodies less as a forum for justice and more as a development oriented service provider. Therefore, local government bodies are fast losing their credibility in providing justice to local communities despite having clear sanctions of the law.

Moreover, the fact that justice delivery mechanisms of the quasi formal system are clearly distinct from that used in community mediation both in terms of quality and effectiveness make informal mediation more acceptable to local people. The inherent distinction between justice dispensed through NGO mediation and that by the Village Court is that the proceedings in the latter are premised on

the arbitration model. In other words, while in mediation parties themselves arrive at a solution with the assistance of the mediator who simply facilitates the process, decisions at the Village Court evolve by way of arbitration based on the opinion of the majority members. Compensation is awarded by the Village Court on the basis of the value of the suit whereas, in mediation compensation is agreed upon by both parties. While there is no scope for appeal under T*he Village Courts Ordinance 1976*, mediation offers the disputants the opportunity to reopen their cases and reapply for mediation where the first attempt fails. Finally, although the Ordinance is silent about the sex of the members of the Village Court, the participation of women as members of the Village Court is rare. Contrarily, women are increasingly officiating as mediators on ADR committees.

Impact of ADR in the Formal Legal System

i. Activating ADR in the Family Courts

Within the formal judicial system, the scope of mediation through *The Family Courts Ordinance 1985* has been tested with positive results. Although options for ADR were available under the Ordinance, the provisions were hardly utilised by the Family Courts in the past. This was largely due to ignorance and lack of motivation amongst lawyers and judges who, confined within the traditional adversarial system, made no attempts to take cognizance of or apply these provisions.

Given the multi-dimensional problems besieging the Courts of Bangladesh, particularly the civil justice system, initiatives were undertaken by Justice Mustafa Kamal, former Chief Justice of Bangladesh, to commence reforms in the legal system. To this end cooperation was sought from the Institute for the Study and Development of Legal Systems (ISDLS) of USA for effectively resolving the problems faced by the Civil Courts. Drawing upon the American experience, a Project was designed and launched to investigate avenues of judicial reform for dealing with the backlog of cases. Comprising of several phases the initiative produced a report that underscored specific reforms that could be initiated in Bangladesh. One of the recommendations of the report was to start

a pilot project on mediation, a non-mandatory consensual dispute resolution system, in the Family Courts of Dhaka, gradually expanding the practice to other judgeships in the country. [44]

Mediation in the Family Courts was recommended on a careful assessment of the pervasive problems, their causes and likely solutions. The idea was to build, as far as possible, on the existing foundation of the country's legal system. The reason why the Family Courts were earmarked for the pilot project is that since *The Family Courts Ordinance of 1985* itself provides for conciliation there was no need for a new legislation. Thus, while inclusion of other Courts at that stage would have necessitated new legislation or amendment of *The Code of Civil Procedure 1908*, the plan sought to commence reforms in ways that did not require a change in the procedural rules.[45]

The other reason for recommending mediation in the Family Courts is that the process entails direct participation of the parties to the dispute. They are required to attend confidential meetings along with their lawyers and other interested persons in the presence of a neutral third party, who, a judge, is trained to facilitate dispute resolution. The parties are allowed to talk about their positions in joint sessions before settlement options are discussed in private. Parties are able to interact freely without inhibitions; this enables them to anticipate the likely result, should they choose to litigate. This process is particularly beneficial for women litigants, who have the opportunity of voicing their grievances without having to go through the embarrassment and discomfort of appearing in Court. As it is, given the traditional bias against them, women feel uneasy about exposing their private matters to the public in open Court; mediation, in the circumstances, has enabled them to utilise alternative modes of dispute resolution without compromising their privacy. [46]

---

44. Hasan, Justice K.M., 'A Report on Mediation in the Family Courts: Bangladesh Experience', presented at the 25th Anniversary Conference of the Family Courts of Australia, Sydney, 26-29 July, 2001, p. 3.

45. *Ibid.*

46. *Ibid.*

ii. Increased disposal of cases and realisation of decretal money

Currently, three Assistant Judges' Courts of Dhaka Judgeship have exclusively been designated as Family Courts for mediation purposes. It is found that cases are being disposed of relatively quickly after the establishment of the Mediation Courts. The following table demonstrates the modes of disposal of cases between 2000 and 2003.[47]

Year	Cases disposed of on compromise	Cases disposed of on contest	Cases disposed of otherwise	Cases disposed of after establish-ment of Mediation Courts	Mediation failed
2000	76	35	423	534	71
2001	153	34	895	1082	84
2002 (up to 31-03-02)	35	11	334	380	35
Total	264	80	1652	1996	190

It is evident from the above table that since the establishment of the Mediation Courts the rate of disposal of suits has gone up. In nearly three years between 2000 and 2002 the total number of cases disposed of through mediation was 1996 as opposed to disposal of contested cases, which amounted to only 80 during the entire period.

Since the introduction of mediation services in the Courts the average rate of substantive disposal by mediation has gone up to 60 percent compared to contested decree.[48] Moreover, the total realisation of money through execution of decree in suits disposed of by trial is far below the total realisation of money in disputes settled through mediation. Statistics reveal that from 1985 to 2000

47. Source: Monsoor, Taslima, Presentation on Judicial Decisions in the Light of Protection of Women and Children, 14 January, 2004.

