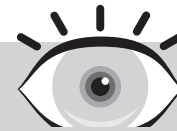


## LAWvision



# Mediation in Family Courts of Bangladesh

JUSTICE K M HASAN

ONE of the most basic requirements of our life is the effective access to justice. Any denial to such access is denial to the most basic human right. In this regard both the civil and criminal justice systems of Bangladesh currently confront serious crisis. Delay in the resolution of civil disputes and abuse of criminal process are eroding public trust and confidence in the system and obstructing the path to the establishment of a just society.

### Existing regime of civil suits

The existing regime of civil suits in Bangladesh is governed by the Code of Civil Procedure enacted in 1908. Since then little change has taken place. The legal system may very well be described as admirable but at the same time slow and costly and entails an immense sacrifice of time, money and talent. The British adversarial system introduced in our country may be distinguished by its laissez-faire emphasis on party controlled litigation process, emphasis on procedural justice and limitations on available legal remedies, confined to win or lose legal outcomes. Litigation being the primary means of resolving disputes, our civil justice process have failed to administer justice in a timely manner to a larger, more diverse, faster paced, technologically and economically changing society. The ever increasing backlog of cases and incapability of the legal system to deal with it effectively are putting the courts on trial.

### Backlog of cases and delay

The causes of backlog and delay in our country are systemic and profound. The legal system's failure to impose the necessary discipline at different stages of trial of cases allows dilatory practice to protract the case life. Today the legal system is ossified to a point and slow to the degree where they cannot flexibly assist the litigants in resolving their dispute easily and quickly. The reasons for ever increasing backlog of cases overburdening the civil justice system are many.

One of the damaging results of the above is that the country's commercial activities are directly and significantly affected. Legal barriers are created to the orderly exit of bankrupt or insolvent enterprises and to the entry of new enterprises not only in the industrial field but also in the field of intellectual property and information technology.

### Alternative Dispute Resolution

Outside the sub-continent legal culture in Singapore, Hong Kong, Australia, England and many other countries have already introduced different Alternative Dispute Resolutions (ADR) methods to settle disputes outside the court. Remembering that a litigant is justifiably interested in results and not procedural niceties, efforts should be made to accelerate the disposal of cases and to reduce the backlog of cases. But it will be naive to say that the appointment of more judges will solve the problems. Without a method, procedures and machinery, appointment of more judges will produce more backlogs, more delays and more litigants. 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.

### The US-Bangladesh collaboration in dispute resolution

Given the gamut 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. One of the recommendations made in the report is to initiate immediately a pilot project on mediation, a non-mandatory consensual dispute resolution system, in the Family Courts in Dhaka, and then to expand it to other judgements in order to ensure speedy and alternative

dispute settlement process. A 'Pilot Project Design Committee' was formed with me as the convener.

### The Family Courts: A test case

The reason for inclusion of the Family Courts in the Pilot Project is that it does not involve any new legislation. The Family Courts Ordinance itself provides for conciliation whereas inclusion of other courts at this stage might need legislation or amendment of the Civil Procedure Code. In other words, the implementation of the plan is carefully crafted to commence the reforms without first requiring a change in the procedural rules.

The Family Courts Ordinance '85 provides the courts with arms to exercise mediation in suits pending before it both at the pre-trial stage under section 10 and after close of evidence following framing of issues and fixing a date of preliminary hearing under section 13. Unfortunately, since the enactment of the Ordinance, the Family Courts failed to take cognizance or to apply these provisions to mediate disputes in pending suits before them. The reason being lack of motivation of the concerned judges. The other reason for recommending mediation in the Family Courts is that it involves the direct participation of the parties in dispute. They are required to meet along with their legal representatives and other interested persons at confidential meetings at any time during the law suit in the presence of a neutral third party who, a judge, is a trained facilitator at conflict resolution. The parties are allowed to voice their position in a joint session before settle-

village elders have been doing from time immemorial. They bring quick relief but unlike mediation in the Family Courts the settlement of disputes by salish do not have any legal force behind them and as such not binding upon either party and can be revived at any time; whereas mediation settlements in the Family Court reach finality with the compromise decree.

