Three Waves of Access to Justice in Bangladesh: A Call for A System Approach to Success

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Introduction

Though many protective legal provisions are theoretically *'available'* in different laws of the country, because of the high-cost and delay in litigation, poor people may not be able to access the benefits of such laws. As prudently observed by Rhode,[1] *"[p]rocedural hurdles and burden of proof may prevent the have-nots from translating formal rights into legal judgment"*.Thus, the divergence between the literal availability of justice in law books and its practical availability in court system may not ensure *'actual'* access to justice for *'all'*. In other words, *'availability' of justice carries only a little meaning to justice seekers if it is not 'accessible'* to them. To make a clear distinction between *'availability'* and *'accessibility'*, Hutchinson[2]rightly linked availability *"to the question of whether a service exists"* and access *"to the question of whether a service is actually secured"*.

Therefore, even when justice is made available in state courts, people may not have required access to it. Hutchinson argues that*"[t]he difference between availability and access is caused by 'barriers',"* which Rhode[3]calls *"procedural hurdles"*[4]. Scholars identified various factors which present as *'barriers'* to access to justice through litigation. When discussing barriers to access to justice, Macdonald[5] identified broadly two different types of barriers: *'subjective barriers'* and *'objective barriers'*. Subjective barriers relate to intellectual and physiological barriers including *'age, physical or intellectual deficiency ... the attitude of state functionaries, such as the police, lawyer and judges', while the 'objective barrier' relates to 'purely physical barriers'*.[6]

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1 Deborah L. Rhode, 'Access to justice' (2000-01) 69(5) *Fordham Law Review*, 1787.

2 Allan C. Hutchinson, *Access to Civil Justice* (Carcwell, 1990) 181.

3 See Deborah, above note 1.

4 As prudently observed by Rhode above note 1, p. 1787, *'[p]rocedural hurdles and burden of proof may prevent the have-nots from translating formal rights into legal judgment'*.

5 Richard A. Macdonald, 'Access to Justice and Law Reform' (1990)10 Windsor Year book of Access to Justice, 298-300.

6 Ibid. 300.

For instance, access to justice for the poor and disadvantaged is limited in Bangladesh due to these subjective and objective barriers (e.g. a huge case-backlog, and consequent delays in the disposal of cases, high-cost of litigation, complexities in court process, gender etc)[7]. There are 1048 Supreme Court Justices and 1500 other judges to dispense justice to a population of nearly 170 million people in Bangladesh. In 2015, only in the High Court Division of the Supreme Court of Bangladesh 37,753 cases were disposed of from 4,31,978 cases.[8] In the same year, in the Appellate Division 9,992 cases were disposed of from 23,353 cases.[9] According to Lord Woolf's general principle to access to justice[10], Justice is fair when it is just in its outcome and dealt with reasonable speed.If the current rate of disposal continues, Bangladesh cannot expect to mitigate this backlog and any resulting delays. Given this situation, when people are finally granted a hearing, the end result may not be just, because *'the longer the period from the time of the events which are the subject matter of the action to the time of the trial, the harder it may become to prove the facts of the case'*[11]. Therefore, to minimize unnecessary delay in the formal justice process, high expense of litigation, complexities in court process, the flexible and consensual ADR process should be adopted in a more acceptable way in Bangladesh.

Apart from case backlogs and delays, access to justice for the poor is also restrained by the high-cost of litigation[12]. In Bangladesh, the cost of litigation is further increased by the cost of bribes.According to a nine-month long recent survey conducted by the Transparency International, Bangladesh on 18 pillars of national integrity, our judiciary still remains exploitative[13]. In another study, most of the parties (63 per cent) opined that court officials are major facilitators of corruption and bribe was asked directly in 73 per cent of cases[14]. During interviews conducted

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7 AshutoahSarkar, 'Case backlog piling up', *The Daily Star* (Online), 28 March 2015 <http://www.thedailystar.net/frontpage/case-backlog-spirals-73002> accessed 15 June 2016; see also, NusratAmeen, 'Dispensing justice to the poor: The village court, arbitration council *vis*-a-vis NGO'(2005) 16(2) *The Dhaka University Studies Part F*103; Begum A Siddiqua,*The family courts of Bangladesh: An appraisal of RajshahiSadar family court and the gender issues*(Bangladesh Freedom Foundation 2005); Jamila A Chowdhury, *Women's access to justice in Bangladesh through ADR in family disputes* (Modern Book Shop, 2005); MustafaKamal, 'Introducing ADR in Bangladesh: Practical model' (paper presented at the seminar on *alternative dispute resolution: In Quest of a New Dimension in Civil Justice System in Bangladesh*, Dhaka, 31 October 2002).

8 Supreme Court of Bangladesh, Annual Report 2015, p.95.

9 Ibid. p.85.

10 Access to Justice, Interim Report to the Lord Chancellor in the civil justice system in England and Wales, 1995); Final Report, (London: HMSO, 1996, p.42).

11Hilary Astor andChristineChinkin, *Dispute Resolution in Australia*(Butterworths, 1sted, 2002)33.

12 See Asian Development Bank, above note 8, 82; See also, Brian Dickson 'Access to justice', (1989) 1 *Windsor Review of Legal and Social Issues* 32; See more, Deborah, above note 1, 369.

13 Transparency International Bangladesh, Annual Report 2014, p. 6.

14 Transparency International, *Corruption in South Asia: Insights and benchmarks form citizen feedback* (2002)

by transparency International, Bangladesh, 88.55 per cent of respondents agreed that it was almost impossible to get quick access to justice from the courts without utilising financial or some other pressure[15]. Further, despite high cost of litigation, availability of legal aid is scarce and is not able to support poor and marginalized people to overcome such barrier to access justice. Among the barriers to access to justice, sometimes complexity of process is also identified[16]. Literature shows that litigation is a much more complex procedure than mediation[17]. In Bangladesh, there is some procedural complexitiesin dealing with civil disputes that severely affect a large number of plaintiffs who do not have sufficient literacy to have minimum understanding of this process.

Therefore, a mere availability of legal provisions carries only a little meaning to the *'accessibility'* of justice to many poor in Bangladesh. Hence, to improve the access to justice condition in the country, different measures have been taken both by the civil society and law makers, following major waves of access to justice experienced worldwide. Thus, this paper firstly discusses three different waves of access justice experienced worldwide and how Bangladesh has adopted with these waves by taking appropriate measures. Secondly, it argues that all different waves are complementary to each other and are contributing to the development of overall access to justice condition of the country. However, still an integrative system approach, to combine all three waves and getting their fullest potentials in the development of justice delivery system of Bangladesh, is largely absent. Hence, this paperthen elaborates how a system approach may integrate the benefits of all three waves simultaneously, to create a more enabling environment for attaining better access to justice in Bangladesh. This part also highlights the significant improvement in lawyers' role that is required as a pre-condition for creating such an enabling environment in the country. Finally, it concludes with some recommendations for future.

Access to Justice and its Developemnt: A Worldwide Phenomenon

Scholars identified three major waves of access to justice that was experienced worldwide since the mid-sixteenth century till today. Cappellletti and Garth (1978)[18] categorized three waves of access to justice staring from 1960s. Incidentally, all

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<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019883.pdf> accessed 20 July 2016.

15 Transparency International Bangladesh above note 13.

16 SeeMacdonald, above n. 6, 298.

17 Ruth V. Glick, 'Was That Mediation or Arbitration? Two New California Cases Beg the Question Again' (2006) (3) Business Law News.

