

Law and Our Rights

"All citizens are equal before law and are entitled to equal protection of law"-Article 27 of the Constitution of the People's Republic of Bangladesh

Alternative Dispute Resolution in Bangladesh

By Fazlul Huq

MEDIATION in the rural society of Bangladesh is virtually an immemorial origin based on customary practice having its deep roots in the cultural heritage of this sub continent.

Easy access to social justice, particularly distribution through equal participation for those who now share stark deprivation and poverty is the need of the hour.

Recent trend and development in the field of disputes resolution indicates that people in general tend to prefer mediation to litigation. In this backdrop mediation (ADR) should be allowed to play a role free from any statutory regulations and control. Thus Village Court/Green Court would adjudicate on petty cases in the matter of civil and criminal issues with legal authority but mediation should be left beyond its jurisdiction.

But the real challenge is how to revive and mould the traditional shalish on the right line reflecting the spirit and aspiration of the people.

One of the options is to activate participation of the community. But due to structural violence, lack of peace and amity, the rural civil society is unable to contribute/fulfil its social obligation in bringing about equitable resolution between the conflicting parties (in the society). Be that as it may, ultimately dispute resolution in a society can not be top down but bottom up. By this it is envisaged that the vacuum created should not be thought of filled in by an enactment as an easy solution from the top. Instead, approach is expected to be bottom up so that disputes arising in the community should be resolved at the community level resulting in not only decreasing the number of litigations but also creating space for legal system to pay attention to more pressing matters to be taken care of by the courts (of law). In this matter what is important is liberal attitude and patronisation from the administration in upholding the traditional values and customary practices.

Now the critical question as to how traditional mediation in keeping with the modern trend of dispute resolution could be moulded and be in full play. But there is no easy answer. One of the optimistic developments is some of the non-govt organisations have taken up the challenge in the field. They are conscious of neutrality, non-imposition of any verdict and 'win-win situation' in mediation process. As an integral part training for the mediators (mostly volunteers) on concerned legal issues and mediation process have been introduced (as a must) to overcome the limitations of the traditional mediation.

The finest hour of justice is when foes compose their fight through fair settlement to become friends. This can be achieved with little cost and no delay, with an informal procedure, confirming only to the requirement of natural justice where the key-note would be justice rather than law.

Parameters of Effective ADR

The first requirement is the active participation of the local community in the dispute resolution process.

The process of dispute resolution, particularly in the informal settings of rural Bangladesh, can hardly be achieved with a top-down approach. It has to be a local affair of the people themselves. In other words, the current problems and lacunae in the alternative dispute settlement process ought not to be remedied through an enactment from the above. Instead, local disputes should be resolved at the local community level, resulting not only in decrease in the number of litigations but also providing space to the formal legal system to pay attention to more pressing matters and processing those through the judicial system (courts). What is important for alternative dispute resolution is not the creation of new structures and norms by the central authorities but facilitation of traditional practice to ensure natural justice for disputants.

The second requirement is to ensure that alternative dispute resolution does not become another arena for perpetuating domination of the powerful.

The wider the participation of the local community in the process, the lesser is the opportunity for the powerful to turn it into a mechanism for sustaining inequitable practices and power structures. However, wide participation must include representations of not only the

disputants and their friends/relatives put the poor and disadvantaged segments to reflect their notions of justice in the process.

The third requirement is to ensure that some of the orthodox and inequitable notions of justice, particularly the notions of subservience and rightlessness of women and medieval religious practices are not reproduced and strengthened by the shalish process.

