LAW *reform*

## Alternative dispute resolution system

# In quest of a new dimension in civil justice

**MD NUR ISLAM**

OWING to the dispensation of justice in the mould of the nineteenth-century as inherited from the Anglo-Saxon origin, there has been a rising flood of pending cases. The delay process of delivering justice gave rise to a tidal wave of litigation threatening to engulf the judicial system. In fact delay devalues judgement, creates anxiety in the minds of litigants and uncertainty for lawyers, resulting loss or deterioration of evidence, wastes court resources, needlessly increases the costs of litigation and creates confusion and conflict in allocation of court resources. In the language of Mr Justice V R Krishna Iyre it can be said, "Delayed justice is the means of inflicting injustice through process of law. Prolonged delay makes the litigants enormously impatient. As such an implicit model of mechanism must be made to play to resolve undue delay in the disposal of cases. After years of controversy and frustration of the problem of administration of justice a new device needs to be chalked out.

Taking this view in mind the alternative dispute resolution system can be introduced and developed in our present society beside the formal justice system in order to eliminate the endless sufferings of the poor litigants. This new device can be developed by practising dispensation of justice in traditional methods like mediation, conciliation, arbitration, and resolution for a long period of time. Here role of individual is less significant and group/community gets emphasis in such system. Thus violation of an individual's right is violation of the right of the community/group to which he belongs. Where collectivity is the cardinal conception of the notions of rights, liabilities and injuries.

### Objective of alternative dispute resolution system

The alternative dispute resolution system (ADR) has been developed in the USA and the success of ADR is significantly high, the parties have been able to come forward to sit and talk together in resolving their disputes finally. The prime aim of alternative dispute resolution system in civil justice delivery system in Bangladesh is resolve the dispute and restore harmony between litigating parties through medication, conciliation and arbitration etc. In this system a high degree of public participation and coordination is badly needed. A general sense of satisfaction develops which helps in enforcement of the decision. Thus the reconciliation can be eased, which is the fundamental objective of ADR system.

### Civil justice delivery system

The concept of alternative dispute resolution (ADR) system is not a novel one in our civil justice delivery system. Outside the sub-continent legal culture in Singapore, Hong Kong, Australia, England and many other countries have already introduced different Alternative Dispute Resolution (ADR) methods to settle disputes outside the court. Remembering that a litigant is justifiably interested in results and not procedural niceties, efforts should be to accelerate the disposal of cases and to reduce the backlog of cases. It is time for us to think in terms of alternative process capable to save the legal system from genetic blemishes, geriatric distortion of access to justice, technicalities and ever increasing expenses and overload of cases. What is required is introduction of genuine reforms to the legal system to accept challenges, to streamline the whole judicial system, modernizing the methodology, making technology a tool for speedy procedures and experimenting with non-judicial or quasi-judicial alternative disputes resolution methods.

ADR have traditionally been used to settle labour and commercial disputes. In 1960's mediation came to review a way to humanize justice and

relieve the back packed courts. It was then that dispute resolution centers began to appear, usually set by social agencies. People are usually referred disputes to resolution centers instead of courts. In our civil justice system the alternative dispute resolution can be introduced with regard to commercial matters, suits relating to money matters, industrial dispute matters etc. In this regard, it is mentioned that the mediation process in the family court system has already proved a tremendous success.

### Why alternative dispute resolution system

There are several reasons people turn to ADR. One is to save time; the legal system is overcrowded, which results in long delays between the filing and the hearing of the case. But the most important reason is accessibility. Courts are often hard to get to and their 9:00 to 5:00 routine means people have to take time off from their work. These methods of dispute resolutions don't create the win/loose atmosphere that provides the adversarial system of our courts. Cost of litigation is an another reason. The expenditure of the courts is on the litigant, while ADR is usually offered for little or no charge as the dispute resolution centers are funded in a variety of ways, usually by a combination of public money and donations from other associations.

### Some instances and achievements

The study shows that the Madaripur Legal Aid Association (MLAA), which is one of the oldest NGOs of these kind, started facilitating mediation between parties in 1983 and now around 80 per cent of cases brought to them by the legating parties without going to court. This task has been possible only organising local mediation committees. Positively affecting the knowledge and attitudes of the influential community members who voluntarily serve on those committees.