18 Authors like Cappelletti and Garth trace the movement of access to justice in three waves, while Parker views such development in four waves. See more on SumaiyaKhair, *Legal empowerment for the poor and the disadvantaged: Strategies Achievements and Challenges- experiences from Bangladesh* (CIDA, 2008). Frank S. Bloch, 'Access to Justice and the global clinical movement' (2008) 28 *Washington University Journal of Law and Policy*.

three waves started in the United States of America (USA) and then spread all around the developed and developing world.

The first wave began with a series of effort from many developed countries to increase access to legal aid and legal advice to their citizens. For example, in 1963 the US Supreme Court held that criminal defendants have a right to legal counselling in serious criminal charges. Further, the right to legal aid to civil litigants in the USA was established through the Legal Services Cooperation Services (LSCS). Similar initiatives to provide legal aid and legal counselling were replicated by many other developed and developing countries afterwards. For example, providence of legal aid to civil and criminal cases was initiated in Bangladesh through the enactment of *Legal Aid Act 2000* (Act No VI of 2000).

The second wave enhanced access to justice through a class of actions, popularly known as Public Interest Litigation (PIL). This kind of litigation provided an opportunity to file a single suit to represent collective or social interest[19]. The objective of this innovation was to reduce the cost of access to justice by deciding cases on common interest collectively. Like the initiation of legal aid, PIL was first introduced in the USA and later replicated in other developed and developing parts of the world. In Bangladesh, the avenue of PIL was open through the land mark litigation of *Anwar Hussain Chowdhury vs. Bangladesh*[41 DLR (AD) 165] where the plaintiff challenged the 8th amendment of the Constitution of Bangladesh. However, the concept of *'aggrieved person'* in PIL was extended in the case of *Dr. MahiuddinFarooque vs. Bangladesh& others* (Writ petition no 891/1994).

The third wave of access to justice movement started with the introduction of ADR and other informal processes to resolve small claim cases in the USA. As usual, the wave was later extended to other developed and developing countries of the world. In most of the developing countries, the wave of ADR was swelled through judicial reform funded by the donors[20]. In Bangladesh, such a project to popularize ADR was initiated in the year 2000. A detailed discussion on the introduction of ADR has been discussed elaborately in the next section of this paper.

Though all three waves to the development of access to justice got repercussion to the judicial system in Bangladesh, the third wave of ADR seems to be the most effective mechanism to ensure access to justice to its people under the current socio-economic reality of the country. Though the first wave of legal aid may operate as a

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19 John A. Jolowichz*On Civil Procedure*, (Cambridge University Press, 2000).

20 The World Bank,*Legal/Judicial reform projects approved, identified, or under preparation 2004*(July 2007)<http://www1.worldbank.org/publicsector/legal/legalprojects.htm> accessed 10 July 2011.

complementary force to enhance access to justice through the third wave of ADR, the application of the second wave of access to justice through PIL is still limited in Bangladesh. As mentioned earlier, the following section will delineate the origin of each wave in Bangladesh along with their achievements and bottlenecks.

Access to Legal Aid: A Form of Acess to Justice to the Poor

Government legal aid: The obligation of governments to provide legal aid was asserted in the *International Covenant on Civil and Political Rights* (ICCPR). According to article 14(3) (d) of ICCPR, it is obligatory for each government to provide legal aid to people who want to bring their issue to a court but are not able to do so because of their financial constraints. According to article 2 of the *United Nations Basic Principles on the Role of Lawyers*, it is an obligation of a state to provide legal services to the poor and disadvantaged sections of a society.

Since its initiation in 1972, the Constitution of Bangladesh has recognised equal access to law by all of its citizens[21], yet until 1994, the government had not provided any funding for legal aid to ensure equal rights for the poor and less advantaged groups of society. Provision of legal aid, however, is stipulated in the *Code of Civil Procedure (CPC) 1908*[22] and the *Code of Criminal Procedure (CrPC) 1898*[23] which are still in practice in Bangladesh. The first public fund to provide legal aid was constituted under a resolution by the Ministry of Law and Parliamentary Affairs in 1994 which allocated legal aid to 48 districts. However, the fund had remained almost unutilised since 1997 until the formation of the National Legal Aid Committee (NLAC) for providing legal aid and counsel to financially insolvent or helpless seekers of justice.

Later in 2000, the *Legal Aid Services Act 2000* (Act No. VI of 2000) established a formal legal framework for providing legal aid in Bangladesh.[24]Under this Act, the National Legal Aid Organisation (NLAO) was formed to administer and manage provision of legal aid to different districts in Bangladesh. To support NLAO, 61 District Legal Aid Committees (DLAC) were established for '*providing legal advice, paying lawyers' fees and cost of litigation including any other assistance to the justice seekers who are incapable of seeking justice due to financial insolvency,*

21 According to Section 27 of the Constitution of People's Republic of Bangladesh, '*All citizens are equal before law and are entitled to equal protection of law'.* See more on, *Legal Aid Act 2000*(Act VI of 2000).

22 Order XXXIII; Rule 1.

23 Section 340 (1).

24 Legal and Judicial Capacity Building Project (LJCBP) *Final report: Improving mechanism for delivering legal aid* (Unpublished report, Ministry of Law and Parliamentary Affairs, 2004); NusratAmeen 'The Legal Aid Act, 2000: Implementation of government legal aid versus NGO legal aid' (2004)15(2) *The Dhaka University Studies Part F*59.

destitution, helplessness and for various socio-economic conditions' [s. 2(2); *National Legal Aid and Services Act, 2000*]. One year later in 2001, NLAO adopted the *Legal Aid Rules* to enumerate the eligibility criteria for applying legal aid under the government legal aid scheme. It describes the rules and procedures for the submission of legal aid applications, for the nomination of lawyers and to determination of fees receivable by the lawyers.[25] Therefore, the government's legal aid scheme in Bangladesh started its fully-fledged journey only after 2001.

Despite all these developments, the quality of the government's legal aid program is not satisfactory. It could improve access to justice by boosting the financial capacity of poor clients and by making them capable of running their own cases, yet scarce legal aid funding and inefficient management of available funds has failed to resolve the problem of disproportionate access to formal courts[26]. For instance, government provided legal aid covered only an insignificant number of total family cases filed in *Dhaka*, *Narayanganj* and *Mymensingh* districts. Unpublished secondary data collected from respective court registries in 2006 (Table 1) suggests that among the total family cases filed, only 2.6, 0.8 and 1.3 per cent of cases received government legal aid in those three districts respectively.

