LAW *campaign*

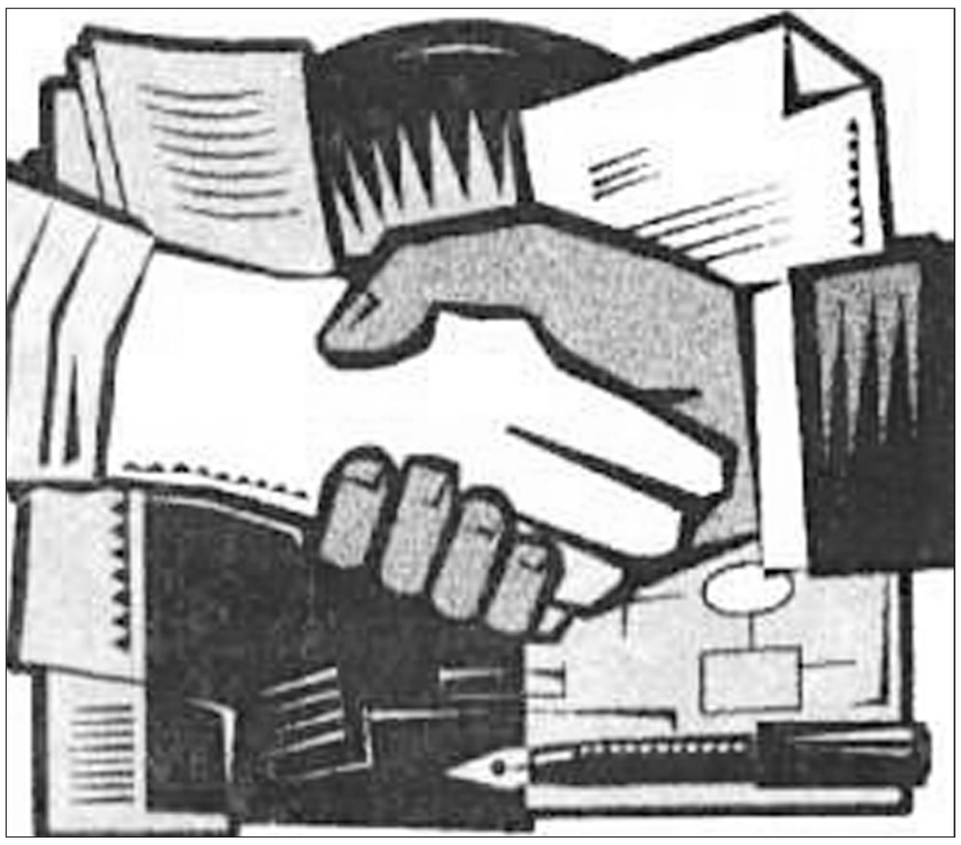
Judicial mediation: Can it make difference?

ABDULLAH AL FARUQUE

MEDIATION as one of the means of alternative dispute resolution is increasingly gaining popularity due to the fact that it is generally is less expensive, more expeditious system of dispute settlement, and involves greater confidentiality as well as informal and flexible process. Typically, mediation is loosely structured process where a neutral third party assists the disputants in reaching their own settlement through negotiation, and unlike litigation, he does not render decision of his own. While, in litigation, parties has to conform strict legal principles and rules, in mediation parties can reflect their own value and resolve disputes within their own social structure.

Mediation differs from litigation in many respects and confers many advantages to the parties compared to litigation. Indeed, litigation is adversarial and confrontational process which can inhibit the parties to fully participate in the process. On the other hand, mediation is a consensual, voluntary system, which can help the parties to tell their own story. Mediation gives the parties the opportunity to participate fully and they can control the process and design solutions that meet their needs, while not necessarily adhering to technical legal principles, procedure of evidence and witness. Therefore, in mediation process, parties are really empowered to restore their sense of own value and apply their capacity to handle their problems. The parties may reach to results that are outside the typical judicial order. On the other, outcome of litigation are limited to strictly legal remedies. The informality of mediation allows holding negotiation more quickly and decision can be made immediately following negotiation. This time element helps to reduce cost to a significant extent.

Apart from reduced cost, mediation can provide social and psychological benefits to the parties. Legalistic and formalistic approach of litigation emphasises on legal rights of the parties which can decided upon one of the parties is right or wrong. In this binary process, one party may win and other may lose. This win-lose outcome may be counterproductive to the future relationship of the parties. This social cost of adjudicative process is hardly taken into consideration in legal remedies in litigation. On the other hand, mediation tolerates degrees of right and wrong and values personal feelings and relationships. Mediation not only brings to the resolution of the dispute, but also peace and healing, which is important for preservation for future relationship between the parties. Thus, mediation reduces the alienation and tension that often arises between the parties and create mutual understanding and trust. This achieves valuable goal of social cohesion. In this way, mediated settlement tends to be integrative, accommodative and durable. Although mediation is voluntary system and mediated settlement has no procedural force in the traditional sense, meditated settlements enjoy a higher rate of compliance. Even in cases of failure, mediation can clarify issues, sort out facts and reduce hostility. Mediated settlement, if reached, gives finality to any dispute. On the other hand, a claim litigated through the courts will most likely to be appealed, which can result in reversal and a new trials.