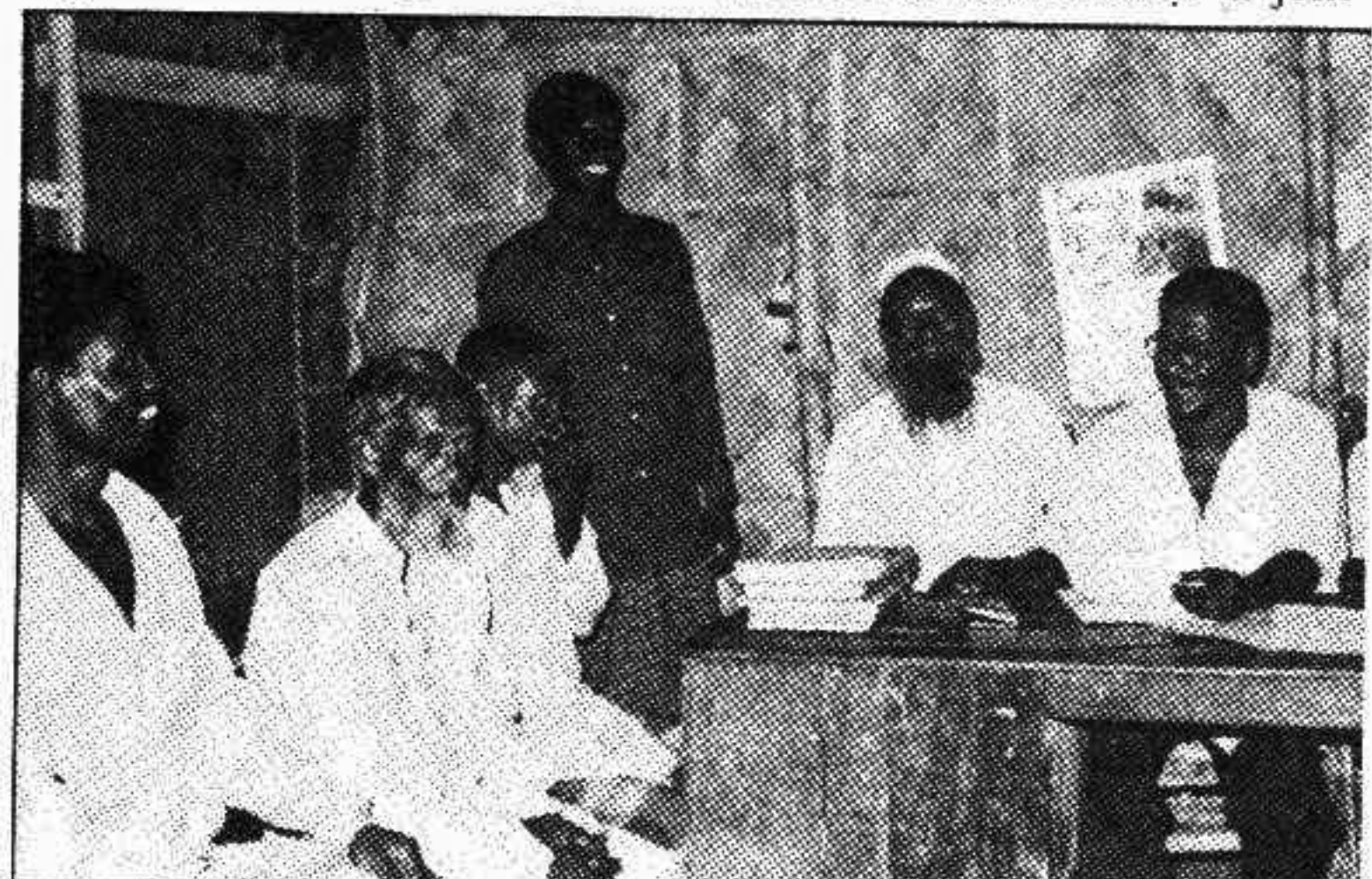
Legal literacy and awareness, along with an understanding of the limits (imposed by the

successful resolution of around 5,000 disputes in three districts (Madaripur, Shariatpur and Gopalganj) in southern part of the country.

Secondly, MLAA is also providing training to workers/mediators of around 30 NGOs each year, from all parts of country.

Thirdly, since last year it has taken up the role of supervising mediation activities of a substantial portion of these NGOs.

Fourthly, for last two years MLAA has undertaken a joint



The mediator and the parties in a mediation

legal system) of acceptable resolutions, can gradually diminish the scope for inequitable deployment of the shalish process by the elite. An alternative dispute resolution mechanism is also a powerful medium for legal literacy and legal awareness, requiring due attention to these aspects also.