Table 1: Total filing of family cases and their receipt of government legal aid (2006)

	Dhaka		*Narayanganj*		*Mymensing h*		Three districts together	
	Total	%	Total	%	Total	%	Total	%
Total family cases filed	2632	100.0	354	100.0	701	100.0	3687	100.0
Family cases that received government legal aid	68	2.6	3	0.8	9	1.3	80	2.2

Source:*Unpublished data from district legal aid committees in Dhaka, Narayanganj and Mymensingh*

25 Ibid. LJCBP.

26 Begum AsmaSiddiqua, *The family courts of Bangladesh: An appraisal of RajshahiSadar family court and the gender issues*(Bangladesh Freedom Foundation, 2005); United Nations Development Program *Human security in Bangladesh: In search of justice and dignity* (UNDP, 2002).See more on, Macrothink Institute, 'A critical analysis of legal aid in Bangladesh' (2014) 2(1) *International Journal of Social Science Research*.; Syed Aminul Islam, Overview of Government legal aid system, The Daily Star (online), 28 April, 2013. <http://www.thedailystar.net/news/overview-of-government-legal-aid-system> accessed 23 August 2016

Another drawback in government legal aid services relates to insufficient payment made to panel lawyers who provide ‘free of cost’ legal services to clients. Although NLAO does not use a monitoring mechanism or performance index to measure the quality of legal services gained through legal aid, data indicate that, because of insufficient payment, lawyers are not diligent when dealing with cases which receive government legal aid.[27]

> [I]t has been expressed by many respondents that often the lawyer is found to be absent on the date of hearing…Many of the prisoners stated that they never met the lawyers assigned to them even when legal aid had been provided for about a year.[28]

It has been argued that women and other vulnerable people in Bangladesh, who have lower income and higher demand for legal aid, are the most deprived from government legal aid services in Bangladesh.[29]

Table 2: Percentage of government legal aid channelled to family cases (2006)

	Dhaka		Narayanganj		Mymensingh		Total	
	Number	%	Number	%	Number	%	Number	%
Percentage of government legal aid to family cases	139	5.3		0.8		11	4.6	
Percentage of government legal aid to other civil cases	105	0.4		0.8		8.5	0.9	
Percentage of government legal aid to criminal cases	2482	94.3		98.3		80.4	94.5	
Total								

Source: *Unpublished data from district legal aid committees in Dhaka, Narayanganj and Mymensingh*

Insufficient provision of government legal aid affects family court clients even more because, as is evident from Table 2, in all three districts, almost all government-provided legal aid is allocated to criminal cases.

Legal aid from NGOs: A number of NGOs provide legal aid to the poor. ‘*While the general focus is on providing legal support in civil cases…[the]nature of disputes centred generally around matrimonial issues like, divorce, non-maintenance, non—*

27 See LJCBP above n. 24.
28 Ibid42.
29 Ibid.

payment of dower, child marriage, dowry, and polygamy'[30]. Research data reveal that legal aid granted by various leading NGOs in Bangladesh is not high enough to satisfy the demands. For example, according to the data collected from BLAST, BNWLA and ASK,these leading NGOs granted legal aid to203, 82 and 85 cases respectively or a total of 370 family cases in *Dhaka* district. A comparison of this figure with the total 2,632 new family cases filed in *Dhaka* district in 2006 indicates that leading NGOs provide legal aid to 14.1 per cent cases. A study of LJCPB on legal aid recipients from government and non-government sources concluded that aid recipients from these two sources do not overlap by any considerable degree[31]. Therefore, there is no possibility to increase the number of aid recipients by relocating the fund more equitably to avoid overlapping.

Table 3: Availability of legal aid and different rates of disposal

	Dhaka	*Narayanganj*	*Mymensingh*
In-Court			
Ex parte	35.0	39.0	22.0
Dismissal	32.0	42.0	47.0
Sub-total of *ex parte* and dismissal	67.0	81.0	69.0
Resolved through litigation or in-court mediation	33.0	19.0	31.0
Cases covered under govt. legal aid	2.6.0	0.8	1.3.0
Cases covered under NGO legal aid	14.1	6.2	19.4.0
Cases covered under government and NGO legal aid	16.7	7.0	20.7
Out-of-Court			
Parties never come again (absent)	26.3	43.7	12.5

Source:Court and NGO registries of Dhaka, Narayanganj and Mymenshing districts.

As indicated in Table 3, the availability of legal aid could affect the nature of resolution in family courts. To be specific, the number of cases resolved *ex parte* declined as the availability of legal aid increased. For example, family cases in *Narayanganj* received less legal aid from NGOs and from government sources (Table 4). This could be one reason why the per centage of *ex parte* cases is higher in *Narayanganj* (Table 4) than in *Dhaka* and *Mymensingh* districts. As shown in Table 4, the higher the rate of legal aid from government and NGOs, the lower the number of cases which are settled through *ex parte*. Though the issue cannot be addressed by the data collected under paper, one reason for the negative relationship

30 See Nusrat, above n. 24, 66.
31 See LJCBP, above n.24.

between the availability of legal aid and lower rate of *ex parte* decrees could be that husbands take litigation more seriously when they perceive that, by means of legal aid, their wives have gained the capacity to contest through litigation. This results in a husband making the required payments to his wife. NGO legal aid also increases the abidance to mediated agreements. Sometimes merely the knowledge that a legal aid case is the next step is sufficient to make parties voluntarily comply with a *shalish* agreement[32]. Therefore, provision of legal aid is often described as the *'teeth'* of mediation efforts[33].

Table 4: Family cases receiving legal aid from NGOs (2006)

	Dhaka		*Nrayanganj*		*Mymensingh*		Total for three districts	
	Total	%	Total	%	Total	%	Total	%
Total cases filed in family courts	2632	100.0	354	100.0	701	100.0	3687	100.0
Cases filed by BLAST	203	7.7	20	5.6	114	16.3	337	9.1
Cases filed by BNWLA	82	3.1	2	0.6	22	3.1	106	2.9
Cases filed by ASK	85	3.2	*	0.0	*	0.00	85	2.3
Three NGOs together	336	14.0	22	6.2	136	19.4	528	14.3

Source:Unpublished data from legal cell of BLAST, BNWLA and ASK
** Indicates no operation in that area*

Because of its scarcity, legal aid funding from government and NGOs might not have any significant positive impact on the number of cases proceeding through litigation. In 2006, only 2.6 per cent of family cases received legal aid from government sources, while 14.1 per cent of family cases received legal aid from leading NGOs providing legal aid to their clients. Thus, only 16.7 per cent family dispute cases of *Dhaka* district are covered by the legal aid schemes of the Government and the other three leading NGOs in the country in 2006. This indicates that more than 80 per cent of total family court clients may not have access to either government or NGO provided legal aid and may be '*denied equality in the opportunity to see[k] justice as envisaged in our Constitution*'[34]. Under this circumstance, legal aid fails to relieve the excessive cost of proceedings in the family court. However, recently government has taken initiative to widely circulate the information on availability of legal aid among prospective beneficiaries online[35].

32 The Asia Foundation, *Access to justice: Best practices under the Democracy Partnership* (The Asia Foundation, Dhaka, 2002).

33 Rana P. Sattar, *Existing ADR framework and practices in Bangladesh: A rapid assessment* (Bangladesh Legal Reform Project, Dhaka, 2007).

34 See Nusrat, above n.24.

35 BD News24, (2016) PM Hasina launches national helpline for free legal aid, 28 April; <http://bdnews24.com/bangladesh/2016/04/28/pm-hasina-launches-national-helpline-for-free-legal-aid> accessed 22 Aug 2016>; See more on, State sponsored legal aid for those in

Access to Public Interset Litigation: A Form of Collective Access to Justice

The judiciary of Bangladesh is increasingly assuming an impressive role through liberal interpretations of procedural rules and various laws for a better regime of social justice of what is known as *'judicial activism*.' Public Interest Litigation (PIL) has emerged as a pivotal instrument of such judicial activism in the South Asia. According to the traditional standing rule, judicial redress is only available for persons who have suffered a legal injury by reason of the violation of their legal rights by the action of the state or of a public authority. For the last three decades, the courts of these countries have relaxed the Anglo-American standing so that it has become easier for litigants to initiate class actions. PIL has been developed in Bangladesh through judicial activism in order to establish collective rights of people. PIL attempts to ensure access to justice to the socially and economically disadvantaged, deprived and exploited sections of the people who are unable to seek remedy through court due to various resource constraints. PIL has led the way for expansive interpretation of the procedural rule of *locus standi* and has also opened up the judicial system for those who, otherwise, would have been restricted in terms of access to judicial remedies for violation of their rights. Thus, the initiation of PIL that *'led to the demise of the principle of standing reflected a paradigm shift from the conventional role of judiciary as adjudication of disputes to as a vehicle for the delivery of social justice.'*[36] The shift was from purely legalistic justice to social justice. In Bangladesh, PIL is being conducted in many fields including the promotion of human rights, protecting environment, and preserving historical sites.

