



Seven years of ADR: Concerns and challenges ahead

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THE present law minister stated recently that new amendment of CPC is scheduled for introduction of mandatory ADR provision. He also stated that present provision being optional in nature it may not yield better result in resolving civil disputes. The fact is that the Government has not published any paper on this- What shortcomings are there in the present law? What is the outcome of seven years experience on ADR? What specific amendments will be brought into now and why? The stakeholders are in the dark. Seven years have passed since ADR was introduced in CPC back in 2003. However, no official statistics on the achievement of ADR is available either at the Ministry of Law or in the Supreme Court. Without substantive reports and statistics it is very difficult to predict how successful the new system of ADR has been and what needs to be done further to develop the system. One thing is very clear from the statistics of pending cases that in last seven years situation has not improved at all; rather it has deteriorated as the number of pending cases keeps mounting in a leap frog style. The newly adopted system of ADR has not been kept under review since its inception in 2003. The author visited the Ministry of Law and also the Law Commission with regard to this but both the organizations stated that they do not have any statistics on ADR performance in lower courts. Secondly,

some working experience on ADR proceedings in different civil court suggests that there are some important shortcomings in the provisions in section 89A of the CPC which need to be remedied.

First, sub-section 89(1) states that after filing of written statement if all the contesting parties are in attendance in court in person or by their pleaders, the court may by adjourning hearing, mediate. What will happen if both the parties or their pleaders do not attend courts together? Reality is that neither parties nor their lawyers attend the court together; if the lawyer of the plaintiff attends, lawyer of the defendant does not attend and the courts have no other option but to give date one after another. This problem is complemented by another problem. Suppose lawyers of the both the sides appear and the court makes an order for appearing before a mediator for settlement or asks themselves to mediate and report the court, the parties or party does not attend mediation. What is the consequence? This makes the life of the suit lengthier only. The court has not been given any power to impose any penalty or measure as this is the stage even before first hearing. Thus the present provision adds up only delays in prolongation of suits. In this regard, provisions in Order X should be linked with section 89A to the effect that both the parties or their pleaders must appear before the court at first hearing which would be also considered

for mediation hearing and if any of the parties fail to attend, the court may dismiss the suit or proceed ex parte as the case may be. These provisions have also been incorporated in the Indian CPC. Without such mandatory measures it is unlikely that lawyers would follow provisions of

such a situation the court should be armed with power to impose fine to the unreasonable defaulting party and this can be done by making a link with rule 6 of Order XIV of the Code of Civil Procedure. Most developed and developing countries have adopted penal measures in this regard. In the UK

lawyers is a must and for this some incentives from the judiciary/state is also necessary. Lawyers willingly do not want to mediate because mediating soon after filing and submitting written statement means that their income will be limited to only two to three dates. To encourage lawyers to be proactive in mediation as well as to develop a culture and environment of ADR in the country, some mechanism needs to be introduced: (i) provision should be made regarding mediator-of-the year (one who has mediated the highest number of suits in a district in the preceding year); (ii) provisions should be made regarding advocate-of-the year (advocate engaged by either of the parties to the suit who has assisted the mediator in arriving at the settlement of highest number of the suit/case in the district); (iii) provisions should be made to provide monthly honorium to the Advocate-of-the year and Mediator-of-the year from the Government fund at the rate of Tk. 2000 per month for a period of next 12 months.

Fourth, sub-section 89A (11) of CPC provides that on settlement of a suit by mediation the court shall issue a certificate directing refund of court fees within 60 days. Although this provision has been made to encourage mediation by the parties, in fact this has been proved meaningless. No allocation is made in the budget of the Government for this purpose and the accounts offices of the Government refuses to refund. Thus to create a congenial atmosphere of ADR the Government

should consider allocating budget for this purpose so that court fees may be returned effectively and without any hassle on mediation. At the same time, necessary provision for return of court fees must be inserted in the Court Fees Act, 1870 as has been done in India also.

Fifth, 99% judgments in both lower courts and Supreme Courts come up with usual order- "there will be no order as to cost". If no cost order is imposed it is unlikely that filing of false cases will be stopped. The worldwide recognized rule is that the losing party will bear the cost of winning party and that cost must commensurate with the cost of litigation, lawyers fees, court fees and other expenses on date basis. If this cost order jurisprudence can be streamlined and developed in Bangladesh, a big number of false cases could be thrown out automatically.

The movement of ADR seems to be on full swing in Bangladesh including under fiscal laws but the mechanism seems to have been introduced without effective nuts and bolts. If the present Law Ministry like his predecessor makes mandatory provision of ADR without proper study and keeping safeguards as in neighbouring countries, it is highly likely that the attempts will be fruitless. It is hoped that the Ministry will consider the views of all stake holders, experiences of India and then bring necessary amendments.

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mediation.

Second, very often lawyers of both the parties attend mediation meetings. The mediator suggests a compromise but one party does not want to compromise. In such a case the mediator has to give a report of disagreement. There is no measure to be taken against the party which unreasonably withdraws from compromise. In

a party which does not take its duty to consider ADR seriously is likely to be penalized when the court looks to the question of costs (CPR, r. 44.3(4)). Accordingly a winning party may find its recovery of costs reduced by reason of a failure to cooperate in relation to ADR (CPR, r. 3(6)(g)).

