

LAW HISTORY

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As a means of non adversarial system, alternative dispute resolution (ADR) is a buzz phrase and much talked about mechanism at almost every legal system varying from adversarial to inquisitorial one. ADR as a consensual form of dispute resolution is being practiced almost in all disputes from family to business except grievous criminal issues and also has proven to be effective mechanism for dispensation of justice. It refers the ways of settling disputes outside of the traditional court room setting and also within court as a format of court sponsored one with and without the intervention of the court. Over the ages, the disillusionment and frustration of people over the cost, inordinate delay in dispensation of justice through judicial dispute resolution (JDR) looms large as a great threat to erode the confidence of people in the justice system expanding the use and scope of ADR.

The means of JDR can be traced throughout history in various laws and religious codes over the past 5000 years, starting with the laws of Hammurabi, a Babylonian ruler from about 2500 BC while the ADR perhaps can be founded even long before the development of code and laws but with the existence of human being in the earth. The basis for JDR is to determine the rights and obligations of the parties and award the winners and also punish the losers reflecting a zero some theory of game while the basis of ADR is social consciousness and moral obligation with voluntary participation to settle the disputes to restore social harmony and peace.

The philosophical basis of ADR is perhaps drawn from Confucianism which in a phrase 'calling for ruling by virtue' during 551-478 BC, although the Chinese predisposition to seek dispute resolution through ADR as opposed to litigation is rooted in at least three sources viz. Confucian philosophy, the unavailability and inadequacy of the court system, and a social structure that emphasized small, stable units.

In ancient China, inspired by Confucianism, ADR became the primary method of settling disagreements. The philosophy of Confucius, was, in essence, one of harmony, of peace and of compromise and according to him the best way of resolving disagreement or dispute is by moral persuasion and compromise instead of by sovereign coercion. Chinese agreed that the foundations of the community are ethical rules which require that the state of a natural harmony in human affairs should not be disrupted. These are based on the strong belief that laws are not the appropriate way to regulate daily life and hence should only play a secondary role reflecting ancient adages of China i.e. 'in death

avoid hell and in life avoid the law courts' and also 'going to court means getting a goat selling a cow'.

Conflicts have been recorded from the very early days of humankind finding in the Bible and similar religious and historical documents and were resolved by various processes, including negotiation, mediation, conciliation, arbitration, and adjudication. The first negotiation in The Bible was between the snake and Eve, over the apple in the Garden of Eden. The Buddhist tradition is one that recognises conflict as a common part of the human predicament and has developed both spiritual and practical guidelines to assist in resolving issues. This begins with the understanding that before one can work at resolving a conflict; one should identify and examine the source of the problem. Often the source of the

were dominating in continental Europe earlier than in common law countries.

The same indigenous method of dispute resolution existing even thousands of years before in the Asia is now at malnourished stage in India, Pakistan and Bangladesh, due to scarcity of balanced diets over the ages, although India is couple of steps ahead in term of its utilization. Whether it is our inferiority complex that we prefer to swallow the concepts and philosophies of the west and the Europe and overlook the same or better ones loitering here and there in the Asia and elsewhere in the Indian subcontinent. As it seems, now a days in the seminars and discussions, ADR has turned into a catch phrase or buzzing word and seems to be a cutting age mechanism but ironically the similar means of



problem is obscured, preventing clarity about the real issue in question. Buddhism teaches that at the core of suffering is ignorance. This is often the root of conflict. It follows that in order to address a dispute one must have an understanding of the various causes that underlie the difficulty. In the Muslim tradition we find the story of Prophet Muhammad (sm) who negotiated with the Almighty over the number of times that the followers will pray. Muhammad (sm) managed to reduce the number from the initial fifty times a day down to five, using as his main argument the necessity to leave enough time for people to do things other than pray. There are numerous examples of the historic resolution of conflicts by arbitration, such as its use by warring Greek city states and by various Catholic Popes who acted as arbitrators of conflicts between European countries during the Renaissance. It is said in the inquisitorial civil law system pre-litigation and pre trial settlement as the format of ADR

dispute resolution prevailing long ago in China and in the Indian subcontinent since the 6th century BC or even before. Indian scriptures called 'tantras' mentioned mediation techniques 5000 years ago. Presence of Panchayat and historical basis for resolution of disputes by the heads of respective clan, guild or neighborhood is found in the work of Dr. P. Sen who claims the existence of dispute resolution at the village level during the period of Dharmashastra.

Brihashpati mentions that during the period of kingship an assembly of people (two or five) elected from the villagers, guilds and corporations named Samaya was constituted to advise on any disputes that came before them. The disputants were also bound to accept the advice given by Samaya. The central administration usually did not interfere with the decision of the village administration. Similar to Panchayat, Shalish is a social mechanism for informal settlement of petty disputes both civil and criminal, by local notables, such as

matbars (leaders) or shalishkars (adjudicators) have been in place in rural Bangladesh from the days of antiquity.