Bangladesh, like many other developing countries, is facing multitude of environmental problems, such as air pollution, hazardous waste, land degradation, water pollution etc. Pressure of rising population, rapid industrialization, urbanization and agricultural development has largely contributed to the environmental degradation in Bangladesh. Legislation is by far the most effective instrument to protect environment. Bangladesh has large number of environmental legislations and many laws containing provisions on environmental protection. In Bangladesh, there are about 180 laws, which deal with or have relevance to environment[37]. Apart from statutes, Bangladesh has also well-developed

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need, (2014) Dhaka Tribune, May 1, <http://archive.dhakatribune.com/ juris/2014/apr/30/ state-sponsored-legal-aid-those-need> accessed 23 Aug 2016.

36 Abdullah Al Faruque, *Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal*, p.1, Available at www.culaw.ac.bd.com, Accessed on 18 March, 2016. *See also*; Amirul Islam, A review of Public Interest Experience in South Asia in Sara Hossain et al (eds), *Public Interest Litigation in South Asia*, the University Press, Dhaka, 1997, p.56.

37 Mahbubul Islam, *Defending Human Rights through Public Interest Litigation: Role of Human Rights Activists in Bangladesh*(January 2015)<http://www.hrpb.org.bd/images/PDF_File_%20RPB/Advocate%20Mahbubul%20Islam. pdf>accessed 22 January 2016.

environment policy and many sectoral policies which have relevance to the preservation and conservation of environment.The courts had taken responsibility for upholding the historical sites and national monuments. For instance, regarding the *ShaheedMinar*, the court asked government to take steps so that functions and meetings are not held in the *bedi* or main part[38]. The courts have had to order for the protection of *Lalbagh Fort*, a historic site on which multi-storied buildings have been constructed. Scholars observed the rise in PIL as a healthy trend. *"It is a part of the process of a growing democracy, encouraging rule of law and governance…Every new democracy as it appears has gone through the process; for example, in India, the role of PIL has reached its Zenith"*[39]. Therefore, a good trend of PIL in Bangladesh indicates possibilities to use this avenue for enhancing access to justice to its people.

Access to Alternative Dispute Resolution: the Third wave Enhancing Right to Acess to Justice to the Poor

As mentioned earlier, access to justice is affected by the complexity of a dispute resolution system or the general level of understanding on the system by its beneficiaries. Complexity of the formal court system makes its procedure most difficult to poorly educated, illiterate women who are most ignorant to this system due to their usual presence behind the four walls of their home. It has been shown that women do not understand what is happening and they, therefore, do what their lawyers tell them to do. Once the dispute reaches the lawyers, they take control and parties just follow their instructions. This turns the matter of dispute from a difference between two laymen to lawmen (i.e. a battle between two well-trained professionals who are arguably motivated primarily for enhancing their financial gains)[40].

An earlier study in Bangladesh indicates that, in terms of the complexity of process, women in Bangladesh feel much more comfortable with Alternative Dispute Resolution (ADR) than with litigation.[41] In several focused group discussions conducted with the family court clients of two districts, *Kishorganj* and *Netrokona*, it was unanimously agreed by the participants (women) that they did not understand the court procedure; and had to depend completely on the lawyers from the

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38 Ibid.

39 Julfikar Ali Manik and Shehreen Islam; The Courts to the Rescue; *Forum, Vol 3, Issue 11, Nov 2010 <http://archive.thedailystar.net/forum/2010/November/court.htm>*accessed 22 January 2016

40 Formanul Islam, *The Madaripur model of mediation: A new dimension in the field of dispute resolution in rural Bangladesh* (unpublished research paper, 2002).

41 See Chowdhury, above n.7.

beginning to end of the process[42]Therefore, considering the long-standing backlog in civil courts, relatively simple and easily understandable process of ADR, and widely recognized benefits of quicker resolution through ADR, law makers in Bangladesh inscribed a provision for in-court ADR in many laws in Bangladesh including the *Family Courts Ordinance* (FCO)*1985*. According to ss. 10 and 13 of the FCO, family courts have to conduct mediation to resolve family disputes[43]. Though the provision of mediation was present in the FCO, since its initiation in 1985, the family court judges had hardly used this provision in Bangladesh. One of the main reasons behind such reluctance to use mediation was the lack of motivation of the concerned judges towards the practice of mediation in family disputes. Further, judges of family courts were also reluctant to use mediation because they were much acquainted with an adversarial system. It has been observed that mediation was not well practised in family courts prior to the reformed ADRmovement in 2000 – no attempt was made either to train judge-mediators with the art of mediation or to encourage them to use mediation to resolve family disputes[44]. Therefore, attempts were made to incorporate mediation in the family courts in a more systematic, improved way. Such developments were made with the co-operation of the Institute for the Study and Development of Legal Systems (ISDLS)[45] of the USA.

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42 Ibid.

43 Section 5 of the FCO provides that subject to the provisions of the MFLO, the family court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely: (a) dissolution of marriage (b) restitution of conjugal rights (c) dower (d) maintenance (e) guardianship and custody of children.

44 KM Hasan, 'A report on mediation in the family courts: Bangladesh experience', (paper presented at 25th Anniversary Conference of the Family Courts of Australia, Sydney, 26-29 July 2001) 8.

45 ISDLS initiatives seek to help the foreign country-partners to address the problems of the formal judicial system and to make procedural reforms with the help of their legal communities and models that have been successful in other parts of the globe. ISDLS bases most of the study components of its civil justice reform collaborations on studies of the California civil court system, where, due to utilization of mediation and case management, only 1% of civil cases goes to full-trial and thus is considered in the forefront of procedural civil justice reform. In all ISDLS projects, foreign legal groups study the techniques and litany of the alternative to litigation utilized in California. As a part of their study program, Bangladesh Legal Study Groups (BLSG) met attorneys, judges, mediation professionals and law professors who were experts in mediation in California. Based on what the BLSG learnt from mediation techniques in California, they returned to their home country to apply the learning by way of designing a model or reform the existing judicial model of the respective country that consisted of their own unique cultural and legal environment. Not only this, ISDLS visit the foreign country-partners to observe what they learned or to assist their reform proposals as needed by the BLSG. The ISDLS successfully reforms civil justice system in many countries in the world.

