

LAW

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# In search of a permanent attorney system for Bangladesh

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THE prime concern of a government is to ensure common people's access to justice and good governance. Rule of law, needless to say, is a precondition of good governance, which cannot be ensured without a good legal system. In Bangladesh delay in the delivery of civil justice destroys confidence of the peo-



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ple. Administration of criminal justice is surrounded by many drawbacks. Among them police investigation and state attorney service have recently caught sight of the incumbents.

## System of state attorneys

Attorney system is constituted of lawyers appointed and enjoined to look after the interest of the state. Without an efficient team of attorneys, government is not properly represented, particularly in criminal cases public interest remains uncared. In Bangladesh Government Pleaders (GP) are appointed to preserve the interest of the government in civil cases. They are assisted by Additional and Assistants GPs. The Public Prosecutors (PP) are appointed to represent the government in criminal cases. They are assisted by Additional and Assistant PPs. Besides them, the Attorney General work with Additional and Assistant Attorney Generals to represent the government in the Supreme Court of Bangladesh.

## Administration of criminal justice, police investigation and system of state attorneys

Police investigates a criminal case and it ends with either a charge-sheet (a sheet containing the names who are involved in the commission of a crime), or a final

report ( a report saying that the alleged crime has not committed and the individuals accused in the F.I.R. are not guilty.) The Police accomplish almost all the initial activities of a criminal case. Basing on this foundation Public Prosecutors cook up a case in a systematic way, which will bring the real criminals within the purview of the penal provisions. When preparing a case the Public Prosecutors take into account the F.I.R., Charge-sheet,

inefficient and not committed to preserve the interest of the community.

The attorneys are state lawyers as well as private lawyers as they have double capacity. They get scanty amount in government cases and cannot give proper attention. As a result government remains least-represented or non-represented in civil cases and loses huge properties, which can be translated into crores of money. In criminal cases accused having power and money influence police and state attorneys. The situation has worsened to such an extent that one Public Prosecutor brought a criminal (accused in a criminal case) in his car and made all the arrangements for his bail. Because of this deterioration, the influential accused, white-collar criminals, and god fathers remain free. After committing crimes they are take the advantage of faulty police investigation and weak state attorney system. As a result, they are released on bail or come out of the prison. They intimidate the family members of the victim, influence different agencies of criminal justice system, and destroy or fabricate the evidence. Ultimately the criminal cases become a farce.

Criminal justice administration in Bangladesh does not have any mechanism to compromise the cases between the parties. At least twenty to thirty per cent cases could have been minimised through this mechanism. Moreover, we lack a system of scrutiny under which police could submit their cases to the state attorneys, they would then scrutinise and drop weak and unnecessary cases.

## Possible way out

Civil and criminal justice administration of any country is very important as it is the last resort of the common people. State must have mechanism for alternative dispute resolution as well as dispute resolution. The disputes may be resolved by amicable settlement without involving a court of law. That is ideal condition for properly civilised individuals ensuring a win-win situation. Option should be open for unsuccessful parties to go to a court of law for resolving the disputes.

Procrastination of the cases is the main problem of the administration of civil justice. Overburdened courts, taking time by the advocates, corruption of the lower echelon of the civil courts, difficulty to preserve the documents-- all these create a fibre of inextricable knot.

Various types of problems, as mentioned earlier, have impinged on the criminal justice administration of Bangladesh. When any crime is committed, sense of 'pity and probity' of the common people is offended. Not only the victims, but the state becomes aggrieved due to the commission of offence. The law casts heavy duty on the state to bring the real culprits before a court of law. On behalf of the state, the police, state attorneys, and criminal court act to outweigh the mischief done by the crime. Investigation of police constructs the foundation on the basis of which the state attorneys arrange a case. Criminal Courts examine the prosecution and defence witnesses, verify the documents to determine the veracity of the case and identify the criminals. Finally the courts pronounce their verdict to penalise the delinquents, and try to minimise the grievances unleashed by the commission of the offence.

The police are busy with maintaining law and order. For that reason they cannot give much attention to investigation of criminal cases. Government may introduce a separate department of police for investigation. Under the existing dispensation of police an officer is enjoined to accomplish many activities including investigation. As a result he cannot concentrate on investigation. This separate department of police must be intro-

duced with a check and balance system so that corruption cannot infiltrate into it.

After thorough investigation the police will submit the criminal cases to the state attorneys. They will examine and determine the merit of the cases. First, they will drop those cases, which do not have sufficient merit. Secondly, in possible cases they will try to settle the cases amicably with the assistance of both the parties. The state attorneys, then, cock up the cases having merit and bring those cases before the courts.

The existing state attorneys cannot dispose of this task properly. It requires a new set of committed and efficient lawyers. Present government is considering to introduce a permanent attorney system, which is prevalent in developed countries. Under the new system the state attorneys will be recruited through Public Service Commission. The law graduates will have to attend competitive examination [for example examination for BCS (state attorney) cadre] and the successful candidates will be appointed as state attorneys. This efficient team of state attorneys will preserve the public interest far better than the existing set-up.