Best Practices

The critical issue is, obviously, the modes of re-organising traditional mediation process to ensure that disputes are mediated within the parameters indicated above.

A number of Non Government Organisations (NGOs) have been arranging mediation of disputes in several parts of the country. The oldest of these, Madaripur Legal Aid Association (MLAA), has been facilitating mediation as its primary activity for almost two decades now.

Annually MLAA facilitates

programme with Bangladesh Legal Aid and Services Trust (BLAST) to facilitate mediation activities of BLAST in another three districts (Barisal, Khulna and Sylhet, setting around 1,000 disputes annually).

The experience of MLAA and BLAST indicate that the following three components are essential for successful mediation:

i. Training: Successful mediation is largely predicated upon the methods and techniques deployed to ensure that disputants arrive at a mutually acceptable compromise where both sides 'win'. This requires appropriate training in mediation techniques and a broad understanding of applicable laws.

According to the structures developed by MLAA and replicated by a large number of NGOs, a mediation worker is engaged for each Union (usually comprising 10 villages) as the focal point for receiving com-

plaints and arranging shalish. These mediation workers are provided extensive training in mediation techniques, documentation and law.

ii. Involvement and participation of the local community: Mediation is not an imposed structure from the above. Local elders, influential persons and elected leaders in large numbers are involved in mediating disputes.

Usually for each village a village mediation committee is formed with at least 10 volunteer-mediators. A union mediation committee for each Union is then formed with representatives from the village mediation committees.

The members of these mediation committees are provided with short and repetitive trainings to help them distinguish between mediation and dictating solution, and facilitate their understanding of the legal system.

iii. Participatory mediation and documentation: The mediation process starts with:

(a) a disputant contacting a mediation worker who, then, (b) informs the other party, and (c) informs the mediation committee members regarding the dispute.

Documentation is initiated with the first (a) of the above steps. In addition to mediation committee members, local people are encouraged to participate in the mediation to ensure openness and fairness of the process as well facilitate wider acceptance, not only by the disputants themselves but the local community also, of the compromise reached.

(e) The compromise reached at a mediation session with the participation of the above persons is then documented with authentication by the members of the mediation committee and the disputants.

The participatory mediation process is also a useful and effective, avenue for legal literacy and awareness.

A substantial legal aid programme of the 'mediation' or 'organisation' ensures that a client/complainant is supported for resolving his/her dispute through mediation and, if mediation fails or mediation is not appropriate, a networking and collaboration between

'mediation' and 'legal aid' organisations can be evolved to ensure service/support for effective resolution of disputes.

The above, in its entirety, is increasingly being identified as the Madaripur Model of Mediation (MMM).

Replicability and Possibilities

As already indicated, a large number of NGOs in various parts of the country are undertaking mediation according to the above model (MMM).

MLAA has a large and resourceful training centre in Madaripur. Besides, a number of MLAA Mediation Trainers are engaged in providing training and supervision in the project areas of other NGOs, BLAST, with offices in 13 districts, plan to expand its offices to all the 'old' 19 districts within the next year and a half and is in a position to provide support in instances where a dispute is appropriate for mediation.

The way forward, therefore, would include:

• further strengthening of the training facilities for ensuring mediation training on a much larger scale;

• mechanism for extensive supervision of and support to other NGOs particularly at the initial stage of their mediation programme; and

• production and distribution of materials on mediation techniques and legal literacy.

Most importantly, successful mediation is predicated upon the integrity and perception of fairness and justice of all those who are engaged in the process, as well as their thorough training and understanding of the requisite techniques.

These essential requirements imply that the expansion of mediation activities will have to be gradual and not instantaneous. Also, mediation, particularly for the disputants who are poor marginalised and disadvantaged, is not an income generating activity. Consequently, the long term availability of resources is an important determining factor.

The writer, an advocate, is Secretary, Madaripur Legal Aid Association. This is the full text of his paper presented in the British Bangla Law week (29 November-5 December 1998) organised by the British Council Bangladesh.