To popularise mediation, in November 1999 Steve Mayo, Executive Director of ISDLS, Judge Wallace Tashima, and Mr. Jeffery Ranchero came to *Dhaka* to explore the operational procedure and to determine the practical problems on the procedural formalities of formal courts in Bangladesh[46]. In January 2000, a trip by Judge Clifford Wallace to *Dhaka* finalised the selection of a five member Bangladesh Legal Study Group (BLSG) under the leadership of Justice Mustafa Kamal, the former Chief Justice of Bangladesh, to address the problems of backlogs and delays in the court system of Bangladesh. In February 2000, the BLSG visited San Francisco, to attend an intensive ten-day training session[47]. Later, in the first week of April 2000, ISDLS brought a team of US Judges and lawyers as well as Justice Jilani of the Lahore High Court to *Dhaka* to conduct a workshop to demonstrate the methods examined by the BLSG[48]. Finally, after a year-long intensive study by the BLSG in collaboration with American experts from ISDLS, an historic first in Bangladesh, the '*pilot reformed family courton mediation'* was introduced in three family courts in *Dhaka*in June 2000. Additionally, some other techniques were adopted to promote mediation in the family courts. These were briefly as follows:

Mediation by trained judges*:* In Bangladesh, family court judges conduct in-court mediation. Since the success of mediation in the family courts largely depends on the family court judge-mediators, training of judges on mediation was conducted at the initiative of the Ministry of Law, Justice and Parliamentary Affairs, Government of People's Republic of Bangladesh and with the assistance of the American Centre, and the USA Embassy, *Dhaka*, Bangladesh. Initially, a mediator of the US Court of Appeal gave the training in an intensive manner[49]. Since then, training in mediation has been given from time to time[50] by the pioneers and legal experts of mediation in

46 Mustafa Kamal,'Alternative dispute resolution' in W.Rahman and Shahabuddin (eds), *Judicial Training in the New Millennium* (Bangladesh Institute for Legal studies and International Affairs, 2005) 124.

47 Ibid.

48 Ibid.

49 KM Hasan'Mediation in the family courts: Bangladesh experience' (Paper presented at the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002) 128.

50 Inspired by the success of the pilot project under *Dhaka* judgeship and the training of 36 participants by Mediator Mr. Robert W. Rack, some other 15 Assistant Judges and an equal number of lawyers in addition to the previous 36 participants, were intensively trained for 2 days from 18th October to 19th October, 2000 in *Dhaka*. The training was provided by Mr. Justice Mustafa Kamal. After several training programs in mediation techniques in *Dhaka* district, attention was given to other districts. For example, some two or three days training in mediation were given to the Assistant Judges, lawyers of the Northern Division in *Rajshahi* and *Sylhet* Divisions and of Southern Division of *Khulna* and *Barisal* districts and *Chitagong* district. This training was provided under the able and inspirational guidance of the former Chief Justice Mustafa Kamal, together with Mr. Justice Anwar-ul-Haq and Mr.

Bangladesh, including the former Chief Justice of Bangladesh[51] and the sitting judges of both High Court Divisions and Appellate Division of the Supreme Court[52] – purely on a voluntary basis. Since it is believed that in every dispute there exists a point where the parties can be brought together, and thus they can be assisted to reach agreement, judges are trained in how to find that point of settlement, thereby enabling them to quickly resolve the dispute. The judges are also trained to enhance their role in convincing the parties to come into mediation by focusing on mediation's benefits, as opposed to promoting the full litigation procedure. Reportedly, because of the training of judge-mediators, it appears that the success rate of mediation in family courts have become significantly higher.

***Training of lawyers and NGO representatives**:*Since lawyers and NGO representatives continued to be a part of the success of this process, training programs also included representatives from these groups. The training covered motivational technique, and touched on the earning-potential that exists for lawyers promoting mediation. It is the lawyers in the society upon whom the clients mostly depend for resolution of disputes. The training was aimed at convincing lawyers that the quicker a case leaves their *sheresta* (chambers) by way of final disposal, the more the concerned lawyers will gain trust and good-will amongst the clients – which will automatically provide them new cases[53].

Removing disincentives to use mediation: Taking into account that more time is spent to resolve cases through mediation, the initial challenge was that the judges received no credit for cases resolved by mediation. This was put to the then Chief Justice, and Law Minister who were ultimately persuaded to make an amendment to the performance measures of the judges of the family courts[54]. Consequently, a decision was reached that for every successful mediation case, the judges concerned would get two credits i.e. equivalent to the holding of two litigation cases; and for every two failed mediation cases, they would get one credit. A government circular to that amendment[55] was issued accordingly[56]. Thus, one of the initial problems prior to the year 2000 had been solved successfully to the satisfaction of the judges[57].

AKRoy then Deputy Secretary of Ministry of Law. Moreover, sometimes the training sessions were inaugurated by the Minister of Law to apprise the audiences of the progress of mediation in the family courts of Bangladesh.

51 Justice Mustafa Kamal, the former Chief Justice and the Chairperson of the 5-member BLSG constituted in 2000 for adopting the reformed mediation techniques in Bangladesh.

52 Justice KM Hasan, the then most senior Judge of the High Court Division and one of the members of the 5 of BLSG visited California in 2000.

53 See Hasan, above n. 49, 129.

54 All Assistant Judges are ex-officio presiding judges of the family courts in Bangladesh (s. 4(3) of the FCO 1985).

55 It was also provided in the amendment that such amendment would be enjoyed by all of them, whether they would preside over a pilot court or not.

56 See KM Hasan, above n. 49 130.

57 Ibid.

Another problem was that the judges were only being involved in mediation procedures during court hours. This was also resolved by the Ministry of Law and Parliamentary Affairs, after a discussion with the judges, with one conclusion reached that time management would be the best solution to this problem[58]. The judges of the family courts were allowed to split their time between mediation and the other responsibilities of their ordinary litigation cases so that their time was not wasted, and their credits, which are directly related to their professional career, were not affected adversely[59].

Legal enforceability of the disputes settled through in-court mediation:Prior to the year 2000, mediator-judges used to mediate cases following their own individual methods to a certain extent, and if a settlement was reached by mediation, no further steps were taken to formalise the methodology for settling disputes[60]. So, the judges were directed to follow a uniform method and asked to pass a 'compromise decree' once the settlement was reached. Under this method of mediation with a definite compromise decree, unlike ordinary litigation cases, there is neither a possibility of a settled case being revived, nor any chance of appeal or further proceeding of execution[61]. In other words, once the mediation settlement is reached and the family court passes a compromise decree, the case is finally disposed of and no appeal can be preferred[62]. This is a short and easy procedure for finalising mediation agreements, with the decree having a legal enforceability by the court.

Finally, after necessary adjustments and amendments to the initial model, family court mediation began to achieve good results. By the fall of 2000, the reformed model was deemed successful with 40 per cent of total cases resolved through mediation.[63] Family court mediation attained a remarkable success in reducing the backlog of formal courts all over Bangladesh[64]. The success of pilot family courts was also found to be remarkable in attaining a higher rate of recovery of decree

58 Ibid, 130-31.

59 Ibid, 130.

60 See Kamal, above n. 46, 131.

61 See Hasan, above n. 49.

62 See Hasan, above n. 49, 131.

63 Observing the success of mediation in family courts, separate provisions for mediation have been specifically enumerated in many other laws including the *Code of Civil Procedure, (amendment) Act 2003* ; *Code of Civil Procedure, (amendment) Act 2006*; *Code of Civil Procedure, (amendment) Act 2012*; *Arbitration Act, 2001* (Act I of 2001); *Muslim Family Laws Courts Ordinance, 1961* (Ordinance VIII of 1961) ; *Family Courts Ordinance, 1985* (Ordinance XVIII of 1985); *ArthaRinAdalatAin (Money loan Courts Act) , 2003* (Act XIX of 2003); *Money Loan Courts (Amendment) Act, 2010*; *Village Courts Act 2006 (Act XIX of 2006)*; *Dispute Settlement Board Act 2010*; *Labour Act 2006; Income Tax Ordinance 1984* (Finance Act 2011); *Value Added Tax (amendment) Act 2012*, *Bankruptcy Act 1997*; *Child Act 2013*; *Maintenance of Parents Act 2013*; *Legal Aid Rules 2015*.