Let us be friendly

The success of mediation depends, to a significant extent, personal qualities, skill, training and outlook of mediator. Mediator should possess positive and constructive outlook. Mediator should have good communicative skill to bring out essential information from parties, which may appear vital to settle the disputes. Communicative skill is very important to bring together parties to settle their dispute. The mediator has to facilitate communication and identify the interests and position of the parties, generate alternatives and option for settlement. Understanding psychology of the parties is also essential to identify the source of dispute. Mediator has to create favourable psychological environment in which parties can tell their own stories. Cultural understanding of the parties may be very crucial to identify the desired solutions. Cultural traits, power structure and social organisation of the parties should be understood and valued highly which can help the disputants to resolve the dispute within the framework of their own social and religious fabric. This also allows the parties to construct a resolution they perceive as fair, which may prove more satisfying than formal, legal solution.

Mediator should bring the parties together and keep the negotiation going and establish a constructive ambience for negotiation. Mediator should help the parties identify divisive issues and points of agreement, create option, and explore compromise. He/she guide the parties' discussion towards the merits of their dispute and away from squabbles based on personal animosity. The mediator should encourage the sharing information needed to resolve the dispute and reduce misunderstanding. A successful mediation also depends on how mediator keeps him away from personal biasness in resolving dispute. Therefore, mediator should act on impartial and neutral way while conducting mediation. A mediator should disclose all actual and potential conflicts of interests reasonably known to the mediator. A good mediator strictly maintains his neutrality throughout the whole mediation process. Mediator should provide parties a neutral perspective on their position and a norm of equity and fairness. He/She should allow both sides to tell their stories and vent their emotion in a setting made 'safe' by a neutral presence. He/she has to show sympathy, build trust, at the same time, has to keep a sense of detachment and advise the parties confidentially. Thus, unlike the judges, jury and arbitration, who ear only the arguments of the lawyers, mediator has to learn the concerns of the parties in private and confidentiality if necessary. Another important quality of the mediation should be his/her patience of listening to the parties, which should be exhibited throughout the entire mediation. The mediator must all time be positive and constructive in listening.

Recent initiative in Bangladesh for resolving disputes of small scales through mediation within the framework of law of land and existing judicial structure should be appreciated not only for its perceived utility of reducing backlog of cases, but also conferring disputants many advantages in resolving disputes as mentioned above. Such official recognition of mediation as means of dispute settlement recognises the necessity of dispute settlement in informal and speedy manner. It also reveals that how traditional court system with inflexible procedure can be remodelled to adjust with the flexible process of mediation to cope with the changing needs of society. However, success of this judicial mediation system depends considerably upon efficient administration and time management within the justice delivery system of lower judiciary. It also involves effective coordination between legal norms and social norms within the setting of mediation process as judicial mediation can involve application of legal principles and rules contained in the statutes, codes, and judicial decisions. On the other, mediation is also seen as social process that reflects prevailing societal norms and values in a given society. In fact, mediation is pervasive and exists in institutionalised form in many societies and cultures. This is also true for Bangladesh where mediation is seen as traditionally and culturally accepted and socially recommended method of resolving family, land and other small disputes. Therefore, mediation combining use of appropriate legal technique and social norm can make difference in current scenario of adversarial process of litigation that developed in colonial era.

However, in order to build up an effective mediation system, it is necessary to identify the barriers that impede the initiatives of mediation and suggest some recommendations. It should be recognised that in common law legal system, legal community including academics, judges and lawyers are geared and motivated towards litigation through legal education and training that shape and control their mindset. Therefore, a reform in curriculum of legal education and skill training for lawyers for orientation towards mediated dispute settlement and its advantages can be suggested to change existing culture. Economic consideration also plays a great role in promoting litigation. Lawyers prefer litigation as usual means of their professional pursuit and livelihood which explains their professional apathy towards mediation. These facts explain why mediation still remains the exclusive function of some legal and human NGOs and government, not legal professionals. Not surprisingly, this trend will persist also in foreseeable future. However, it may be suggested that legal reform can be introduced to the effect that a small portion of all disputes brought before lawyers, should be mediated and resolved by them outside of the court. However, it will be difficult task to define nature of dispute that to be mediated by lawyers. In this regard, a benchmarking of dispute by its nature and economic value of the subject matter of dispute can be taken into account. For example, family disputes and simple property disputes can be identified for mediation by lawyers. Legally mandatory provision in this regard can be considered on the basis of welfare perspective of society. They can also be persuaded that private initiative of lawyers for mediated settlement can enhance their image and bring to them social respect, which has been eroded in recent time. Moreover, considering that present scope of judicial mediation is limited as it has been introduced in only few district courts but already has been appeared to be a success story, the programme should be further extended by the government to every unit of lower judiciary. It needs considerable reorientation of lower judiciary towards mediation, and requires adequate institutional and policy support, and appropriate legal reform on the part of the government.