In Bangladesh, there is one group of courts, which started ADR system in adjudicating disputes/matter. These are family courts established under the Family Courts Ordinance 1985. So far the success rate of mediation is more than 70 per cent. In pursuant to the notion of ADR system, some family courts have been introduced in different places of Bangladesh. By applying this mediation process, these courts have got a tremendous success in disposing of its suits. From 1995 to 1999, a premeditation period, the total money realized in connection with family courts cases by the Dhaka Judgeship is Tk. 30,27130.00 whereas the total realisation through mediation since the introduction of mediation from June 2000 up to 28 February 2002 i.e. in twenty months is Tk. 89,68,202.00. This has been achieved without changing the law, but through introducing mediation.

### The US-Bangladesh collaboration in dispute resolution

Against the backdrop of problems faced by the courts in our country, especially in civil justice system and the apparent inability of the existing legal system to resolve them, initiative was taken in 1999 to commence reforms in our legal system. Since then a co-operation has been built up between the Institute for the study and development of legal systems (ISDLS) of the USA and the Bangladesh legal study group under the leadership of Mr Justice Mustafa Kamal, the former chief justice of Bangladesh, to benefit our system with the American experience in this field and to work out an appropriate mechanism for resolving problems faced by our civil courts. On the basis of the successful US experience, the Bangladesh legal study group prepared a report proposing specific reforms that could be implemented in Bangladesh.

### Enactment

Our country does not still have adequate laws with regard to ADR system. But this mechanism should not be allowed to interpret the religious edicts without having its valid authority to do so. The sufficient legal provisions to refer civil disputes at pretrial stage can lessen the burden of cases on existing courts. A creative approach is necessary to improve the ADR system and to establish a just society.

### Concluding remarks

Alternative facility in Bangladesh is yet to take a meaningful uplift. The village courts of Bangladesh were set up to resolve some criminal and civil cases. These courts are presided over by elected representatives for local Govt. bodies. For meaningful expansion of ADR in Bangladesh legal resource has to be developed among the rural poor by providing them with alternative lawyers and judges. To do this, the first step would be to pass legislation providing legal backing for alternative resolution of disputes outside the court of law. The next step would be for the society to come forward to accept change of traditional legal prosedure. Only reformative thinking, new values, new projection and positive out look with determined action can achieve this.

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LAW *opinion*

# Whither constitutionality of Indemnity Ordinance

**RAFIQUL ISLAM**

*(Continued from previous issue)*

THERE are specific liabilities, both strict and vicarious, for the excesses and abusive use of law enforcing powers that abrogates the lawful rights of citizens. The Latin maxim salus pouli suprema lex (the safety of the people is the supreme law) lies at the heart of the liability and compensation regime. The Constitution of Bangladesh contains provisions (Arts. 44 and 102) for the enforcement of the citizens' rights under chapter 3, but does not contain any provision for granting monetary compensation for the contravention of fundamental rights. This constitutional position on compensatory liability is not unique but quite common in many other Constitutions of common law jurisdictions. In these jurisdictions, their highest courts have developed the principle of compensatory liability in cases of the proven violation of right to life and liberty. There are ample relevant judicial precedents. A selective of them having no constitutional provision for compensation are highlighted and commented upon below.

The Indian Supreme Court in D K Basu v State of West Bengal (1997 AIR 624-25) held that the prosecution of all offenders, including those responsible for the violation of citizens' rights, is the obligation of the state, which is obliged to compensate the victims for the breach of its public duty to protect the lawful rights of the citizens. The Court rejected the state defence of sovereign immunity on the ground that such defence is not available for the established violation of the rights to life and personal liberty. The legal limit of arrest without warrant and specific charge is explained by the Indian Supreme Court in Joginder Kumar v State of UP (1994, 4 SCC 260): "The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. No arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as the person's complicity and even so as to the need to effect arrest. Denying a person of his [or her] liberty is a serious matter". In Nilabati Bahera v State of Orissa (1993, 2 SCC 767), the Indian Supreme Court ascertained the extent of liability on the basis of the principle that it is the responsibility of the authority to ensure that the citizen in its custody is not deprived of his/her right to life and liberty and that the offender must be prosecuted under the existing criminal law and the state is bound to do it (also the Basu case cited above at 628). During the operation clean heart, the army indiscriminately and arbitrarily arrested citizens without warrant and specific charges (see Daily Star, 21 Dec 2002, editorial; Janakantha, 8 January 2003; Jugantor, 31 December 2002). Arrest without warrant involves the infringement of a legally protected right and therefore must be justified. It is no defence to say that the officer responsible acted in good faith (Ex parte Hague, 1992, 1 AC at 123, per Mr Taylor LJ).