64 See Hasan, above note 44, 2; See also Kamal, above note 46, 12.

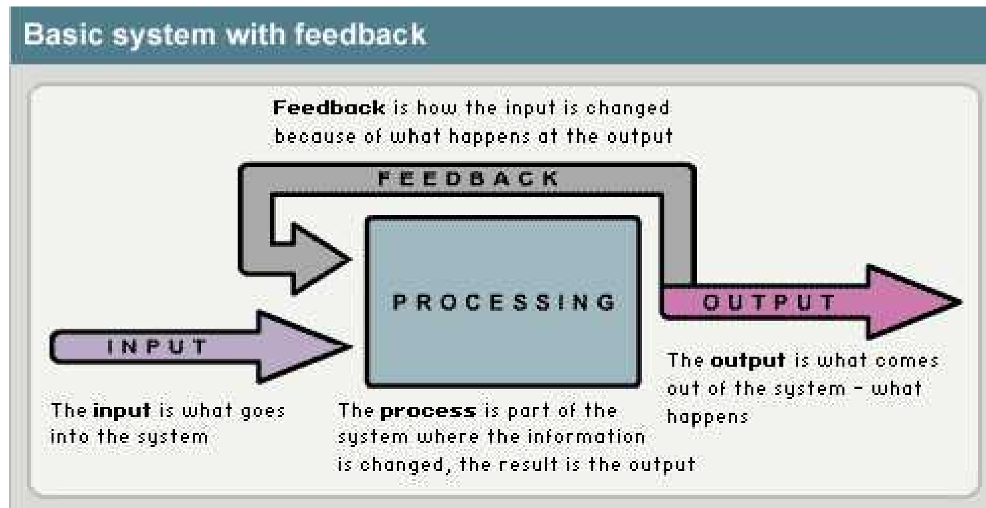
money through mediation[65]. By 2002, the continuing rate of success prompted the World Bank to sponsor[66] the expansion of the reform movement to most of the courts across the country.

However, in many cases performance of ADR is discouraging. The next section thus looks at how a consolidated system approach incorporating all three waves may be applied to improve the situation.

The System Approach To Provide Access To Justice: A Call For Consolidated Action

A system is any set of distinct parts that interact to form a complex whole.[67] For instance, think of the universe; Its parts are as small as subatomic particles and as large as galactic clusters. Each part is distinct but interacts to form the universe. Systems theory treats an institution as a system.[68] A system can be either closed or open, but most approaches treat an institution as an open system that interacts with its environment by way of inputs, throughputs and outputs. Therefore, both inputs from external environment and processing inside the system is important in a system that generates output and feedback for further development of the system.

Figure 1: System approach in an open-end system



65 See Hasan, above n 44, 10.

66 The World Bank provided Bangladesh with a $30.6 million loan to modernise and reform the legal and judiciary system in Bangladesh under the 'Legaland Judicial Capacity Building Project'. The project seeks to support efforts to enhance the quality and cost-effectiveness of the legal, regulatory and institutional framework for private sector development.

67 Michael C. Jackson, *Systems Approaches to Management* (Kluwer Academic Publishers, 2002).

68 Mats Olov Olsson and Gunner Sjostedt 'Systems and Systems Theory in Mats Olov Olsson and Gunner Sjostedt (ed), *Systems Approaches and their Application* (Kluwer Academic Publisher, 2004).

If we consider the in-court mechanism of dispute resolution through ADR as a system, lawyers' non-cooperation or lack of motivation for quick disposal of cases through ADR, as discussed above, is an internal lacuna that slows down the process. On the other hand, a lack of linkage between out-of-court settlements with in-court deprives the system to benefit from quick disposal of cases through out-of-court settlements. These restrict the system to receive an input that may enhance its effectiveness. On the other hand, as widespread gendered power disparity restrainsmany to seek effective remedy at court, better availability of legal aid may have remedied many of these problems. However, government legal aid service is functioning poorly in our country. Though NGO legal aid is operating much effectively in the country a lack of linkage between government legal aid funds with NGO legal aid operation put a restrain on the functioning of NGO operated legal aid schemes. The following sub-sections highlight how the system of providing access to justice can be improved by enhancing the internal efficiency as well creating better linkages with external factors. However, before discussing specific issues for development, the next sub-section discussesabout the indispensable role of lawyer's for the development of the access of justice through ADR.

Pathways to Instigate the System Approach: Process and Input

Promoting Thepro-Activerole of Lawyers: Optimizing the Process

Delay in court proceedings increases cost and involve a complex matter. It has been argued that the conduct of lawyers contributes to it. There are indications in literature that lawyers may not expedite resolution of cases by mediation[69]. The former Chief Justice K. M. Hasan also asserts that '*the lawyers and bar council should change their mindset and come forward to strengthen the mediation system in the judiciary*'[70]. There seems to be a possibility that lawyers may not regard mediation as financially beneficial for them. However, existing literature in Bangladesh does not address this issue with empirical evidence. This paper takes an attempt to confirm this issue. During interviews, the tendency of lawyers to make unnecessary time petitions was highlighted by many family court judges as contributing to such delay. Therefore, most of the judge-mediators prefer direct interaction between parties in settling disputes and to minimise the involvement of lawyers. It is widely identified by family court judges that they are not getting

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69 See Kamal, above n.7, 12.

70 KM Hasan,'ADR can ensure speedy justice for poor litigants', *The Daily Star* (Online), 23 April 2008.

sufficient cooperation from lawyers[71]. Sometimes lawyers do not want to cooperate with the quick resolution of dispute that may be attained through ADR, because of a fear that quick disposal will create a loss of their business revenue[72]. Such kind of non-cooperation from the lawyers is one of the hindrances in the success of ADR in Bangladesh. However, most of the policy makers who are in a position to promote ADR in Bangladesh have failed to make lawyers understand that as the existing court system is struggling against a backlog of half a million cases, by promoting the use of ADR and quick disposal of cases, lawyers would be able to get many new cases in their list and ultimately they will be benefited financially. Further, a reduction of disposal time may bring in more cases from those disputants who were not willing to come to court earlier in fear of its lengthy process.

In Bangladesh, it is not surprising that fees for lawyers are overwhelming for the poor. Furthermore, sometimes costs are exacerbated due to delay. As the disposal of cases is delayed, total charges paid to the lawyers increase with consecutive court appearances. An increased number of court appearances also involve higher costs that litigants have to pay for their lawyers in case of settlement their cases through trial. Therefore, lawyers were asked to indicate what they usually charged their clients to resolve their cases through mediation and litigation. Results from a questionnaire survey among lawyers conducted by Chowdhury[73]indicate that in the case of litigation, more than 50 per cent of the clients have to pay lawyer's fees exceeding BDT 10,000, while none of the cases resolved through mediation required lawyer's fees of more than this amount. On the other hand, 95 per cent of in-court mediation can be resolved with lawyer's fees less than BDT 5,000, whereas in the case of litigation, only 23 per cent of cases can be resolved with the lawyer's fees not exceeding BDT 5,000. A more than 50 per cent cost savings in ADRincomparison with trial cases has also been acknowledged by Gold[74].

Further, in a survey[75] conducted for the Transparency International, Bangladesh, regarding the expected time for settlement of pending cases, 78% of the

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71 Jamila A Chowdhury,'Women's Access to Fair Justice in Bangladesh Is Family Mediation a Virtue or a Vice?' (unpublishedPhDthesis, University of Sydney2011).