The ADR and the Madaripur Mediation Model

THE pathos of litigation wherein lies the genesis of the search for alternative of dispute resolution (ADR), was outlined aptly in the lament of JS Auerbach:

"Litigation has become an inevitable stage in the life cycle — slightly beyond adolescence but before maturity. It is occasionally possible to endure it and remain sane. As a modern ordeal by torture, litigation excels. It is exorbitantly expensive, agonisingly slow and exquisitely designed to avoid any resemblance to fairness and justice. Yet in strange and devious ways, it does settle disputes to everyone's dissatisfaction." The current state of legal system in Bangladesh would amply justify the observation of Auerbach. The fact that there are no winners in litigation and that the nominal winner is often the real loser is dawning with increasing and monotonous regularity upon all actors in the legal system.

In an effort to streamline the life of a case while preserving justice, alternative dispute resolution (ADR) offers an arena for litigation outside of the traditional trial process. Within the chosen form each ADR mechanism provides a third party (private lawyer, mediator or judge) to meet with both parties early in the life of a case in an effort to reduce any delay and expenditure.

Kinds of ADR

There are a number of mechanisms of ADR practised globally. They vary considerably on various grounds e.g., geographical condition, state of economy, population, social structure etc. Some of them are depicted below:

Early Neutral Evaluation

Early Neutral Evaluation (ENE) is a technique used to provide early focus to complex commercial litigation. The

Central goal of ENE is to get the central participants in the litigation that is the decision makers on behalf of the clients and their principal trial lawyers intensively involved in the legal and factual merits of the case in the very beginning of the litigation.

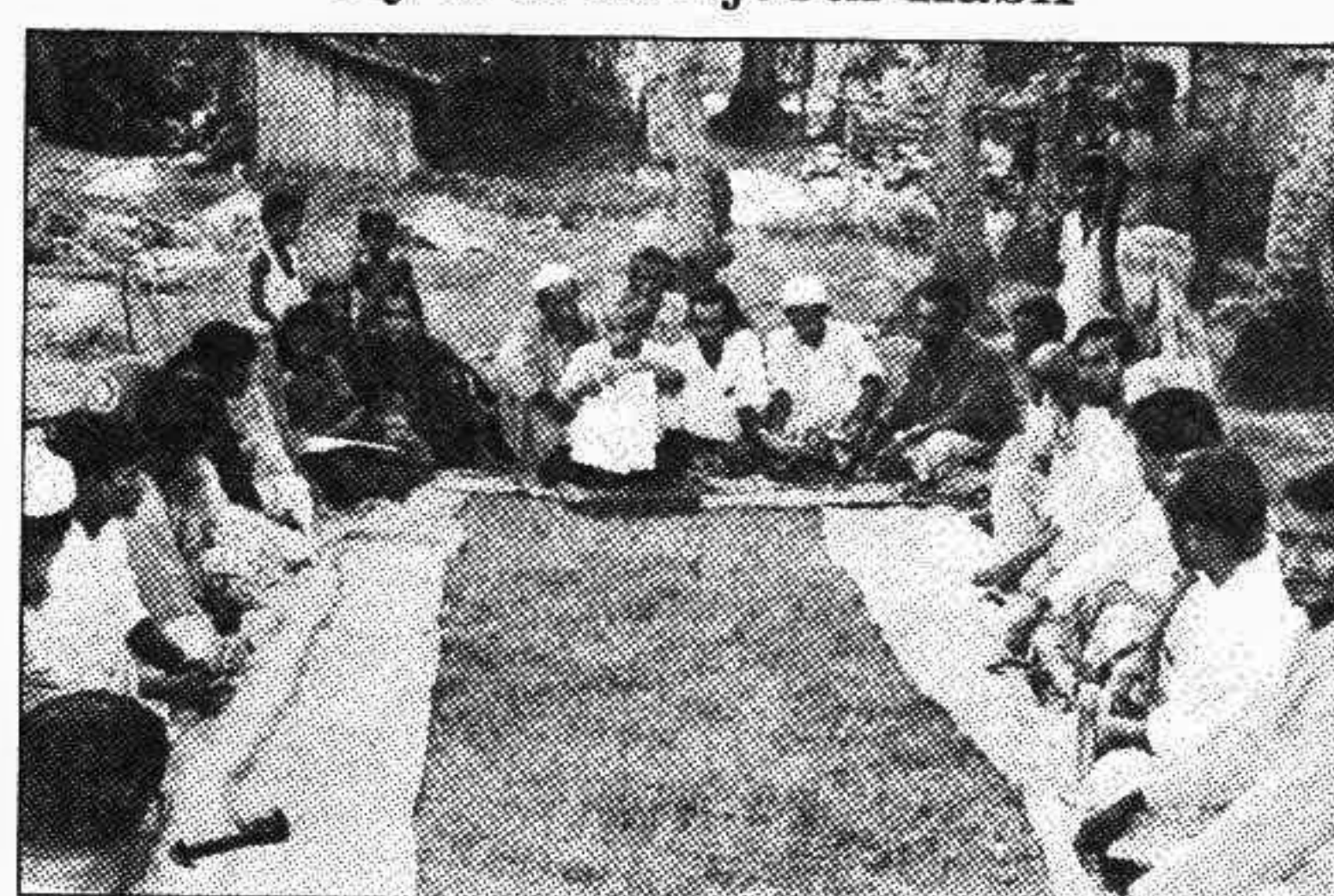
ENE is conducted by a senior lawyer with expertise and experience in a particular subject matter. In this process, the parties convene in the office of the early neutral evaluator (the neutral), who evaluates each side of the case. Following a joint session and private caucuses, the neutral prepares an outline of the issues and an informed evaluation of the potential outcome of the case, which is then communicated to the parties either jointly or more frequently separately. If appropriate, the neutral conducts consensual mediation of the dispute in an effort to pursue settlement discussions. If settlement is not reachable, the neutral then discusses case management and assist the parties in reaching agreement on a procedural plan of the case.