In a similar vein, the Irish Courts have developed remedies for the breach of citizens' rights and awarded damages against both the individual responsible and the state. O'Dalaigh CJ explained the rationale for such judicial activism in State v Ryan (1965 IR 70): "It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at naught or circumvented. The intention was that rights of substance were being assured to the individual... As a necessary corollary, it follows that no one can with impunity set these rights at naught or circumvent them, and that the Court's powers in this regard are as ample as defence of the Constitution requires". In Byrne v Ireland (1972 IR 262), the Court held that "where the right is once guaranteed by the state, it is against the state that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed". In addition, the following judicial decisions granting compensation for the contravention of basic human rights and fundamental freedoms may be cited to the same effect: the Privy Council in Maharaj v Attorney General of Trinidad and Tobago (1978, 2 All ER, 670), the New Zealand Court of Appeal in Simps v Attorney General (1994 NZLR 667), and the Indian Supreme Court in Rudul Sah v State of Bihar (1983 AIR, SC 1086), Sebastian M Hongrey v Union of India (1984 AIR SC 1026), Bhim Singh v State of Jammu and Kashmir (1985, 4 SCC 677), Saheli v Commissioner of Police, Delhi (1990 AIR SC 513).

### Vicarious liability of state

The judicial precedents referred to reveal that the state is vicariously liable for the wrongs and excesses of its functionaries, which contravene citizens' rights and the victims' claim to justice is based on the principle of strict liability. In Bangladesh, there are few orders of the High Court Division made against the individual offenders on the basis of strict liability to compensate the victims of violation of fundamental rights. In Md Shahnewaz v Bangladesh (18 BLD 337), the court ordered the delinquent police officer to pay Tk 20,000 to the victim of a false arrest. In State v Md Moinul Haque, the court ruled on 28 May 2001 that the victim of rape should be compensated by half of the property of the rapist (Daily Star, 1 July 2001). The compensation order of the District Court in the sensational case of Falu Mia in 2002 for his prolonged wrongful imprisonment without any charge or trial is a case in point for the vicarious liability of state.

### Onus of proof should lies on the offenders

Perpetrators of all custodial deaths and tortures during the operation clean heart should be brought to justice under the existing penal and criminal laws of Bangladesh. It should be a conclusive proof that any death in custody is caused by torture and the officer who had the custody must be held responsible. An act of death by torture must be presumed unless otherwise is proved and the accused officer must bear the onus of such proof. The rationale for this submission is simple. It is not practical to expect external eyewitness to custodial tortures and killings, which often take place beyond public eyes. It is also unlikely that colleagues of the accused officer witnessing the incident will testify that the victim has been tortured to death. In Shaikh Baharul Islam v State (1991, 43 DLR 336), the Bangladesh Supreme Court held that it was not possible to prove the case of the death of person in the police station, because only those who beat him/her had special knowledge how he/she was beaten to death. The Indian Supreme Court in State of M P v Shyamsunder Trivedi (1995, 4 SCC 262, 273) held that death in custody is perhaps one of the worst kind of crimes and that it is difficult to secure evidence against the police responsible for resorting to third-degree methods since they are in charge of police station records, which they do not find hard to manipulate. The verdict of the Rubel murder case (June 2002) held 13 police officers and constables responsible for the death of Rubel in custody and sentenced them for life (New Nation, 18 June 2002). In this case, a police officer was punished on the charge of causing the disappearance of evidence of custodial torture and for giving false information to save the offenders.