The state attorneys will be stratified into two categories: first, the Supreme Court Attorneys and second, the District Attorneys. Attorney General, as it is now, will be the chief of the attorneys of the Supreme Court and be assisted by Additional, Deputy and Assistant Attorney Generals. In districts, the District Attorney General will be the chief of the District Attorneys. S/he will work with the assistance of Additional, Joint and Assistant District Attorneys. There will be an office of Directorate General of District Attorneys in Dhaka under the authority of the Law Ministry. It will be the headquarter of the District Attorney offices. The office of the Attorney General of the Supreme Court will remain as a constitutional office as it is now. The Assistant District Attorneys and the Assistant Attorney Generals of the Supreme Court will be recruited by the Public Service Commission.

## Criminal justice need to be addressed as a whole

The incumbents are considering to bring some changes into the existing criminal justice administration. They want to make it speedy and dynamic. Their intention and initiative are praiseworthy. But they ought to ponder the administration of criminal justice as a whole, not in piecemeal. They consider to introduce separate department of police for investigation and a permanent state attorney service. But these initiatives are not enough. They may consign the Law Commission to prepare new penal laws and introduce inquisitorial system in the place of accusatorial system. The British concept of adversary system is very old. We have to change our mind-set and legal culture. We also need to introduce alternative dispute resolution. After recasting the whole system, we may fairly expect that criminal justice will be administered to keep a balance between the right of the accused and the interest of the innocent as well as the interest of the whole community.

## Concluding remarks

The penal policy of Bangladesh is a mix of retributive, deterrent, and preventive theories of punishment. We lag far behind the civilised standard. Before making any change into the criminal justice system, we ought to revise our present penal policy. We should incorporate progressive ideas into the penal policy to suit with the changing demands of twenty first century.

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LAW

alter views

# Who will cast the first stone?

SAIRA RAHMAN KHAN

I am a wife, a mother and an impatient observer of the frustrations of life. But I am a woman first. As a woman, it is easy for me to zone into searching for women's rights and possible violations in anything I see or read. If I see an advertisement stating that 'women are encouraged to apply' I think 'yes, but how sincere are the employers about this?' and 'what will the office atmosphere be like?' and 'will the job be flexible enough for her to handle work, home and children?' and 'will her husband encourage her and lend a helping hand?' I wonder if men ever think about the multifarious tasks that women have to perform in a mad circus act. Other little, inconsequential things such as the lack of sufficient public restrooms (ok, toilets) for women in government offices and dare I mention it even in the Supreme Court, for both the women in the office and their clients or visitors, the lack of office space, the



PHOTO:AFP

absence of crèche facilities for children, etc. constantly tug at my brainstrings. The Constitution encourages the participation of women in public life and the Government should at least make the atmosphere welcoming and comfortable. Or is the government not interested in doing this miniscule bit of public service?

Hundreds, if not thousands, of reports, articles, papers and research documents have been written, published and disseminated right up to the UN level regarding the situation of women in Bangladesh. The violence faced by women in both public and domestic life is laid open in these reports. The government has been criticised, lambasted and even (subtly) threatened to improve its human rights record, albeit from countries that may have worse records but are far richer and powerful which for some mad reason seems to justify their behaviour. Regardless of such bombardments, why is the record of violations against women still so high in the country? Is it due to lack of interest? Corruption? Criminalisation of politics? Faulty NGO tactics? Lack of government will? Or all of the above and more? A layman might ask 'If there are so many laws available for the protection of women, would not be easy to prosecute men for acts of violence against women?' If only it were so!

When will the government start doing something to curb violence against women? I realise there are other social and economic factors involved in this issue- and the whole picture needs to be improved. This may take some time but when? In the mean while, more that 300 women are falling victim to acid violence every year, over 200 to rape, hundreds are being trafficked (though this is one area where we have been bullied into behaving) and hundreds are victim to dowry-related violence. God only knows how many are silently bearing the brunt of domestic violence and sexual harassment in the workplace. It is shameful to think that we had to be externally threatened with dire consequences if we did not 'improve' our record on trafficking in persons. Were we really incapable of doing it on our own? Will we need such international arm-twisting to reduce other violations against human rights? If so, then what does that say for Bangladesh? Has our constitution become mere fading words on paper? Are all the laws aimed at protecting women and children mere fairy tales?

When will we see significant drops in the violence perpetrated against women? It does not matter how educated a woman is, or how many girls are now studying in the free- for- girls education system introduced by the government. All are potential victims of violence and harassment, whether it is mental or physical and whether it is the uncomfortable brushing against in a crowded bus or rape. When will the laws to punish and protect be implemented in full?

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FOR YOUR

information

ANISUR RAHMAN

ONE of the old traditions of the Indian Subcontinent is to settle disputes by the elder and learned members of the society through negotiation or conciliation. The *panchayat* system consists of local elder persons had been existed in the rural area since from the Mughal period. All petty disputes of the locality were dissolved by the *panchayat* then. In Bangladesh though we have no *panchayat* system, such type of dispute resolution outside the court is a common phenomenon in the rural area. It is *shalishi* (mediation). Petty disputes whether civil or criminal in nature have been resolved through *shalishi*. Sometimes grave criminal offences are also resolved through the *shalishi* to avoid long period of adjudication in the court.

