

LAW opinion

For a functioning and an independent Judiciary in Bangladesh

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A robust and independent judiciary is imperative in establishing rule-based governance in the country. It can restrain and hold the executive accountable together with other state institutions. A functioning and an independent judiciary could be established by bringing in changes in various institutional and operational aspects of the judiciary. In this context, the Institute of Governance Studies (IGS) of BRAC University has recently produced a policy note entitled "The Judiciary: Policy Note". The policy note has provided a number of policy recommendations under four themes, i.e. independence, accountability, efficiency, and effectiveness. These policy recommendations, if fully implemented, would assist both the higher and subordinate judiciary to perform collectively as an institution of accountability by resolving disputes in impartial manner.

Independence of the judiciary

Form a Supreme Judicial Commission or a collegium for appointment of Supreme Court (SC) Judges

Appointment of Supreme Court judges has been a controversial issue in Bangladesh. The 1972 Constitution stipulated, "The Chief Justice shall be appointed by the President, and the other judges shall be appointed by the President after consultation with the Chief Justice" [Article 95(1)]. In 1975 the explicit requirement of the consultation with the Chief Justice was removed through an amendment. A landmark decision of the Supreme Court has reasserted the role of the Chief Justice in 2008 (Iddrisur Rahman v. Bangladesh 60 DLR 714). However, appointment of a compliant Chief Justice may not act as a significant safeguard in appointing judges. Therefore, a Supreme Judicial Commission or a collegium of judges headed by the Chief Justice can be formed which will identify appropriate persons for appointment as judges and recommend their names to the President. Specific eligibility criteria for SC judges should be determined. Such eligibility criteria may include the number and nature of cases conducted, handling of complex legal matters, and level of professional standard.

While considering persons for appointment as judges the commission or the collegium will seek the opinion of Supreme Court Justices about the com-



petency of the candidates. A candidate may be appointed only if two-third of judges consulted are satisfied with the person's competency. The process of appointment should be made as transparent as possible, for example, by putting the candidates' educational and legal records in public.

Establish a separate secretariat for financial and administrative independence

Although subordinate judiciary has been separated from the executive still it has to depend on the executive for its budgets and logistics. Such dependency has severely undermined the effective functioning of the judiciary. For example, while many new magistrates joined the subordinate courts in 2008, they had to share court rooms and couldn't hold sessions regularly. Even they had to share stenographers. The Supreme Court judges also reported similar administrative problems in their work. In order to solve these problems a separate secretariat needs to be established under the supervision of the Chief Justice.

Accountability of the judiciary

Enact a new contempt of court act

Contempt of court is seen as a shield in the protection of the judiciary from criticisms. However, it is generally felt

that the current legislation, the Contempt of Court Act 1926, has been used more to protect judges from justified criticism and public scrutiny. Therefore, this Act needs to be revised to strike a balance between protection of judiciary and freedom of expression. IGS recommends enactment of a new Act which will provide a proper definition of contempt of court and allow the press to report and comment on court proceedings and functions.

Establish a Grievance Cell at Supreme Court

At present there is no mechanism through which an aggrieved person can lodge his/her complaints about service of the Supreme Court. A cell could be established under supervision of the Chief Justice which will receive complaints, investigate into and publish reports after every three or four months. Such a cell will bring about a systematic improvement in the Supreme Court.

Activate Right to Information Act 2009 and widespread circulation of annual report

The Right to Information Act 2009 has provisions of suo motto disclosure of information. The Chief Justice could activate the provisions by putting all judgments and orders on the website. In addition, the annual report, published

by the Supreme Court since 2007, should be informative and analytical and the Chief Justice should ensure its widespread circulation.