However, the modern format of court sponsored ADR was also founded in China started even before the foundation of the Peoples Republic of China. The communist party developed the people's mediation system in its liberated area and it was highly encouraged to be used to resolve civil disputes. Ma Xiwu, a trial judge in people's court in Shanxi province employed mediation system in the court system. He successfully resolved numerous civil cases by means of mediation. In 1944 an article in "The Liberation Daily" a popular newspaper sponsored by the communist party, highly praised Ma's use of mediation in resolving civil dispute and promoted the "Ma Xiwu Trial Model" as a successful example of court mediation.

After the foundation of the Peoples Republic of China in 1949, mediation was further institutionalized in Chinese courts paving the way for booming success. Over the years of practice, ADR has now become the mainstream in Chinese society in the format of court-annexed or bar-sponsored means to the conventional 'tea house dispute resolution and settlement tea' in resolving all civil and commercial disputes and to some extent minor criminal disputes as well. Professor Regina Abrami of Harvard Law School in one of hers writings lauded the Chinese 'tea house dispute resolution and settlement tea' terming the Chinese are of leery of courts and legal systems. Talking about history of ADR in the 1750s, as Pennsylvania's Indian Commissioner, Benjamin Franklin said the Indians gave him an education in persuasion, compromise and the consensus building. US president John F. Kennedy while discussion 'crisis management' says, "when written in Chinese the word crisis is composed of two characters. One represents danger and the other represents opportunity reflecting spirit of ADR.

Even now we see world's most influential President Barack Obama is citing the Philosophy of Mahatma Gandhi and Nelson Mandela while we are quote by quote citing western principles and philosophy of which we are not indebted to and rather in true sense disrespecting our own tradition and value. If we focus in the western and European development of the concept of ADR then we notice that the Chinese booming success in ADR leads these countries to adopt the mechanism in the 1960 and the movement started in 1970s which they term modern growth of court annexed ADR. No denying the fact that these countries have successfully utilized the ADR mechanism but its breeding ground is Asia.

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LAW WEEK

Rapist' Mahub arrested

Police on Wednesday arrested Mahub, the alleged rapist and main accused in teenage girl Hena Akter murder, in Savar. The Dhaka Medical College Hospital (DMCH) authorities, meanwhile, submitted its post-mortem report to the High Court saying there were injury marks on different parts of her body, said well-placed sources. Though the court did not disclose the content of the report, it said categorically that there is a vast difference between the DMCH report and the one prepared earlier by and Shariatpur Sadar Hospital. The two reports cannot be true at the same time, the HC bench of Justice AHM Shamsuddin Chowdhury Manik and Justice Md Zakir Hossain said after receiving the report. The body of 15-year-old Hena, who was whipped to death in Shariatpur last month, was exhumed Monday night for a fresh post-mortem in compliance with a HC order. The HC passed on the same day after The Daily Star published a report raising doubts about the earlier inquest and autopsy that found no mark of injury on Hena's body. Earlier, the report of post-mortem conducted at Shariatpur Sadar Hospital said there was no injury mark on her body. -The Daily star online edition 09 February 2011.

Court permits quizzing Noor

A Dhaka court on Wednesday permitted detectives to interrogate a ward-level Awami League leader in connection with the killing of Fazlul Huq, another leader of the area, for two days. Metropolitan Magistrate Mostafa Shahriar Khan passed the order after Detective Branch (DB) of police appealed for a seven-day remand prayer to quiz Noor Mohammad, president of ward-41 unit of Awami League. Sub-Inspector Azaharul Islam, also the investigation officer (IO) of the case, produced Noor before the court with the remand prayer. Earlier on January 28, detectives produced the AL leader before the court with a seven-day remand prayer. But the court could not hold hearing on the prayer due to Noor's illness. DB arrested Noor Mohammad on January 27. Criminals shot dead Fazlul Huq, 40, general secretary of ward-41 unit of the capital's Agargaon, on January 14. -The Daily star online edition 09 February 2011.

2 witnesses testify in Koko's case

Two more witnesses gave depositions against Arafat Rahman Koko, son of former premier Khaleda Zia, and Ismail Hossain Saimon, son of former shipping minister late Akbar Hossain, in a money-laundering case yesterday. The witnesses are Salauddin Ahmed, former attorney general, and Brigadier General (retd) Khalequzzaman Lodhi, former councilor of Bangladesh High Commission in Washington DC. Judge Mohammad Mozammel Hossain of the Special Judge's Court-3 recorded the statements of the witnesses and adjourned the court till March 28 for the next hearing. In his deposition, Salauddin said he received documents from the US on October 23, 2008, regarding the money siphoned off by the duo. He scrutinised the documents and sent them to the Anti-Corruption Commission chairman on the same day. Khalequzzaman in his deposition said he sent a series of documents regarding Koko and Saimon's corruption to the then attorney general through foreign ministry in 2008. Earlier, on January 4 and 19 the court recorded the depositions of three witnesses. -The Daily star 09 February 2011.