Mediation is not panacea. But institutionalised, legally-backed and state sponsored mediation either in existing justice delivery system or in separate forum can make breakthrough in prevailing crisis of backlogging of cases. Structuring mediation process in both legal and social setting and its implementation through pulling of adequate resource and required administrative support and management can reduce economic and social cost involved in adversarial process of litigation to a significant extent, if not fully.

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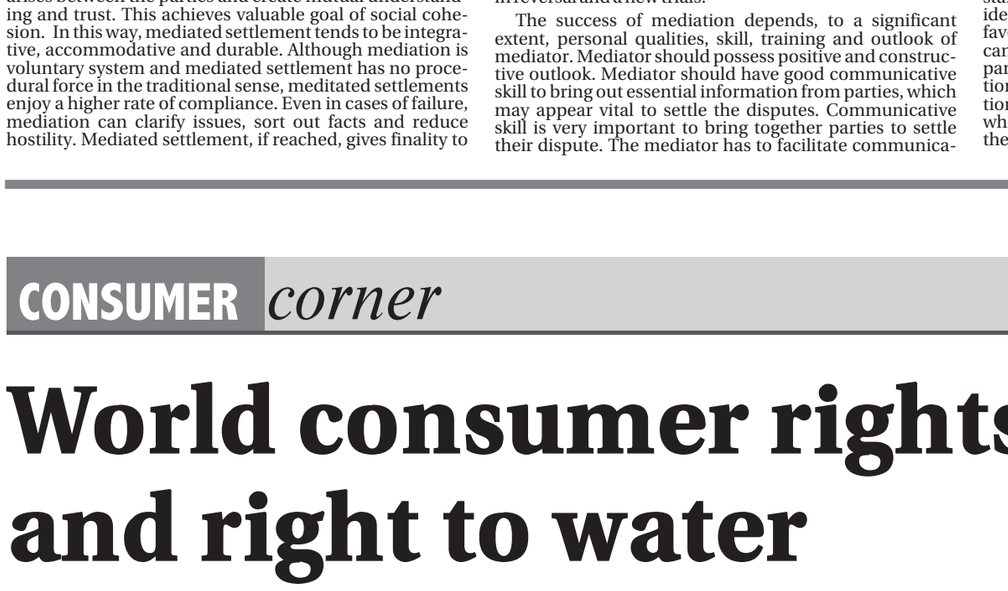
CONSUMER *corner*

World consumer rights day and right to water

QUAZI FARUQUE

WE often talk about quality of life. But to ensure quality of life rights of people are to be protected properly. And these are the constitutional rights of a citizen which are mostly absent in our day to day life for various reasons. We observe that the rights being abused are virtually human rights. And it is needless to say that the consumer rights are the part and parcel of human rights. We are all consumers. In our everyday life we are buying commodities from the market and services from different sectors. Consumerism may be defined as an organised movement of citizens and government to establish rights of the buyers and to protect the interest of the people as consumers'. Consumer rights had evolved in the sixties in USA first and then approved by the United Nations (UN) with eight rights and five responsibilities of the consumers. United Nations also urged the individual country for enactment of separate law for the protection of the consumers. Since then many countries have passed the law. But in our country such law is still absent. We all have been hearing that very soon it would go to the parliament. Actually Cabinet Committee has approved the draft law in principle two years ago. Further by the initiative of the Commerce Ministry there was a two day workshop where experts from Consumers International (C.I), Consumer Council, Hong Kong, Consumer Leader from India and other countries gave their valuable inputs and urged the Government that there was no alternative but to pass the bill earlier to keep pace with the changing global situation. As because this is an age of open market economy, trade liberalisation and so many things where consumers are really a matter. Their rights are to be protected through laws of the land.