### Investigation, trial and role of Judiciary

On the face of the above situations, reliance on any internal investigation would be no more than making someone to act as a judge of his/her own cause. All incidents of custodial deaths and tortures during the operation clean heart must be investigated judicially. Departmental investigations are often suspected as cover ups. A high-ranking judicial committee could credibly undertake investigation. This precisely happened in the Rubel murder case, in which the prosecution was based on the recommendations of a judicial committee headed by a Supreme Court judge. Similarly, departmental disciplinary actions against those responsible may not be enough remedies for the victims and their dependants, who were compelled to bear immense sufferings caused by the cruelty of the officers involved in the operation clean heart. Sufferings of the dependants may not be gainsaid, as the victim may be the sole breadwinner of the family. Being poor, many aggrieved victims cannot afford to invoke the writ jurisdiction of the Supreme Court. The Indemnity Ordinance 2003 is an additional deprivation tool that insulates further human rights violations. The Supreme Court must exercise its judicial review power to determine the constitutionality of the Ordinance. All forms of torture or cruel, inhuman or degrading treatments come well within the purview of inhibition under Article 35(5) of the Constitution. Being the custodian of the Constitution, the Supreme Court can take a pro-active role through suo motu actions to dispense justice. In Re Death of Sawinder Singh Grover (1995, 4 SCC, 450), the Indian Supreme Court took suo motu notice of the death of Sawinder Singh Grover during his custody and ordered the authority to pay Rs 0.2 million to the widow of the deceased by way of ex gratia payment. The landmark judgement of the Indian Supreme Court on custodial violence in the Basu case was an outcome of a letter from a legal aid organisation addressed to the Chief Justice of India drawing his attention to certain news items on deaths in custody. The letter was considered as a writ petition. In Bangladesh, where the enforcer of citizen's rights has become the violator, the judiciary is expected to exhibit due sensitivity and adopt a realistic approach in dealing with cases of custodial crimes so that the guilty should not escape, so that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed.

### Concluding remarks

What purpose does the Indemnity Ordinance 2003 serve? If the authority's claim that these deaths in custody were caused by heart attacks, what does this Ordinance then indemnify? The promulgation of the Ordinance is clear testimony on the part of the government that certain criminal acts were committed during the operation clean heart and it is well aware of such crimes. It failed to protect the victims from the brunt of these crimes, which are now artificially placed beyond the scope of law and justice by this Ordinance. It is thus anti-constitutional and anti-human rights both by its contents and orientation. It also has the potential of bringing the entire army into disrepute for the illegal acts of very few. All in all, the Ordinance is an ill-thought out and rackety affair of a government, prone to exercise its powers beyond the constitutional legitimacy but remain unaccountable.

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FACT *file*

# Laws dealing with marriage and divorce are not friendly to women

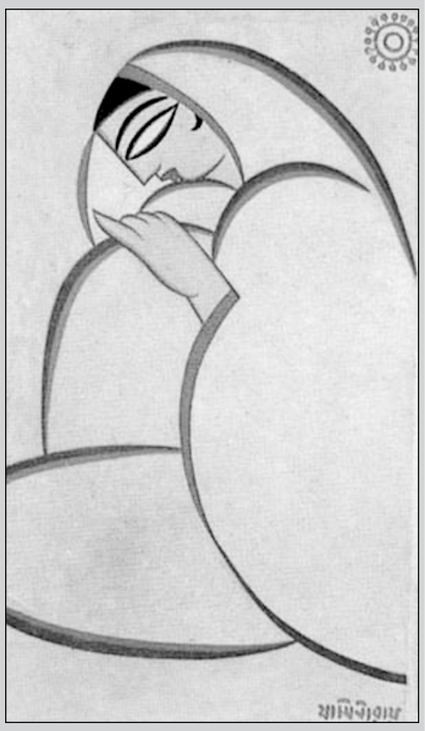
**SHAHRIA HOSSAIN RIA**

When Taslima Hossain was married 25 years ago, her family made a big blunder. The wedding was performed only by a Moulvi and no registration was done. Years later she was shocked to discover that her husband has a second wife through an officially registered marriage. And after her husband died Taslima, 44, realised that neither she nor her three children can legally claim their shares of husband's wealth and property. Those legally belong to his second wife and the children from the second marriage.