Probe into RU student Faruk murder stalled for a year

The probe into the brutal murder of Rajshahi University student Faruk Hossain has remained stuck for a year as hearing on petition for remand of three arrested bigwigs of Bangladesh Jamaat-e-Islami was deferred several times. The Chief Metropolitan Magistrate's Court of Rajshahi, however, fixed February 14 for hearing on the petition for remand of Jamaat chief Motiur Rahman Nizami, Secretary General Ali Ahsan Mohammad Mojaheed and Nayabe-Ameer Delwar Hossain Sayedee as they were implicated in Faruk murder case. Soon after arrest of the three Jamaat leaders in Dhaka in connection with other cases, Inspector Tofazzal Hossain of the Detective Branch (DB) of Rajshahi Metropolitan Police (RMP), also the investigation officer of the case, submitted remand prayer to the court. -The Daily star 09 February 2011.

Verdict in case against 42 mutineers on March 16

The special court-17 will deliver judgement in the mutiny case against 42 jawans of BGB Mymensingh sector headquarters and 45 Battalion under the sector on March 16. The court, headed by Kushtia Sector Commander Col Md Nazrul Islam Sarker fixed the date yesterday. Of the accused, 14 are from the sector headquarters and 28 from the battalion. Meanwhile, the special court-15, set up at Kharachhari sector headquarters, framed mutiny charges against 69 members of 11 Battalion under the sector same day. In the case statement, the complainant alleged that the accused took part in the mutiny at their respective units on February 26 in 2009, expressing solidarity with the rebels of BDR, renamed as BGB, headquarters. They took control of the sector and battalion headquarters, looted firearms and ammunition from armouries and fired blank shots, he stated. A total of 28 witnesses gave their statements before the court. Arguments between the witnesses and the accused were held during the trial pro-

LAW LEXICON

Information - Accusatory document, filed by the prosecutor, detailing the charges against the defendant. An alternative to an indictment, it serves to bring a defendant to trial.

Infraction - A violation of law not punishable by imprisonment. Minor traffic offenses generally are considered infractions.

Inheritance tax - A state tax on property that an heir or beneficiary under a will receives from a deceased person's estate. The heir or beneficiary pays this tax.

Injunction - A prohibitive order or remedy issued by the court at the suit of the complaining party, which forbids the defendant to do some act which he is threatening or attempting to do. Conversely, it may require him to perform an act which he is obligated to perform but refuses to do.

Instructions - Judge's explanation to the jury before it begins deliberations of the question it must answer and the applicable law governing the case. (Also referred to as charge.)

Source: Jurist International.

LEGAL MAXIM

Ei incumbit probatio qui - The onus of proving a fact rests upon the man.

Ei incumbit probatio qui dicit, non qui negat - The burden of the proof lies upon him who affirms, not he who denies.

Error, qui non resistitur approbatur - An error not resisted is approved.

Ex dolo malo actio non oritur - A right of action cannot arise out of fraud.

Ex nudo pacto actio non oritur - No action arises on a contract without a consideration.

Exturpi causa non oritur actio - No action arises on an immoral contract.

Exceptio probat regulam - An exception proves the rule.

Executio est finis et fructus legis - An execution is the end and the fruit of the law.

Source: InRebus.com.

LAW LETTER

Education for altruism

The juvenile delinquency rate is increasing day by day. Juveniles are loosing the track because of many reasons. Nevertheless, all reasons have root causation for being frustrated. Only few of them can reshape their life, but it is not easy enough for them.

Young generation irrespective of social status are involving into unlawful acts because they seem to be restless known or unknown reasons. They often remain outside the ambit of social, economic and cultural rights. They cannot practice their right of gaining knowledge, right of accommodation, right of health, right of entertainment, right of secured family support and finally, right of thinking independently. Their heart is full of unexplained grievance of not having proper means to achieve their desired goal. They have limited platforms to prove themselves. Generally they are kept ignorant about their way to success. Unfortunately, there is hardly anyone to hold their hand and show them the right way to move on. From their very childhood, their parents teach them how to become successful. Successful in the sense that how to go in high salaried position! Money is that most evil thing, which drives the children towards a dark world of crime. This situation makes them tensed and edgy. However, if they were given the opportunity to dream of human friendly society, then the dismal scenario of the present society could have been different.

The juveniles mostly are failing to invent new things, because we do not let them to bloom like a flower and fail to teach them how to gain peace of soul. Our family stress, lack of proper guidance and lack of useful means force them to indulge into criminality.

We all have two sides of our mind, good and evil. We can nurture the good side of our mind by flourishing the pro-human education. We can spread the light of knowledge among the deprived juveniles. State should shoulder a responsibility in this regard. The book based knowledge also needs to be improved so that juveniles can attain altruism.

Ask yourself "Can I do this"? The goal is waiting only for a "YES" from our heart. We know the right path, the thing we need is, courage. So, let us stand together, not wait for another sign or cause. We have to move on by collective and coherent efforts.

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