### The achievements

Most of the Family Court cases involve financial or property settlements, important among these are the cases involving "Dower". The success rate of mediation judges is more than 60%. Statistics show that the total realization of money, through execution of decree in suits disposed of, by trial, is far below the total realization of money in disputes settled through mediation. From 1995 to 1999, a pre-mediation period, the total money realized in connection with Family Courts cases by the Dhaka Judgeship is Tk. 30,27130.00 whereas the total realization 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 and activating the law available in the Family Courts Ordinance. Within this short span 164 cases have been finally disposed of through mediation against which no appeal or execution cases can be preferred. Similarly in all other divisions we are getting more or less the same result. On 12.2.2001 a Family Court started functioning in Chittagong with 507 cases. Out of which 117 cases have been disposed of through mediation and Tk 73,55,000.00 has been realized. Previously the average yearly realization through execution cases was only Tk 12,38,224.00. For want of accommodation Family Court of Khulna is not functioning exclusively. With this limitation the Court has started functioning on 1st September 2001. Up to February 2002, only 48 cases have been disposed of through mediation. Out of which 26 families were reconciled and Tk 4,71,000.00 was realized from the rest 22 cases. Whereas previous annual rate of realization of money was below one lac through execution cases. The Family Court of Rajshahi is also not functioning exclusively because of scarcity of judicial officers. Mediation was started in the Family Court on 7.5.2001 with 1371 cases. Within this short period 95 cases have been disposed of through mediation and Tk 8,28,176.00 has been realized.

The female parties are benefited immensely by immediate realization of the claim and recovery of lump sum money through mediation, which might have otherwise taken years in a trial. It not only helps to alleviate their poverty but also encourages them to invest the money for financial security or to get trained for a career. Thus many of them enjoy financial independence for the first time. It is heartening to note that many non-government organizations are coming forward to extend help to women in such condition so that they can be self-sufficient.

With the disposal of the main suit through mediation, counter suits, mainly criminal, arising out of the same family disputes, are also settled. Invariably for each family court suits, there are other cases arising out of the main dispute. For example, against a suit for dower generally criminal cases for theft or unlawful confinement are filed, whereas a case for dowry encourages filing of a suit for defamation or libel. Against a case under "Oppression and Cruelty to Women and Children Act" the other party will invariably file a suit for restoration of conjugal right. Therefore, mediation encompasses not only the settlement of the main suit but other related suits or cases arising out of the same disputes and with the final disposal of the main suit all others are also disposed of. The cumulative effect of mediation is much more larger than disputes settled in trial or by private salish.

**The success of mediation in the Family Court is not the end. We look forward to the day when introduction of mediation in other courts, like Commercial Court's will be achieved. The experience in the Family Courts provides a solid foundation upon which to create through law, policy and practice an environment to introduce Alternative Dispute Resolutions in Commercial Cases.** In conclusion it may be said that the function of the court is not exhausted by mere adjudication of disputes and disposal of the cases. Justice can be made a meaningful reality by firm will, progressive vision to plan and creative intelligence. A creative approach is necessary to improve the legal system and establish a just society. Only new thinking, new values, new projection and positive outlook with determined action can achieve this.

Justice K. M. Hasan is a judge of the Appellate Division of the Supreme Court of Bangladesh. The Law Desk invites readers' responses on the application of ADR methods in different courts.

## LAW opinion

# Myopic view of terrorism hurts human rights

DARA PURVIS

RECENTLY, the San Francisco Chronicle published an excellent profile of Shehnaz Bokhari, a domestic violence advocate in Pakistan. The descriptions of Bokhari's plight are horrifying -- she founded and operates the Progressive Women's Association out of her home in Islamabad, helping women running from dangerous situations and advocating for improvements in women's rights.