Modernize performance evaluation system of judges

Performance evaluation is seen as internal mechanism of functional accountability of judges. Presently, the performance of subordinate court judges is evaluated by way of Annual Confidential Reports (ACRs). It is commonly held that ACR system encourages tadbir (lobbying). Therefore, the ACR process is in need of modernization. The ACR could be divided into two parts. The first part is to assess personality traits, i.e. honesty & integrity, sense of responsibility, discipline, ability of decision-making, etc. and the second part to analyse judges' legal performance i.e. quality of judgments, timeliness, court management, etc.

Efficiency of the judiciary

Ensure effective and dynamic training facilities for the judges

The Judicial Administration Training Institute (JATI) imparts training to the subordinate court judges. Training provided by JATI is repetitive of what judges achieved in their university education and hence inadequate to provide judges with a broader outlook including knowledge of contemporary international legal issues and necessary practical skills. In this context, a training need-assessment should immediately be undertaken to identify areas of laws such as cyber crime, money laundering, human rights, ethics, arbitration and reconciliation, etc.

Another interesting and innovative mode of orientation for the judges of the subordinate courts could be a form of 'apprenticeship' for the newly-recruited by placing them with the High Court judges for a designated period of time. They could work as 'Research Assistants' of the judges and help them with academic research, drafting of legal instruments, and writing of judgments. After this initial phase of 'apprenticeship', they can then receive further training at JATI. Such apprenticeship will develop a working relationship between the judges of the Supreme and the subordinate courts.

For the judges of the Supreme Court the JATI could organize annual colloquiums/conferences following the Sri Lankan experience where it will invite judges from home and abroad. These colloquiums would be an appropriate

Table I: A comparison of the salary of Supreme Court judges of Bangladesh with that of India and Pakistan

Position	Pay in Pakistan (Rs)*	Pay in India (Rs)*	Pay in Bangladesh (Tk.)*
Chief Justice	2,59,838	1,00,000	56,000
Justice (Appellate Division)	2,45,457	90,000	53,100
Justice, High Court	2,31,563	80,000	49,000

*Per month as at April 2010

venue for judges to share experiences and exchange views about issues relating to substantive areas of law as well as judicial administration and ethics.

Phase out deputation of judges in executive offices

Deputation of judges in various ministries has become a critical concern in Bangladesh. In principle, the practice of deputation inhibits the independence of the judiciary as it brings a number of judicial officers directly under the control of executive offices. Deputation of judges could be phased out by adopting two intertwined steps. A separate cadre should be introduced to meet demand of ministries for law officers. On the other hand, adequate promotion opportunities for judges should be provided to discourage them to opt for deputation. In this context, promotion policy of public universities could be followed where a teacher can apply for promotion if s/he fulfils certain criteria. Accordingly, qualified judges may continue with their existing duties but will receive pay and benefit according to the promoted position.

Revise salary of judges

The present salary structure of judges is significantly low compared to other South Asian countries (Table- I). Such a poor salary and other benefits fail to attract competent lawyers in joining the higher judiciary. In the subordinate courts, the situation is even worse. Due to low level pay scale (Tk. 6800 until 2009) as many as 49 entry level judges left the service. Therefore, a massive increase in salary of Supreme Court Judges is necessary. A raise in the level of salary of judges, commensurate to the decent living standards, may attract a different, and hopefully a better, category of lawyers and meritorious law graduates in the judiciary. The Supreme Judicial Pay Commission could be referred to recommend appropriate salary and other benefits for judges and Government should implement such recommendations with immediate effect.

Effectiveness of the judiciary

Reduce case backlog by adopting a holistic approach

There exists excessive case backlog in the justice sector in Bangladesh. This backlog is seriously delaying dispensation of justice. Three factors are responsible for the existing backlog: (i) structural deficiency, for example, shortage of judges, inadequate number of court houses; (ii) legal and procedural complexity and ineffective case management system, for example, 80 per cent of court cases have their genesis in land disputes; and (iii) weak judicial administration, for example, frequent transfer of Investigation Officers (IOs) of the Police Department.