Judicial Settlement

Judicial settlement requires the involvement of a judge (not assigned to adjudicate the dispute in question) in aiding both parties to settle a civil case. The success of this process is attributable both to the advantage of utilizing judicial experience in evaluating the settlement value of a civil claim and to the separation of private and confidential settlement negotiations from public adjudicatory functions.

The settlement conference may be held at any time during the life of a civil case upon request of a party or recommendation of the trial judge. The settlement judge acts as a mediator or facilitator at the settlement conference, promoting communication among the parties, holding one-on-one

By A H Monjurul Kabir



A mediation (shalish) is in progress

sessions with each side, offering an objective assessment of the case, and suggesting settlement options. The settlement judge does not have the power to enforce settlement and does not communicate any information about the case to the trial judge. If settlement is reached, the parties sign an agreement, thereby avoiding the cost of trial or other litigation. If no settlement is reached, the case proceeds to trial before the previously appointed trial judge.

Mediation

Mediation involves the use of a facilitator trained in conflict resolution. Mediation is consensual, confidential and non-binding. It encourages the parties to discuss their positions with greater candor and fosters compromise. Mediation involves a meeting at any time during the lawsuit between the parties, their legal representatives and a neutral, third party (whether former judge or attorney). As in early neutral evaluation, the lawyers prepare the legal authorities and factual evidence in support of their client's positions prior to the session. The mediator often allows the parties to voice their position in a joint session before meeting privately to discuss settlement opportunities. Frequently the mediator will share with each party an informed prediction of the outcome of the litigation, assuming if were to proceed. All communications are confidential.

Arbitration

This is a process by which a dispute between two or more parties is submitted to a panel of impartial third parties for resolution on the merits based on the evidence presented at a hearing.

Arbitrators are professional and business people who are selected by the court to assist in the informal resolution of disputes because of their knowledge, expertise and reputation for fairness and impartiality. Arbitration can be either binding or non-binding.

Summary Judgment

The American system has a procedure known as a motion for summary judgment,

through which, in appropriate cases, either party may obtain a final and complete resolution of a lawsuit without incurring the often considerable delay and expense of a full trial. Summary judgments exist, therefore to prevent the misuse of the legal system for uncontested factual claims.