72 See Chowdhury, above n 7.

73 See Jamila, above n. 71.

74 Lois Gold 2009. *The healthy divorce: keys to ending your marriage while preserving your emotional well-being*, Sourcebook Inc., Illinois, 224.

75 *"Survey on Corruption in Bangladesh"* conducted for the Transparency International Bangladesh by the Survey and Research System, Dhaka, Bangladesh with the assistance for the Asia Foundation, Bangladesh. The survey was divided in to two phases. Phase I consisted of a 'pilot study' to ascertain the nature, extent, intensity- wherever possible, of corruption, and the places where corruption occur. In the pilot study, a small scale national household survey was undertaken to obtain information on public services performed on six

accused/plaintiff reported that they were uncertain about the period when settlement would be reached and about 75% of them reported that delays in reaching settlement is deliberate and due to lawyer's business interest, 34% opponents ill motive and manipulation and 30% courts high handedness. Most cases that go to the courts remain unresolved for years because of a backlog of cases. Such delay is one of the reasons that discourage the plaintiff not to enter into the formal court process for about two-thirds of the disputes in total.[76]

Further, lawyers consider access to justice in term of 'rights' and not in term of 'interests', the objective of a lawyer in an adversarial trial system is not to find the best solution for clients but to 'win' the case. To attain this objective, lawyers from both sides try to place that evidence that support their claim and suppress that evidence that might strengthen the claim of the other party. In one survey conducted by *Transparency International, Bangladesh*[77], hiring witnesses was reported by 19.8 per cent of the households involved in litigation. 28.6 per cent of urban households are markedly higher than the 18.9 per cent of rural households hiring paid witnesses. This type of fabricated witness can destroy any remnant of faith and honor remaining between the parties for each other. Their primary objective appears to be one of simply getting rid of their opponent rather than of making any amicable or fair settlement. Therefore, the system of ADR that avoid this kind of hostile process has greater potentiality to attain a win-win solution that better satisfies the interest of parties. Furthermore, in contrast to a lawyer dominating adversarial system, where lawyers control the content of a dispute, ADR provides parties an opportunity to effectively control the content of their dispute.

It is already mentioned in that the trials under the formal court usually take years in which one of the most crucial factors that promotes the protracted long trial procedure is the payment mechanism to lawyers. Generally, in our country, fees of lawyers are paid part by part, depending on the number of presence of the lawyers before the judges, for example hearing or argument etc., of the cases throughout the trial till they end. Thus, there was an initial and usual fear regarding the adverse effect on the fees of lawyers, if cases are quickly resolved by mediation. That means, quick mediation process will automatically reduce their number of presence before the judges for hearing of the cases, etc. on which their payment of fees by the client depends. Further, lawyers rarely make settlement out-of-court when a case is ongoing through in-court mediation. In response to a question,[78] all of the in-court mediators interviewed denied the possibility of any out-of-court settlement when a case is ongoing through in-court mediation. It seems that lack of will, particularly from the part of lawyers, and the absence of a coordinated scheme to schedule and

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different sectors among which judiciary sector deserves a particular mention. Phase II consisted of a large scale survey to provide baseline information on corruption.

76 United Nations Development Program (UNDP), *"Human Security in Bangladesh: In Search of Justice and Dignity"*, Dhaka 2002, p.9.

77 See Transparency International, above note 75.

78 See Jamila, above n. 7.

finish the trial of cases within a time-limit[79] are the main reasons for delay in disposal of cases. In fact, delay in *"our judiciary has reached a point where it has become a factor of injustice, a violation of human rights. Praying for justice, the parties become part of a long, protracted and torturing process, not knowing when it will end"*[80].In Bangladesh, the formal legal process is so complex that the majority of the people, especially the poor and disadvantagedunderstand absolutely nothing about it. They often feel alienated from the entire process from beginning to end with tense, afraid and anxiety about the outcome of the case etc.[81]

In the process of adjudication, parties lose control not only over the dispute but also over the whole process. Once the dispute reaches to the lawyer, s/he takes control over the dispute. The parties have to follow the instructions provided by their lawyers. As Islam rightly cites in his unpublished research, *"the matter in dispute turns from a difference between two layman to a battle between two well-equipped, well-trained and hard fighting professionals, who are motivated not only by the prospect of financial gain but also enhancing their reputation, goodwill and personal image."*[82] Any communication between the parties is cut-off according to the advice of the respective lawyers. At last, when the judge gives his/herjudgment it is seen that only one party has won the case becoming a victor while the other turns into the vanquished losingeverything.Some initiatives were taken earlier to motivate lawyers to act pro-actively and promote quick justice through ADR including:

Direct Involvement of Lawyers in mediation procedure: Initially, there was a usual fear or suspicion on the part of the lawyers regarding the adverse effect on the fees of lawyers, if the case is quickly resolved by ADR. Considering the interest of the lawyers on the one hand, and promotion of the practice of ADR on the other, it was felt that lawyers should be directly involved in ADR techniques through the–

I. involvement of lawyers in the training in mediation; and

II. enhancement of the participation of the lawyers in the whole mediation procedure.

Involvement of Lawyers in the Training in Mediation: It was importantly felt that training is imparted to the lawyers as they are the one on whose advice litigants rely

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79 Most of the laws in Bangladesh lay down merely for a time- limit to be observed but does not provide for the ancillary roles and systems. There is no organized office to oversee whether these time limits are maintained.

80 Dr. Shah Alam, 'A possible way out of backlog in our judiciary', *The Daily Star* (Online), 16 April 2000<http://archive.thedailystar.net/suppliments/2010/02/ds19/segment3/delay.html> accessed 15 June 2016.

81 NadjaSpegel, Bernadette Rogers, and Ross Buckley 1998, *Negotiation: theory and techniques*(Butterworts, 1998).

82 See Formanul Islam, above n. 40.

most. It was further felt that without their co-operation the success of resolving disputes through mediation, will not come into reality. That is why, they were also selected as the same numbers as judges selected in all training in mediation those were conducted in 2000 during the reformed ADR movement in Bangladesh. The aim of such training has been to dissipate their fear of loss of cases, financial hardship and above all suspicion of a new method of dispute resolution and to give assurance that the new method of mediation in the family courts will not adversely affect them financially but will open up new horizons for them.[83]

Enhancement of the Participation of the Lawyers in the Whole Mediation Process: Another innovation is the direct involvement of the lawyers in the ADR techniques from the beginning to end. Generally, under the ADR system presently practiced in the civil courts, two lawyers of the litigants draft the language of the compromise decree. It helps the judges to spend more time in their other ordinary judicial responsibilities and not spending time in drafting the compromise decree, which the lawyers can do well. At the same time, if the compromise decree is drafted by the lawyers, it helps the party to put all the terms of their agreement according to their consensus, avoiding all kinds of ambiguity in it. Further, by doing this, lawyers' roles cannot be limited only up to the settlement by the parties but also be extended after the settlement by directly involving the lawyers up to the finality of the compromise decree. Accordingly, they will be more interested to involve themselves in the mediation process.