Taslima has become a pauper. She has gone from door to door for help. No one can help her. After the marriage, Taslima stayed back at her village home, while her husband returned to his work in a town. At one stage, the husband stopped visiting her in the village. So Taslima came to the town in search of him. She found that the man had another wife with children. She did not leave her husband because she had nowhere to go.

Her husband Monirul Islam died a few months ago leaving behind his two wives and children from two marriages. Taslima went to her husband's house but the in-laws refused to accept her. Anxious about the future of her children, Taslima went to court and sought legal support. The law could not help her, as she could not produce any official documents to prove the marriage.

Many Bangladeshi women such as Taslima, particularly in rural areas, are being deprived of their rights due to lack of marriage registration as well as for faulty and discriminatory marriage documents prepared by marriage registrars. It is true that the society is more aware about the rights and privileges of women than any time before. Women are getting education, jobs and businesses. Despite some progress, the condition of Bangladesh is far from ideal and satisfactory. They are victims of neglect, violence and discrimination. This applies also for the women from educated families.



The registration of marriage is a one step forward in protecting the interests of women. But not always. Experts say the existing Muslim marriage law cannot fully protect the rights of women. Here men enjoy unlimited rights and unquestionable authority to divorce their wives. Women usually get a raw deal in divorces. However, some experts and lawyers warn that there are others factors - not only the flawed law - for causing miseries to women. The law is not always enforced and there are people in the male-dominated administration who are biased against women.

Muslim marriage law itself is good. It has become weak in enforcement because the society is male-dominated, says Advocate Salma Ali of Bangladesh National Women Lawyers Association. She says women and human rights organisations have repeatedly recommended establishment of a balanced society removing all discriminations and loopholes in the law. There has been little headway, she revealed. "Community actions involving people from all walks of life are needed to remove such discriminations," says Salma Ali, "The women must get education to become aware about their rights and to raise their voice against all sorts of unfairness."

Supreme Court's Advocate Zahirul Islam says the laws so far enacted to make the marriage agreement effective and unbiased are enough to protect the rights of women. "But lack of application, religious misinterpretation, ignorance and superstitions have made these laws ineffective." Advocate Islam points out the state has a vital role to play in this regard showing more sincerity to resolve the marriage and divorce-related problems of women. "There must be a conducive and balanced system of disposing of the cases in the family courts," he says. Pointing to the huge pending cases, he says the government as well as non-government watchdogs should investigate and find out the ways to dispose of the cases within shortest possible time ensuring justice to the women who are deprived of their rights.

Advocate Masuda Rehana of Bangladesh Mohila Parishad terms current marriage agreement an unequal and male-biased that protects the rights of men and not women. "It also contradicts the constitutional provision that envisages equal rights to all. "Stressing the need for introduction of uniform family code to remove all discriminations, she says the existing laws should be amended and male-biased attitude should be changed to build a society that would equally treat men and women.

Retired Justice Golam Rabbani has also expressed similar views saying that there should be a uniform and internationally recognised law regarding marriage with necessary provisions ensuring that religious rules would not be an obstacle to enforce that law.

The Muslim marriage and family law was enacted in 1961. The law was later supplemented by some other rules on marriage registration, formalities of divorce in 1974 and 1975. The family court ordinance came into being in 1985 and that was the last effort to upgrade the laws. There exists some provisions of punishment for the violators of these laws but experts think these provisions are inadequate. " A three-month jail or Taka 500 fine is not enough to punish those responsible for not registering marriage," says Professor Azizur Rahman of Law Department in Dhaka University.

A second marriage without permission of the first wife is a punishable offense but there is hardly any instance that offenders have been punished.

Many victims cannot afford taking the cases to court. There are men who divorce their wives on flimsy grounds. Most of the husbands do not pay the "Denmohor" (dower) to their divorced wives. The men can easily take a second wife but it is difficult for a divorced woman to marry again though they urgently need money and shelter to survive.

Developed countries, even many Muslim countries like Indonesia and Malaysia, have enacted laws to prevent polygamy and divorce and protect the equal rights of women. In India, divorced Muslim women are legally entitled to get expenses from their previous husbands until they remain single. Women and human rights campaigners feel the need to initiate a social movement to make the women more conscious about their rights, wipe out all discriminations in law relating to marriage and divorce and establish equal rights of men and women.

*- NewsNetwork*