Third, to make the provisions of ADR successful the cooperation of

HUMAN RIGHTS MONITOR



Person 'on move' due to climate change: refugee, migrant, or displaced?

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BANGLADESH is considered as one of the most vulnerable and exposed countries to climate change. According to Germanwatch Global Climate Risk Index 2012, Bangladesh is identified as the most affected country due to the impacts of climate change in the last 20 year period (1990-2010). The geographic location, flat and low-lying topography, high population density, poverty incidence, and dependence on

The existing density of population would make such mass human movement as one of the most severe on earth.

The academics and policymakers use different terminologies such as 'refugees', 'migrants' or 'displaced persons' to identify the persons move for environmental reasons. Without a precise definition, policymakers are not easily able to establish plans for protection of these potential large numbers of displaced people.

It is confirmed by various studies that most of the move-

qualify for refugee status. So, it is inappropriate and misleading to characterise those 'environmentally displaced people' as 'refugee'. (See, detail in Law & Our Rights, Issue: 259; This author received many queries from readers asking 'what should be the appropriate terminology then to identify these people')

Taking this notion into consideration some scholars, notably IOM, on the contrary, use the terms 'environmental migrant' or 'climate change migrant'. The term 'migrant' means 'any person who changes his or her country of usual residence'.

Traditionally, it implies the 'people who have left their communities because they are poor or in search of other livelihoods'. It is mostly reserved for an opportunity seeker who left home to find a work. For example, the term 'economic migrant' or 'migrant worker' is widely used to mean the person who left home for better living conditions. Whereas refugees are compelled to flee and leave their homes without any choice, migrants make a voluntary, rational choice to leave their country. The UNHCR Handbook distinguishes refugees from economic migrants defining them as 'people who moved exclusively by economic considerations' to 'voluntarily' leave their country in order to 'take up residence elsewhere'. So, if the human movement due to climate change is termed as environmental/climate change migrants, it would characterise them as 'primarily voluntary migrants' and imply that those people though apparently moved for environ-

mental reasons; their decision to move is guided by economic incentives. Such notion is opposite to reality. Evidently, thousands of people in the face of severe natural disasters such as flood, storms and cyclone, are compelled to leave their home in search of food, shelter and livelihood. So, characterising those people as 'migrant' bears the risk of treating them as 'opportunity seeker' or 'economic migrant' by the policy makers.

Notably, problem with the terms 'refugee' and 'migrant' is that they imply that a person has crossed an internationally recognised border. But it is evident that people displaced by climate change generally do not cross the state borders. Since most of them are likely to stay within national borders and therefore, internally displaced persons (IDP), using the terminology 'refugee' or 'migrant' may weaken their legal status. It makes a big difference whether people are perceived as refugees, other types of forced migrants or voluntary migrants for the purpose of legal protection. Conversely, the term 'displacement' has no such limitation attached with the extent of movement. The term implies both internal and cross border movement. So, the term 'climate change displaced persons' seems more appropriate to refer those forced migrants who are compelled to leave their habitat as that becomes unliveable due to sudden or progressive environmental degradations.

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LAW NEWS



"Indigenous Media, Empowering Indigenous Voices"



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THE International Day of the World's Indigenous People (9 August) was first proclaimed by the General Assembly in December 1994, to be celebrated every year during the first International Decade of the World's Indigenous People (1995-2004). In 2004, the Assembly proclaimed a Second International Decade, from 2005-2015, with the theme of "A Decade for Action and Dignity." The focus of this year's International Day is "Indigenous Media, Empowering Indigenous Voices". The theme aims to highlight the importance of indigenous media in challenging stereotypes, forging indigenous peoples' identities, communicating with the outside world, and influencing the social and political agenda.

"From community radio and television to feature films and documentaries, from video art and newspapers to the internet and social media, indigenous peoples are using these powerful tools to challenge mainstream narra-

tives, bring human rights violations to international attention and forge global solidarity," Secretary-General Ban Ki-moon said in his message for the day. "They are also developing their own media to reflect indigenous values and fight against myths and misconceptions."

There are an estimated 370 million indigenous people in some 70 countries around the world. Practicing unique traditions, they retain social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. Spread across the world from the Arctic to the Amazon, indigenous peoples reflect the world's cultural diversity and are the custodians of its bio-diversity.

The United Nations Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in 2007, recognizes indigenous peoples' right to self-determination (Article 3) and their right to freely pursue their economic, social and cultural development, and develop past, present and future manifestations of their culture in various forms.

"Indigenous voices are recounting compelling stories of how they are combating centuries of injustice and discrimination, and advocating for the resources and rights that will preserve their cultures, languages, spirituality and traditions. They offer an alternative perspective on development models that exclude the indigenous experience. They promote the mutual respect and intercultural understanding that is a precondition for a society without poverty and prejudice," the Secretary-General said.

Source: un.org.



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natural resources and services render this country particularly vulnerable to climatic changes. Over the next decade, a considerable number of people could be affected by hydrological and meteorological events in Bangladesh. People affected by these intensifying hazards will come under substantial pressure to migrate (temporarily or permanently, and internally or across borders) due to perceived threat to their life and livelihood.

ment related to climatic impacts will be internal. Only very few individuals who have money, education, and networks abroad will succeed to cross international borders for safe refuge. In such case, those international migrant will not get protection under the 1951 Refugee Convention since there is wide agreement that the persons moved for environmental reasons do not fit so well in the refugee definition, and hence do not