In order to resolve these issues three measures could be taken simultaneously. These measures are: (a) appointment of sufficient number of judges at both subordinate and higher courts and court modernisation through application of information and communication technology (ICT) in the area of listing cases and submission of documents; these measures will address structural deficiencies (b) revision of land laws and simplification of land management to reduce rate of case filing; and (c) establishment of an investigation unit at every police station; this unit will keep and update records of all the cases pending in the court within its jurisdiction and will submit witnesses when necessary. When an investigation officer of a police station is transferred, s/he will leave a full departing report for his/her succeeding officer.

Independent functioning of the judiciary is *sine qua non* to make accountable exercise of power in such a democracy like Bangladesh where the same person holds the helms of the executive and the legislature at a time. The policy recommendation put together in IGS policy note will help the judiciary to become an independent entity.

[For the full text of the Policy Note please visit IGS website: www.igs-bracu.ac.bd]
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LAW campaign

Vision for promotion: ADR in Bangladesh

TAREK MAHMUD

THE courts of Bangladesh, being run through the adversarial nature of legal system, and being comparatively smaller in number in proportion to the terrifying number of cases filed, are always spilled over by immense number of cases. The impacts are many-fold but visibly, the everlasting procedure to dissolve a particular case becomes so painstaking and resource hungry (money, time, energy, work efficiency etc.) that true spirit of justice seeker gets relinquished over time. As the famous legal phrase goes "justice delayed, justice denied", most of the legal applications become signs of the incapacity of the legal system and a cynical indication of the judiciary.

By any means, it is the duty of the judiciary to ascertain justice throughout a proper mechanism and within a reasonable period of time and within the economic capacity of the justice seeker. The charm of Alternative Dispute Resolution (ADR) stands here, providing viable means to reach justice for everyone. ADR does not imply threat to the existing legal system; rather it paves a parallel lane in legal highway for smoothest transmission or solution of cases in less time consuming and economical transport.

What and why ADR?

ADR is a well known form of justice mechanism prevailing in human society for a long time. It is believed that even before the formal law of any community came into existence, solving any issue was natural throughout mutual discussion or