Yet she is now facing 15 years in prison because she helped one wife escape a physically abusive husband.

The laws Bokhari is being charged under are called the "Hudood Ordinances," based in extreme Islamic rules, and were instituted under the reign of General Mohammed Zia ul-Haq, a dictator who ruled Pakistan in the 1970s.

The laws make extramarital sex illegal, and institute an extremely anti-victim system of rape laws in which the burden of proof is on a rape victim. In addition, if a rape victim is unable to prove the crime, she is then subject to prosecution under the statutes forbidding extramarital intimacy.

Bokhari and the woman she protected are charged with "attempted adultery" under these draconian, misogynistic laws.

The United States has been down this Manichean, blood-stained road before. When Communism was the Great Evil, we would embrace murderous regimes headed by the likes of Marcos and Somoza simply because they promised to be "anti-communist."

After Sept. 11, the mediocrity in the White House found his great crusade, his reason to love tyrants: the world-wide scourge of terrorism. In recent months, America's relationship with Pakistan has gone from a tenuous, yet cordial, diplomatic relationship to close and almost comfortable ties.

The reason behind the shift, of course, was President George W. Bush's desire to use areas in Pakistan as military bases for the air campaign against Afghanistan. The terrorist attacks changed more than just our relationship with Pakistan. America's interaction with the rest of the world has changed immeasurably in the last six months.

Some of these changes have been positive -- putting more effort into cultivation of diplomatic relationships was something Bush's administration desperately needed to do anyway.

Britain's unqualified stand alongside us has brought our two countries even closer. America should have been directing attention to Afghanistan long before Sept. 11, and although the



**Bush's bipolar worldview is not confined to foreign lands. He and his leftover Reaganite handlers use their label guns on Americans, too. Anyone who questions Bush policies, or who seeks to preserve our hard-won civil liberties from the religious zealots and extreme rightists who now control the United States government, is called a "traitor." But America is not full of simple-minded people who failed every international relations and government class they took. Freedom was not won and preserved by simpletons. To attempt to sort the**

country has had unremitting war and strife wreaked upon it (not the least of which was in the past six months), the fall of the Taliban was a necessary step.

Many changes, however, are not as productive. The relationship between North and South Korea is an exquisitely

temperamental one, and recent statements calling North Korea "evil" have not helped the lengthy and careful diplomatic process.

The wartime rhetoric against terrorists has exacerbated our relationship with Arab countries.

The problem stems from Bush's apparent inability to deal with more than one thought at a time. True, terrorist attacks aroused a spirit for action not seen for years. And true, we must be clear and uncompromising in what goals we have for international involvement.

But even a national mandate behind a few goals does not support mindless unilateralism.

The hawkish rhetoric spewing out of Bush for the past few months has caused a great deal of damage, and ignores the complexities of international relations. Slogans such as "the axis of evil" signal a binary conception of the world: As Bush has put it, either you're with us or you're against us. Either you're pro-freedom or pro-terrorist.

Obviously, the world does not fit into two neat little boxes. A country such as Pakistan is suddenly our good friend, despite the horrific way it treats women like Bokhari. Members of the "axis of evil" are written off as cesspools of depravity.

Using Bush's rhetoric, Chechen freedom fighters are now evil terrorists to be exterminated by Russian armies; Chinese followers of Falun Gong, Tibetans seeking to preserve their culture in the face of Chinese "cultural cleansing" are terrorists to be jailed and suppressed.

Painting entire nations with the red swathe of "terrorism" does nothing to advance our understanding of or ability to deal with actual terrorism. And whitewashing our allies with the Good Patriot Seal of Approval ignores and often worsens the many problems within those countries.

Bush's bipolar worldview is not confined to foreign lands. He and his leftover Reaganite handlers use their label guns on Americans, too. Anyone who questions Bush policies, or who seeks to preserve our hard-won civil liberties from the religious zealots and extreme rightists who now control the United States government, is called a "traitor." But America is not full of simple-minded people who failed every international relations and government class they took. Freedom was not won and preserved by simpletons. To attempt to sort the nation into two camps is not only dangerous, but an insult to the people who recognize that.