The Madaripur Mediation Model and Conventional Mediation

It is important to remember that mediation is a voluntary process. All a mediation organization can do is to make mediation facilities and personnel

available to the disputing parties, should they choose to engage them. Unlike traditional and existing rural power-structure-derived mediation in which self-appointed mediators and self-proclaimed leaders have habitually imposed their own mediation on reluctant disputants under the guise of 'maintaining social fabrics, custom and tradition' etc., the MMM (Madaripur Mediation Model) insists that mediation is a voluntary process. Whatever the assessment or perception of right or wrong of a given situation, the MMM assumes that no evaluation of the need for mediation nor the necessity of neutral resolution of a conflict can lead to an arrangement for a mediation unless at least one party involved in the dispute voluntarily approaches MLAA (Madaripur Legal Aid Association) for a resolution of his/her problem.

Traditional dispute resolution through mediation, commonly known as shalish in rural Bangladesh, has increased grievances of the parties nor their desired solutions but impose what is 'correct' according to the 'mediating elite'. These mediation often reflect and perpetuate the existing power relations in the community and as such do not make any contribution for resolving disputes. The MMM, therefore, lays down that a mediation can be meaningful and acceptable to the parties involved only if the parties themselves voluntarily agree to the mediation process. Needless to say, often one of the parties involve approaches MLAA first with his/her problem and after due recording of the dispute, the other party is asked by MLAA to indicate his/her willingness to take part in the proposed mediation and only after such assent has been obtained from both the parties that a mediation is initiated. Such voluntary participation is also an essential implementation of the agreed decision reached through mediation.

Mediation, Judicial Pronouncements and Arbitration

As already indicated, mediation is a voluntary method of dispute resolution in which the parties to a dispute are assisted in reaching a settlement by a neutral third party or mediation team. Mediation differs from other common modes of dispute settlements i.e. judi-

bitration often leaves the frame of confrontational opposition between the parties intact.

Another important component of mediation is the participation of the *samaj*, i.e. a host of interested people of the locality and friends/relatives of the parties involved. This participation serves a very useful purpose of creating a sense of shared belonging and reinforces the vitality of the agreed outcome. Sometimes, however, too many cooks can spoil the food!

Community Participation is the Core Word

We, at this fag end of the twentieth century can not even develop an efficient justice delivery system let alone of its being pro-people in attitude. Equality before law and equal protection of law is still a notion foreign to us. We had an opulent heritage of resolving disputes amicably through community participation at the grass-root level. We simply didn't bother to keep such local initiative alive and working. As a consequence social harmony and balance are greatly threatened by vested quarters in disguise of religion and various anti-people elements. We must encourage appropriate modes of dispute resolution ensuring

Aspects	In Mediation	In Judicial Decisions & Arbitration
Decision Making	Voluntary	Compulsory
Who Decides	The Parties	Judge or Arbitrator
Who Controls	The Parties	Attorney or Representatives
Procedure	Informal	Formal or less formal
Time Required	Days or weeks	Months or years, even decades
Cost	Hardly any	Enormous
Focus	Future	Past
Relationship of Parties	Friendly	Antagonistic
Method of Negotiation	Compromise	Hard Bargaining
Evidence	Voluntary/Informal	Mandatory/Formal
End Result	Co-operation	Hardened Hostility

cial decision (judgment) or arbitration in so far as social situations of the parties involved form a core consideration in mediation and mediation-settlements are based more on societal perceptions of right and wrong or just and unjust rather than normative understandings of justice. Judicial pronouncements and arbitration rely more dichotomous notions of right and wrong as dictated by the normative frameworks while mediation recognizes the legitimacy of both parties self interest and seeks ways to reconcile them. Mediation can be successful if parties involved in the disputes are conscious of each other's claims and rights and willing to seek a middle ground between conflicting interests.

One of the most important consequence of resolving a dispute through mediation is the restoration of social harmony and reiteration of the commonality of the erstwhile disputants while a judicial decision or ar-

bitration often leaves the frame of confrontational opposition between the parties intact.