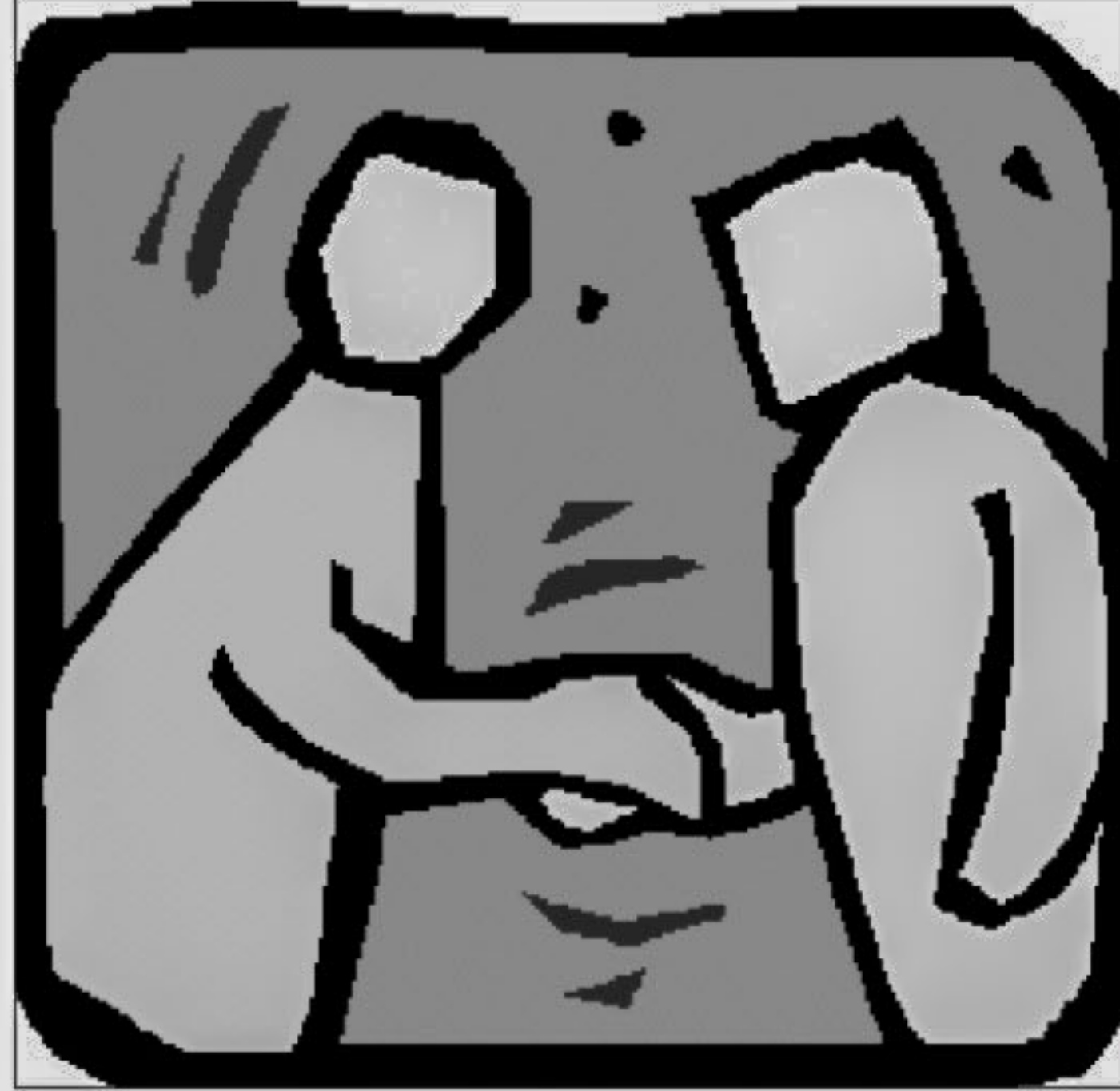
bargaining of any form. If we wonder around, we will see that from grocery to super mall, from street-side hawker to the biggest shopping giant, from your kids' admission to your promotion at workplace, from the smallest fraction of your town's territory to complex diplomatic channeling, everywhere, Alternative way to reach to the targeted outcome is always in use. Legal arena is no exception.

Alternative Dispute resolution is a system in which a dispute is expected to be resolved throughout a wide variety of flexible and seeker-friendly options available. The methods of ADR are commonly the Mediation, Negotiation, Conciliation, Arbitration, Early Neutral Evaluation and Expert's advice. These methods can be used for a vivid range of disputes raised out of family issues, consumer dissatisfaction and claims, neighborhood disagreement, national and international business disputes, racial or other form of discrimination, negligence of any kind, administrative mishandling and so many more. The administering principles of ADR are convincingly simple, faster than traditional legal correspondence, inexpensive, bearers of larger territorial jurisdiction and finally, they contain the maximum proximity of success. The outcome is, at the same time, much easier to execute and convenient for both the parties. In practice, ADR creates an even ground for both the parties by offering a 'win-win' package where both the parties gets rational and winsome share of the outcome while the parties of a tradition legal proceeding get "Zero-sum" result, where one of the parties must lose

the game absolutely. So, in this angle of viewpoint, ADR gains tremendous acceptability in social class. Throughout the world, ADR is extensively used maintaining the equivalent pace of legal proceeding. Countries like USA, UK, France, Norway, Germany and countries of Asia pacific region such as Srilanka, Pakistan, India, Bangladesh have been using ADR for a considerable span of years.