We have the three hundred years old Union Parishad (UP) as a lowest tier of the administrative unit. From the British period this local administrative tier has been played a significant role in rural development. It performs some judicial functions too. Besides the regular tasks, chairman of the Union Parishad has to conduct many *shalishi*. But absence of recognition and lack of manpower hinders UPs to play an effective role in dispute

settlement. As a result *shalishi* takes place frequently in the villages, which sometimes leads to misinterpretation of law, i.e. *fatwa*.

## The informal dispute settlement

*Shalishi* is one kind of mediation where one or more than one persons were nominated by the disputant parties to assist them (disputant parties) to reach in an agreed settlement. The nominated person/persons entrusted to make a settlement of the dispute are called '*Shalish*' and the meeting is called '*Shalishi*'. It is very informal social meeting where the invited person/persons hear the disputant parties very carefully and try to chalk out the main issues of the dispute. They assist the disputant parties to sort their problem out themselves. The *shalish* gives its efforts to bring the disputant parties close to the settlement instead of pronouncing their judgement/own views. There have no formal proceedings in the *shalishi*. The disputant parties disclose their causes of dispute orally before the *shalish*. Sometimes they submit documents to substantiate their claim. Generally there arise no question of witnesses but the *shalish* may hear the witnesses in some cases to determine the core issues. The witnesses are never

examined. There is also no advocate to proceed the matter in dispute. After determining the issues of the dispute the *shalish* gives some outline for the disputant parties to reach in an agreed settlement.

## What type of cases could be dealt by Shalish ?

Generally disputes relating to property, family matter i.e. distribution of property, dissolution of marriage, maintenance, guardianship could be dealt by *shalish*. The Family Courts Ordinance, 1985 speaks for the settlement of dispute through conciliation inside the Court before the formal proceeding of the trial started. The court may initiate a pre trial hearing to settle the disputes relating to dissolution of marriage, maintenance, dower, restitution of conjugal rights as well as guardianship and custody of children. Besides, the Muslim Family Laws Ordinance 1961 empowers the Union Parishad to form an Arbitration Council for reconciliation between the parties wishing to dissolve their marital tie through Talaq and to deal with the polygamy.

## New avenue for settlement of dispute

The government by amending the Code of Civil Procedure expands the avenue for *shalishi*. By The Code



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of Civil Procedure (Amendment) Act, 2003 two new sections were incorporated (section 89A, 89B) in the code. It empowers the court to solve the matter through mediation or conciliation before the beginning of the trial except case under Artha Rin Adalat Ain. However there remain some limitations too, it will not exempt the disputant parties from the appearance before the

court. This law is only relating to the pending cases.

It will also not solve the problem of backlog of cases in the court. One will have to wait for the date of hearing of the case to inform the court about their intention of mediation and this kind of mediation does not give any relief to the disputant parties since they will have to bear the fees of the mediator. Here the

advocate or any other person may be hired for mediation.

## Role of the Union Parishad

The Union Parishad does not have significant role in conducting *shalishi* except forming an Arbitration Council under the Muslim Family Laws Ordinance 1961 to deal with dissolution of marriage and polygamy. However, chairman of the

Union Parishad is used to conduct *shalishi* personally within his Union. Union Parishad is not recognised as an institution for alternative dispute settlement. The Local Government (Union Parishad) Ordinance 1983 also does not provide any role for the Union Parishad to conduct *shalishi*. The Union Parishad has been conducting trial of some petty offences under the Village Court Ordinance 1976.

But this is not *shalishi*. Though the procedure of the Village Court is very informal it is being treated like a court. It has power to issue summons to the witnesses to present in the Court or to summon someone to produce some documents required by the court which is inconsistent with the concept of *shalishi*. It is not the trial of any offence. Here the invited person/persons try to help the disputant parties to agree on a settlement. They act like mediator between the parties. The *shalish* never judge the guilt of one party nor do they pronounce their own judgement/views. On the other hand village court is constituted after receiving an application from someone to form a court to try the guilt of another person. It usually pronounces its own judgement and if one person is found guilty it may order the perpetrator to compensate the victim.

## What could be done?

It is the fundamental right of every citizen to get steady justice. But this constitutional guarantee becomes a farce due to the backlog of cases in the court. Besides, it is very hard for the poor to afford the necessary court expenses to take recourse to the court. Here the UP could play an effective role. Since UP is the nearest institution of the people it can play the key role to resolve dispute through *shalishi*. Mitigation of local dispute through the UP will reduce the overburden of cases in the courts. Now a days many non-governmental human rights organisations extend their hands to resolve the disputes through mediation. But none is for Union Parishad, the age-old people's organisation to make it as a centre for alternative dispute resolution. The Union Parishad could be the best alternative which will ensure the right to justice of the common people. Is there any meaning of right to justice without 'access to justice'?

The author is a legal analyst and an advocate.