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lawwatch

Why Indian Christians Are Under Attack

By A J Singh writes from New Delhi

Christian missionaries in India have been subjected to several much-publicised attacks. Hindu fundamentalism is blamed. But Gemini News Service reports that the main reason behind the attacks is the church's attempt to empower the underclasses in their battles with powerful land-owners.

An anti-Christian wave unleashed by Hindu extremists is sweeping India. Barely a day passes without a report that militants have 'torched' churches, attacked church congregations, assaulted priests and nuns, burned vehicles belonging to Christians, or taken over Christian mission schools.

There is a kind of fear among the Christians that was not there 50 years ago," says James Massey, a respected Christian leader and member of the Minorities Commission since 1997.

There is uncertainty, a feeling that anything can happen. There is for the first time the threat of physical violence. Whoever I spoke to said: 'Please don't mention me.'

Why have Christian clergy become the special target of the landowner-backed Hindu fundamentalists and militant organisations?

The main reason is their attempt to teach India's poor and depressed classes about their rights. Awareness brought about by education has emboldened the poor, who have demanded the return of land and property forcibly grabbed by upper caste Hindus — among them, powerful rich landlords or the rural political elite.

As long as the clergy confined itself to converting the poor or low caste *harjans* and *pariahs* or opening new schools for converts, the upper caste Hindu landlords tolerated them.

Once the Christian missionaries began to teach the converts to take legal recourse to recover their own lands from the property-grabbers the ire against the clergy in particular, and Christians in general, erupted.

Three recent incidents against clergy and nuns have sent shock waves across the entire Christian community.

The worst took place last year in Madhya Pradesh state. A mob of 200 Hindu fundamentalists attacked a Christian Centre and raped four nuns.

Jesuit Father Thomas, 46, was abducted, tortured and beheaded. He worked for almost 30 years in a backward area of Bihar state and set up a network of schools that educated young Christians and helped them find employment.

The youths took legal steps to reclaim their land from upper-caste land-grabbers. Nearly 200 families succeeded. This so provoked high caste Hindu landlords they punished Thomas.

Later, Father Jeevendra Jadhav, 51, became a victim of Hindu militants backed by landlords. He had been working on a project for the rehabilitation of earthquake victims in Latur, Maharashtra state. Local bigwigs with powerful political connections tried to take land belonging to poor Christian earthquake victims. Father Jadhav helped foil their attempts.

Hindu extremists ransacked Jadhav's office and severely reprimanded him. They shouted slogans against him for forcibly converting people to Christianity, but spared his life.

Sister Annie, who works on Jadhav's project, said: "Forget about converting anyone. We do not even wear our habit while working in the villages."

Critics also attribute the spurt in anti-Christian violence to the right-wing Bharatiya Janata Party's rise to power in the central government. The BJP relies on the active support of Hindu extremist organisations such as Vishwa Hindu Parishad (VHP), Rashtriya Swayam-Sewak Sangh, the Bajrang Dal and Hindu Jagran Manch. All are behind the anti-Christian mili-

tancy.