Incorporation and scope of ADR in Bangladesh

In recent years, some schemes of Alternative Dispute Resolution have been integrated in some of the Laws of Bangladesh. One is the Code of Civil Procedure (Amendment) Act, 2003 in where Mediation and Arbitration processes have been incorporated for faster relief of civil cases. The Muslim Family Courts Ordinance 1985 is reframed with ADR technique both in its pre-trial and post-trial stages to reach to a feasible decision in issues related Muslim marriage, restitution of conjugal rights, divorce, maintenance, guardianship and custody of the offspring's. The "Artha Rin Adalat Ain" 2003 or the Money loan Court Act, 2003 which deals with the unpaid debts of individuals or organizations also has the provisions of ADR titled as settlement of Conference and Mediation to manage such kind of cases more efficiently. The Village Court Act, 2006 has the provisions containing formation and strategies to dissolve any dispute within its jurisdiction in modest and flexible and non arbitrary way. Furthermore, the fully-functional Arbitration Act, 2001 is a comprehensive solu-



tion for both the national and international business Dispute with the periphery of the country.

Besides working in judicial organs, ADR mechanism has also been used in providing justice through private initiatives. Several Non-Governmental Organizations namely Madaripur Legal Aid Association (MLAA), Bangladesh Legal Aid Services Trust (BLAST), Ain O Salish Kendra (ASK) and others are working to synergize the non-arbitrary and mutual accord basis techniques of ADR throughout people of different classes of Bangladesh. Yet now, these organizations are yielding progresses focally on volunteer advertising of legal assistance of alternative kinds

and they have to a certain extent been successful connecting people to alternative route to justice.

Some observations

Nevertheless ADR is visibly effective throughout both courts and social limbs, this unique system lacks proper spotlight. The pitfalls are-

A formidable number of promoters and vocals of legal system are unaware or partially aware about the inception and the privileges of this system, though infrequently, attempts have been made by the benefactors via workshops or trainings to familiarize the idea to both the judicial service providers as Judges and Lawyers and the

service takers alias the people. As both of these classes do not have the insight of this comparatively newer system, they fell uncomfortable adopting it.

The information relating the concept of ADR, its usability, benefit points are not disseminated among the people. At the same time, legal professionals are not suggesting about solving the dispute through this process as they are in fear of a minimized income due to the philanthropic attribute of ADR.

As of Criminal cases, ADR is yet to be formalized for attachment. Though compounding of cases under the code of Criminal procedure, 1872 might be treated as a faster process to mitigate issues, revolutionary steps for integration of ADR in Criminal cases are staggering need of the age.

Lastly, a unified management center for ADR management is imperative now where the ADR seekers as well as providers and researchers can have interaction and assistance.

Reminiscent remarks

In these regards, the following measures may be taken for the greater promotion of Alternative Dispute Resolution covering the areas of the country-

The resource personnel, Law officer, legal professional and all other classes of people engaged with legal occupation have to be encouraged to adapt with the theme of ADR; special incentives are to be taken for them so that they may feel rewarded as the ambassadors of this procedure.

Dissemination of information related ADR has to be ensured

throughout different broadcasting Medias so the common people get a translucent picture of ADR and its benefits.

The ADR may also be encouraged to be in practice in private initiative. If it turns into a beneficial form of profession in terms of honorarium like as legal advocating, more employment opportunities would be created and more people will get involved. Here, the example of United Kingdom may be taken into consideration where currently 1400 private firms have been functioning to promote ADR. Besides this, new job designations as mediator, arbitrator, negotiator, conciliator etc. will need trainings and educational traits which will create further interest and opportunities. More NGOs can be brought in to promote ADR.

Not as an academic course only but Alternative dispute resolution can be included as a complete academic subject to be studied in both Honors a Masters level. A good number of countries have ADR in their universities as a subject to be taught in those levels as well as doctoral levels.

Prospective fields such as criminal legal system may be analyzed to have comprehensible ADR provisions in them so that the ADR may be used in a versatile area.

To finish, it may be said that the ADR system is raising popularity over years. Number of countries has been utilizing this system and thus getting immensely benefited. We hope, we can get the same extract out of this outstanding form of practice.

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