Effective Motivation Techniques in Training Lawyers:The motivation technique is also applied for the lawyers who became the best admirers of ADR. It is the group of lawyers upon whom the clients depend most in case of their resolution of disputes. So, it was emphasized in the training during the reformed ADR movement in Bangladeshthat lawyers practicing in the family courts are the best pillars of strengthening mediation in the family courts. The training tried to convince lawyers that the earlier a case goes out of their *sheresta* (chamber) by way of final disposal, the more the concerned lawyer will gain trust and good-will amongst the clients which will automatically afford him/her new cases. The training of the lawyers in mediation during that time was intended to rebut the traditional approaches that *'lawyers like to pile-up cases in their chambers for years'*; *'they do not admire a quick resolution of a dispute because of the chance of losing income'*; *'the quicker a case goes out of their chambers, the lesser is their income'* . The training focused on the public-spirited motive of the lawyers that will attract more litigants to come under the umbrella of informal justice providing speedy and less expensive justice

83 See Hasan, above n. 44, 6.

for them through mediation, who otherwise would not have dared to come to the court premises.

In-Court and Out-of-Court Linkage Possibilities: Deepening Inputs

Out-of-courtNGOclients do not get any legally binding decree, as NGO *shalish* is voluntary. Eventually, anyagreement made under NGO*shalish*may not be abide by defendant husbands, and aggrieved wivesneed to file their cases in formal courts. Abidance of NGO *shalish* by defendant husbands depends on the stringent and prompt punishmentthat they may expect under formal trial. However, if mediation agreements made through NGOs can be summarily reviewed by formal courts to provide a legallybindingforce, rate of abidance to NGO *shalish* may increase due to an expectation from husbands that NGO mediation agreementscannot be ignored at their discretions. Thus,to strengthen the execution of NGO *shalish,* whilereducing backlog of cases in formal court through accelerated out-of-court resolution, a linkage between out-of-court and in-court mechanisms would be beneficial for both the settings. The ultimate benefit goes to mass women seeking justicethrough NGOs. The following section discusses a variety of such linkage possibilities between informal NGO *shalish* and formal court processes in Bangladesh.

Channeling Disputes in Civil Courts through NGOs: As discussed above, the first linkage possibility between in-courtADR and out-of-courtADR (i.e. NGOs providing mediation services)can be attainedbyreferring NGO mediation agreements to civil courts. Channeling disputes through NGOs will reduce the pressure on formal courts;becauseonly those cases will be filed in the courts thatNGOs are not able to resolve out-of-court. Further, when a poor defendant getswidespread support from NGOs to contest their cases informal courts, it gives a message to their counterpartsthat poordefendants are not vulnerable anymore and can access formal justice against them with all kinds of supports from respective NGO, if required. This type of awareness will ultimately reduce the repression thatpoor and women suffer*in general,*and increase the effectiveness of NGO *shalish,* in *particular*.

Giving LegalEffect to the Documents Prepared by NGOs during *shalish*: Now-a-days,increasing numbers of civil case-clients, especially family case-clients, are experiencing NGO *shalish* before coming to the formal courts. However, as discussed earlier,if the defendant husbands do not abide by *shalish*agreements and women have to go to family courts, courts have to start all the process of a dispute resolution from the very beginning (e.g. issuing summon, hearing the parties, in-court mandatory mediationetc.), although manyof these processes were followed during NGO *shalish* to mediate the same dispute. As a result, the time, energy and money spent by NGOs to mediate disputeswent in vain, only because the agreement

made through NGO *shalish* does not have any legal enforceability. To thrash this problem, one possible solution could be the writing of NGO *shalish* agreement on a non-judicial stamp, so that even if parties have to go to court due to anon-abiding attitude of defendant husbands, this legaldocument could be produced at family courtto ensure further legal step.

Providing CourtDecree on Out-of-court mediation: As experienced in Japan,[84] sometimes couples decide the terms of divorce and register their agreement with proper authority assigned under law. In Bangladesh, many family disputes are also settled by the couples themselves or with the help of their family and relatives but there is no system in the country to legalize these amicable settlements to give them proper legal effect while the parties are unwilling to go to court for avoiding unnecessary harassments. Thus, government may consider opening an office to register these amicable settlements either in family court or outside. Provision may also be made for the family court judges to make a hearing on such petition and issue a decree that the parties have made such agreement voluntarily and with full understanding of the consequences thereof.

To give NGO*shalish* a robustlegal effect, NGOs can also go to formal court and apply for a decree in support of the *shalish* agreement by submitting the entire related documents prepared during NGO *shalish* to the court and by registering a case number in it.After getting such application, court can issue a date on which it will hear from both the parties and ascertain that whether a just *shalish*or fair agreement has been made with the free consent of both the parties. After making such hearing, the court can issue a decree on the agreement made. This will certainly increase the effectiveness of NGO *shalish* by giving its legal enforceability. This practice is nothing but a simple variation of similar practice in other developed countries[85].

C. Government-NGO linkage to provide legal aid: Availability of legal aid could be an important factor to enhance access to justice in Bangladesh. Since the effectiveness of the government legal aid program is poor in comparison with the efficacy of legal aid disbursed by NGOs, NGOs are using their legal aid funds effectively. Further, most of the legal aid funds of government are held unused by different district legal aid committees, and it is apparent that channelling government legal aid funds through NGOs could be beneficial to improve the efficiency of legal aid.

D. ***NGO mediation should be promoted to enhance access to equitable justice:*** As discussed, disputes can be resolved in a much quicker time and lower cost through

84 See Jamila above n. 7.

85 Ibid.

out-of-court mediation, in comparison with in-court mediation. Therefore, while exploring the opportunity of mediation, the government should also promote the use of out-of-court mediation services through NGOs. This would reduce the case burden on formal courts and can provide justice to the poor or women in an even more accessible fashion with a fair outcome. Since NGOs provide legal aid in a much more efficient way than government, the government's legal aid fund could be channelled through NGOs. Further, better access to legal aid would also strengthen the effectiveness of NGO mediation by enhancing the potential for poor and women to get recourse of formal courts.

E. ***More gender equalising law should be incorporated, especially for enhancing women's access to justice:***Sincelaw plays animportant basis for mediation, especially when such mediation is done under the shadow of law (i.e. evaluative mediation), the better the laws for protecting women's rights in the country, the more it can protect women's rights through ADR.As in-court mediations are generally conducted under the shadow of law, in-court mediations can also provide better outcomes to women because of the existence of laws that well protect the rights of women. NGOs may also uphold women's rights by applying legal norms in mediation. For instance, stringent laws against violence may also reduce the possibility of post-separation violence and can act as a bargaining chip for women in mediation. Therefore, laws protecting women's rights and protecting women against violence need to be promotedfor enhancing women's access to justice.

Conclusion

The most important lesson for policy-makers to draw from this paper is that, a mere decision to introduce or incorporate the notion of ADR will not guarantee *per se* access to justice in its 'real' sense. Nevertheless, due to wide potential of a system approach to improve the overall access to justice in the country,improvement on all three waves of access to justicecan be considered by the policy makers for a holistic development of the sector—including motivation and incentivize lawyers' wide participation in resolving cases through ADR; proper linkage between out-of-court ADR and in-court ADR; linkage between government legal aid fund and efficient NGO operation in utilizing those funds; andpromotion ofPIL where individuals can be benefitted through collective action of the society. Once out-of-court resolutions are linked with in-court settlements, justice seekers may access low-cost dispute resolution and yet enjoy betterenforcement of their agreement through court decrees. Such arrangements are available in many developed and developing countries like Japan and Egypt. Allocation of unused or underused government legal aid fund to NGOs will also boost-up access to justice by enhancing NGO's capacity to provide wider support to justice seekers in the community. Lastly, a wide practice of PIL will rescue community from collective issues that are not dealt by individual justice seekers either due to the involvement of unbearably heavy cost or because of ignorance of collective issues out of the misery of commons.