Courtesy: U-WIRE, LOS ANGELES

## RIGHTS corner



# Government seeks to stop disclosure of information

AMNESTY INTERNATIONAL

Amnesty International is concerned about steps taken by the Government of Bangladesh to prevent the implementation of a High Court order seeking information from the police to disclose where, and under what legal authority, they had held a political prisoner for seven days in early March 2002. According to reports, Bahauddin Nasim, a private secretary to leader of the opposition Awami League Sheikh Hasina, was held in army custody at that time and was severely tortured.

Bahauddin Nasim's lawyers argued before the court that in addition to being tortured, his detention in army custody was unlawful. The police have given no information about where he was held. The High Court ordered on 3 April 2002 that:

*"To ascertain whether the accused was subjected to any torture as alleged, it is necessary to obtain a statement from the I.O. [Investigating Officer] who took the accused on remand and kept him in his custody for the purpose of interrogation for more than five days, for about seven days. So, he must explain in which places the accused was kept during this period of about seven days. Whether the accused was taken to the cantonment and if so, under whose order or authority."*

This order of the High Court was stopped on 8 April 2002 through a "stay order" issued by the Appellate Division of the Supreme Court on an appeal by the Attorney General on behalf of the government. Under the "stay order", the authorities will not carry out the High Court directive until 22 April at the earliest when the case is to be reconsidered by the court.

The High Court also ordered on 3 April 2002 that a new medical board should be set up to examine Bahauddin Nasim as there were grounds to believe that a previous medical board may not have recorded or disclosed the details of the alleged torture to the court.

*"[The authorities are] directed to constitute another Medical Board within five days for thorough and proper*

*examination of accused A.F.M. Bahauddin and to submit that report before this Court within seven days."*

This order has also been stopped by the "stay order" issued by the Appellate Division.

Amnesty International has serious concerns in relation to these developments. It is the obligation of the government to promptly investigate all allegations of torture, and to bring perpetrators to justice. Stopping that process reinforces a climate of impunity, defying not only fundamental rights enshrined in the Bangladesh Constitution but also international human rights instruments. For example, Article 12 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Bangladesh is a party states:

*"Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."*

The action taken by the government of Bangladesh appears contrary to the provisions of the Torture Convention. Instead of ensuring that Bangladesh's competent authorities proceed to a prompt and impartial investigation of the allegation that Bahauddin Nasim was tortured, it appears to be blocking, or at a minimum delaying, the investigation.

Amnesty International is urging the government of Bangladesh to ensure that the High Court is able to investigate whether the prisoner has been tortured, and that the prisoner - who is reported to be suffering from ill-health as a result of torture - is examined by a competent medical board.

Amnesty International is further urging the government of Bangladesh to ensure that all information regarding the allegation of torture is provided to the court without further delay, and to ensure that alleged perpetrators of acts of torture are not afforded immunity from prosecution.

## WANT TO BE A PART OF LAW DESK TEAM?

Law Desk is a fast developing specialised section of *The Daily Star* and is committed towards a people-friendly legal system in Bangladesh. Promoting culture of 'peace, tolerance and human rights' is one of the prime objectives of Law Desk. Recently, it initiates the Star Law Network for establishing a strong link among the 'doers' in legal and human rights community. Law Desk is looking for pro-active young lawyers/researchers/law students/students of other disciplines with strong English writing and editing skill who will be interested to contribute full-time/part-time to 'Law and Our Rights' section and the proposed 'Star Law Network'. If you are interested, please send your resume along with a 200-word write-up on "What do you think of the present human rights situation in Bangladesh" to Law Desk, *The Daily Star*, 19 Karwan Bazar, Dhaka-1215 on or before 30 April 2002. You may also mail us at [lawdesk20@hotmail.com](mailto:lawdesk20@hotmail.com)