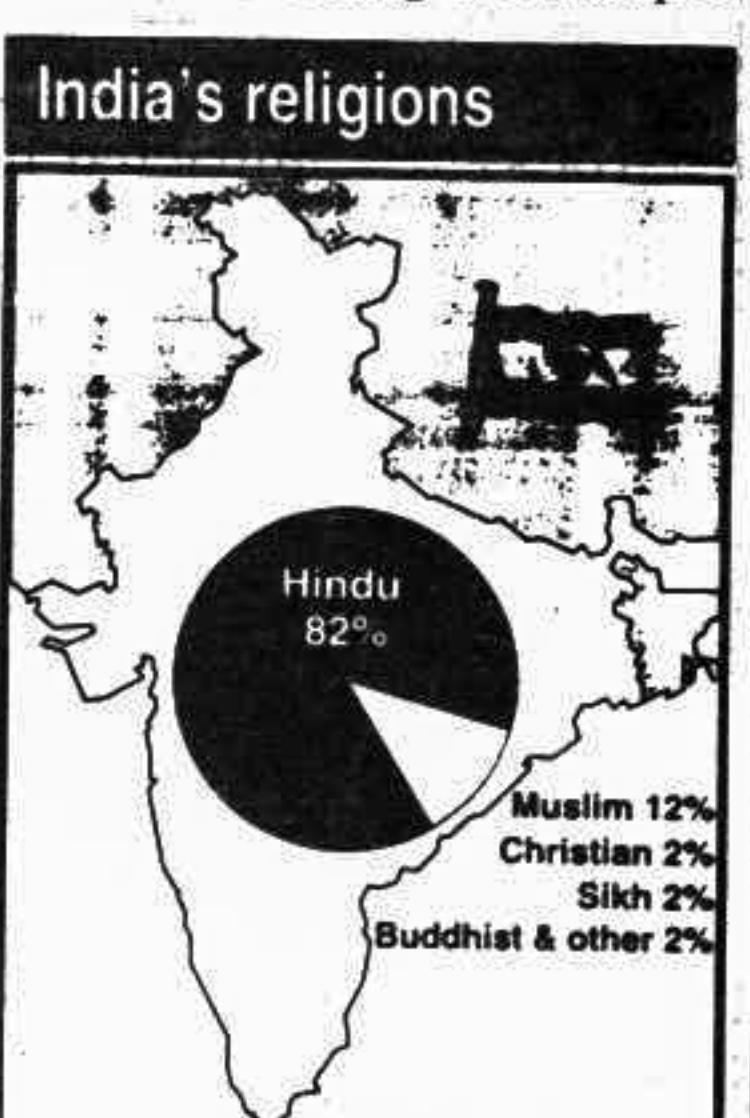
The VHP has always been anti-Christian," says Alan De Lastic, the Archbishop of Delhi. "They want to have one religion, one code. I believe this will ruin the country."

The BJP has tried to distance itself from its radical allies. Prime Minister Atal Bihari Vajpayee has vowed to bring the anti-Christian attacks under control.

Analysts say it will be difficult for the beleaguered BJP government to blame the Hindu extremist fringe for the anti-church violence. It depends on 17 coalition partners if it to stay in power.

Some political observers say that the latest attacks on the Christian community are a political move to stop the rise of Italian-born Sonia Gandhi, president of the Congress Party and widow of late prime minister Rajiv Gandhi. Under Sonia Gandhi, Congress has just wrested control from the BJP in two state elections.

The Hindu extremists believe that their onslaught against the Christians will discomfort Gandhi, a Roman Catholic. The extremists hope to use the emotional issue of Hindu tribals' conversion to Christianity to consolidate the Hindu vote, as they did in 1992 with the storming of a mosque.



allegedly built over a Hindu holy site.

The Hindus' main targets used to be Muslims. They have now shifted focus to Christians because Muslims are not soft targets anymore," says Harshan Singh Surjet, general secretary of the Communist-Marxist Party.

India is a multi-lingual, multi-cultural and multi-religious society, founded on a principle of tolerance and the equality of all religions, although Hindus make up 82 per cent of the population, Muslims 12 per cent and Christians just 2.5 per cent.

The 23 million Christians have long been considered a peace-loving, patriotic and model community. They have contributed much to building modern India and spreading education among Christians and non-Christians. Educated Christians have made a mark in every field of work at the national level.

Indian Christians have never been under such serious attack since the apostle Thomas brought the faith to the sub-continent nearly 2000 years ago.

"Where is all this persecution leading? asks Father Ignatius Mascarenhas of Delhi. "I've been hearing talk from intelligent, informed people, telling me: 'Father, if we do not react they'll laugh at us and nothing will be done.'"

The writer is a freelance journalist based in Dharmasala, northern India, who specialises in Tibet, Nepal, Bhutan and India's northern states.

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Landscape



Recently the 13th Annual General Conference of Bangladesh Law Association (BLA), an organisation of ex-students of the Faculty of Law of the University of Dhaka was held at the Science Annex Building premises.