48. *Ibid.*, p.9.

the total money realised in connection with Family Courts cases of the three Courts is Tk. 61,99,759/50 whereas the total money realised through mediation since its introduction in the same Courts between June 2000 and May 2001 is Tk. 50,94.501/00.[49] Thus, it is clear that the realisation of decretal money is much higher in cases where disputes are settled through mediation than execution suits. According to a recent study the most significant impact of ADR in the Family Courts is that monetary claims of dower and maintenance have been reimbursed in large amounts through amicable settlement.

6. CONCLUDING OBSERVATIONS

It is apparent that community disputes are particularly amenable to the mediation process, which serves as a forum at which both parties are given an opportunity to sit and discuss the cause of their discord and attempt to arrive at a solution. The process, being participatory, facilitates the reaching of a satisfactory consensus by both parties. The current alternative method of dispute resolution applied by NGOs departs, in essence, from the judicial processes and the stereotypical *shalish*. Under this system parties are encouraged to communicate with mediators and between themselves, identify the areas of conflict, articulate their demands and arrive at a mutually acceptable solution. As such, NGO assisted *shalish* or community mediation is not coercive by nature, as it does not impose decisions. Rather, the process is voluntary whereby parties are induced to reach a compromise in an amicable manner. Mediation avoids the intractability and the one-sidedness that are inherent in other legal actions. By actively involving the disputants in shaping the agreement and binding them personally to make the agreement work, the parties become psychologically bound to respect the terms of their resolution.[50]

---

49. *Ibid.*

50. Cooke, Lawrence H., 'Mediation: a Boon or a Bust?' in Harter, Philip J. (ed.), *Alternative Dispute Resolution: A Handbook for Judges*, American Bar Association (Standing Committee on Dispute Resolution), Public Services Division, Governmental Affairs Group, Washington D.C., 1991, pp.121-127, p.123.

The nature of the solutions through community mediations tends to vary from that dispensed by the traditional *shalish*. Mediations being modelled on equitable and non-violent settlement of conflicts have wrought changes not only in the attitude of the parties, but, in the nature of their demands. Suppose, a rural woman leaves her husband who beats her habitually and seeks justice at the traditional *shalish*. The matter is likely to be settled in a reconciliatory way for example by asking the husband to present his wife with two *sarees* as a token of truce and take her back. Having very little knowledge about her options the woman would in all probabilities comply with the decision. If the case is taken before the NGO assisted *shalish*, the woman would be acquainted with her choices in which case she will most likely want the *shalish* to ensure that her husband does not beat her any more, rather than give her material things, before agreeing to go back. The example demonstrates a shift in ideologies and practice as a result of ADR interventions that enhances women's positions in more ways than one. Thus, it is not so much the decision itself but the nature of the transaction that makes ADR initiatives unique in providing clients some measure of choice.

Although the broad based impact of informal mediation with assistance from NGOs are indeed commendable, the issue of their continuity in the absence of donor support is of vital importance that cannot be undermined. While the larger organisations, on account of their experience and institutional capacity may well attain self-sufficiency in the long run, the smaller organisations, requiring further development of their infrastructure and personnel, are most likely to suffer if donor support ceases. It is also true that NGOs cannot expect donors to fund their ADR programmes indefinitely. While educating people about the value of ADR is one way of initiating a change in adverse customary practices, there is no guarantee that the knowledge will be retained and used. In the absence of NGOs the scenario may well change unless the lessons that have been learnt from NGOs are internalised by the people at all levels of the society.

The question of sustainability brings to mind the possibility of making effective use of the existing state operated local justice

system, i.e., the Village Court or the Conciliation Board. Arguably these forums stand a good chance of sustaining ADR services as they are headed and operated by personnel in local governance, namely Un*ion Parishad* Chairmen and Pourashava Commissioners. Backed by government sanction, the structures are in place, the functionaries selected and their functions prescribed and regulated according to the provisions of law. The chief drawback is that the *Union Parishad* Chairmen have multi-dimensional functions but not adequate infrastructure to support their responsibilities.[51] Their offices are equipped with sparse staff and nominal resources. Since they have to undertake the role of administrator, police and judge concurrently they are obliged to look into matters that need immediate attention on a priority basis. Food distribution and health issues are primary on their list of priorities with family disputes and other violations of law coming much later. Moreover, *Union Parishad* personnel are reportedly corrupt and politically motivated in the majority of cases. Preoccupied with amassing wealth and power *Union Parishad* functionaries have little time, much less patience, to attend to the needs of the poor and marginalised who have very little to offer them in material terms.

The reactivating of the judicial functions of the Village Court and the Conciliation Board can provide local communities with a viable alternative for dispute resolution. In order to do this, respective authorities across the country need to be trained and sensitised about the value and utility of local justice delivery. They need to reevaluate their role as service providers and ensure that every individual has access to their services at times of crises. The involvement of state apparatus in local justice delivery can carry forward the ADR initiatives of NGOs in a more constructive and sustainable way.

---

51. In conversation with Dr. Shahdeen Malik, Advocate, Supreme Court of Bangladesh and ex-Advisor to BLAST, a legal aid organisation.