However, although not many at least some of us know that 15 march is the World Consumer Rights Day. It is observed throughout the world. This year's theme of the day was 'Water is a Consumer Right'. We all know that people's quality of life, health, even their survival depend on the access of water. It is learnt from a source that nearly 30,000 people die each day of illness linked to drinking water or sanitation. Water is also a deplectable natural resource and water scarcity is a real threat to human society. The United Nation Environmental Programme (UNEP) reports that by the year 2025 two thirds of the world's population will live in water stressed conditions. At present 1.1 billion people do not have access to safe drinking water, despite some progress made in the past ten years to improve coverage. Many more do not have effective sanitation. In many cities and towns of our country supply, distribution and metering systems are antiquated and suffer from a lack of maintenance. These are the almost common pictures in the different places of the country.



Awaiting consumer protection law

But access to pure water and sanitation is widely recognised in principle as fundamental human rights. The United Nations Committee on Economic Social and Cultural Rights adopted a general comment on the right to water on November 2002. This puts an obligation on the governments to extend access to sufficient, affordable sanitation services to all citizens without discrimination. This right is also established in Agenda 21, in the Declaration of the 2002 World Summit on Sustainable Development (WSSD) and by the 4th P7 summit.

To meet the Millennium Development Goals of access to water and sanitation by 2005, 3000 new connections will need per day which requires a huge amount of money estimated approximately in US $ 25 billion. Debates about water policy focus on how to find the money for such large investment and how to mange water resources, existing storage, distribution infrastructure and necessary major improvements to these to meet the basic rights of all. And CI's own research shows that private sector involvement (which can take many forms) has in some cases been successful and in others has been disasterous for consumers. In the same way, some public supply systems are really excellent and others are poor.

With these experiences CI therefore promotes a set of principles which should be applied to all water supply systems whether in the public or private sector or a mixture of the two. And these principles reflect and support statements adopted within the United Nation. As water is a vital issue and fundamental right to all the consumers irrespective of countries great importance are to be attached to it. We all know about the water supply situation in our country. Scarcity of safe water has given the opportunity to many business people to make crores of taka selling bottled water to our helpless consumers. Sometimes they are selling the plain water as mineral water rather compelling the consumers to change their habit. They publicise misleading advertisements which amounts to forgery with the consumers, but due to appropriate protective laws there is very little scope to punish them for their offences. So, on the eve of the World Consumer Rights Day we the consumers urge the Government to get the Consumers Protection Law in the Parliament.

Quazi Faruque is General Secretary of Consumer Association of Bangladesh (CAB).

LAW *news*

US: Two more states abolish juvenile death penalty

The governors of two states, South Dakota and Wyoming, each signed legislation on March 3 raising the minimum age for capital punishment in their states to 18. In the United States, 31 states and the federal government now prohibit the execution of juvenile offenders, including the 12 states that have abolished the death penalty entirely.

At least nine other states, including Arizona, Kentucky, and Virginia, are considering raising the minimum age for capital punishment to 18. Most recently, New Hampshire's Senate on February 19 passed such a bill, which now goes to the state House of Representatives for consideration. These steps follow the national trend in recent years. Indiana abolished the death penalty for juvenile offenders in 2002, as did Montana in 1999.

A month ago, the US Supreme Court agreed to reconsider the question of whether executing juvenile offenders violates the Constitution's ban on "cruel and unusual punishment." In its last decision on the issue, in 1989, the court held that states may impose capital punishment on those who were 16 and 17 at the time of their crimes.

Texas has continued to schedule executions for juvenile offenders even after the high court announced on January 26 that it intended to review the practice. But in the past week, Justice Antonin Scalia has granted stays of execution for Anzel Jones and Edward Capetillo, two of the five juvenile offenders with execution dates in Texas. The court usually issues such stays when the outcome of its decision in one case would affect the validity of the death sentences in other cases.

International treaties and customary international law forbid capital punishment for offenders under the age of 18 at the time of the offense for which they were convicted. Iran, Saudi Arabia, Nigeria and the Democratic Republic of Congo are the only other countries that are known to defy the worldwide consensus that the death penalty should not be imposed on juvenile offenders.

Four US Supreme Court justices are already on record as opposing the execution of those who were under age of 18 at the time of their crimes. In a dissenting opinion issued in October 2002, Justice John Paul Stevens-joined by Justices David H. Souter, Ruth Bader Ginsburg and Stephen Breyer-characterised the juvenile death penalty as "a relic of the past" and concluded, "We should put an end to this shameful practice."

Read together with the court's June 2002 decision in Atkins Vs Virginia, the recent state developments suggest that the high court may indeed put an end to the death penalty for juvenile offenders in the next year. In Atkins, the court found that the execution of offenders with mental retardation was unconstitutional, reasoning that a national consensus had developed against it. As Justice Stevens noted in his dissent, the reasons supporting the court's decision in Atkins "apply with equal or greater force to the execution of juvenile offenders."

Source: Human Rights Watch.