LAW OPINION

Enforcement of ADR without force

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IN legal parlance, when do we term the legislature utopian? It is obviously at that time, when they expect proper compliance of any legal provision without providing for any force. In fact, presence of force draws the line of difference between legal and moral principles. I consider alternative dispute resolution (ADR) and/or mediation system in the Civil Procedure Code (CPC) of 1908 as utopian since it has accommodated no element of force in case of unexplainable non-compliance.

In par with the civil justice system of different countries, the mediation provisions have been included in the CPC in 2003 with a noble goal of reducing huge case backlog. But why this system is not working could be identified observing the real scenario of mediation sessions in the subordinate judiciary.

In practice, when the written statement is submitted, the suit is required to be sent to mediation. In most of the cases, the advocate-mediator submits report of non-agreement of the parties to the compromise effort irrespective of the merits of the cases referred to mediation. Sometimes, the judges call the parties in private with an endeavour to settle but the tutored parties either imitate their lawyers' stand or show tremendous adversity to such efforts. Consequently, the suits end up in framing issues for trial. Meanwhile, two court-dates, i.e. at least two months elapse without any positive improvement to the case.

As part of making the mediation mandatory, an amendment to section 89A of the CPC has already been brought substituting the word 'may' with 'shall' thus making directory provision mandatory (this would be effective on publication of gazette under section 89E). The result would, however, be same even if the mandatory provision is given into effect (i.e., sending suits for mediation and returning to cause-lists without any success wasting, at least, two more months) because it does not provide for any sanction to the negligent party to the compromise efforts. This deduction of sanction might sound peculiar as we believe compromising any dispute is the discretion of the party and there should be no sanction for its failure. There is no disagreement with this belief, but who would be held responsible for the costs borne by the winning party as s/he had a reasonable right to expect compromise-offer from the defeating (weaker) party.

In the UK, before going to court, at the 'Pre-action Protocol' stage, lawyers on both sides are under a heavy obligation to consider the ADR and to opt for litigation only as a means of last resort. Both sides are required to advance evidence before the court that ADR options were considered. However, like our system, this protocol expressly recognises that the parties cannot be forced to enter into any form of ADR, but a failure to comply with the requirement to consider ADR may be taken into account as a means to impose costs.

Generally, the defeated party is required to pay all the costs of the case incurred by the winning party in the form of paying court fees, process fees, evidence collection fees, lawyer's fees etc. There is also apprehension of exceeding the value of real claim by the amount of costs. For example, at the end of the trial, it might happen that the real claim decreed is £5000, whereas the costs of the case are determined at £8000. However, question may arise how the judge identifies the real costs of a case. This would happen well-ahead of the trial when a judge hears both the parties for a cost budgeting to determine the expected expenditure of the case. The level of concern about costs is to such an extent that this is one of the main reasons for choosing an ADR process because it is likely to prove cheaper than taking a case to trial. This costs concern compels the parties to cooperate rather than to compete in the dispute settlement.

Another question may arise as to why the stronger party in evidence would cooperate for compromise. This is because of the part-36 offer which, in brief, is an offer to settle a dispute by any party at any stage of the proceedings, refusal of which has some cost implications. Such as, if the refusing party finally wins the case, s/he may not obtain any costs from the losing party (the party offering compromise). Sometimes, the court even may order the winning party to pay all the costs incurred by the losing party from the date of offer to final judgement. It may happen that after deducting the winning party's own costs and the costs to be paid to the losing party, the winning party may get less amount than the amount offered in part-36 offer.

Therefore, the force of costs compels even the party having strong evidence to cooperate in compromising any dispute at the earliest possible time reducing pressure on courts. Following the UK-ADR system, I think, we should carry out research to locate the position of 'force' or 'sanction' into the ADR provisions of our country for making it effective.

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FOR LAW STUDENTS

Guide to find and read law reports

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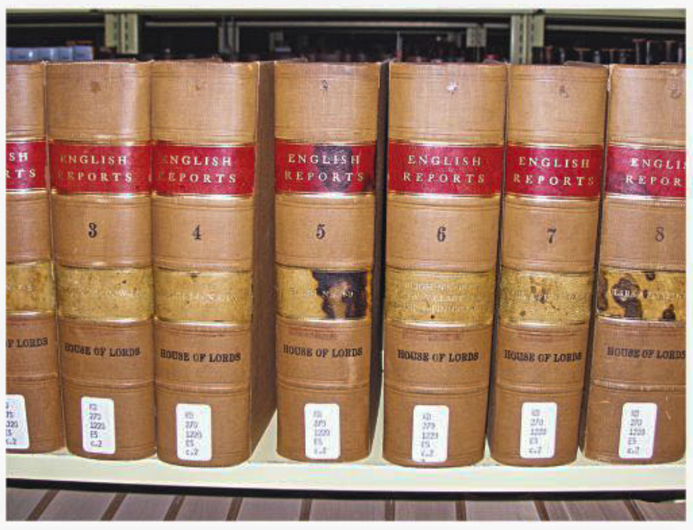
READING through topical case laws is a must for all law students. This is not only confined within knowing about celebrated age-old judicial decisions, but also extends to get oneself be acquainted with newly held decisions of both home and abroad.

There are many places and techniques to search for judicial decisions. Law reports are the reliable and available source of finding mostly important court decisions. In the context of Bangladesh, there are many institutions that publish decisions of the Supreme Court of Bangladesh. Dhaka Law Reports (DLR), Bangladesh Legal Decisions (BLD), Mainstream Law Reports (MLR), Bangladesh Law Chronicles (BLC), Bangladesh Law Times (BLT), Law Guardian (LG) and many others publish Supreme Court decisions both monthly and yearly in order to provide for ready case references to the members of legal community and people at large. Under the guidance from the Judicial Reform Committee, the Supreme Court of Bangladesh has also started publishing an online law report named Supreme Court Online Bulletin (SCOB) which compiles important judgments from the Appellate Division and the High Court Division. Till December 2015, it has published five issues which are available at Supreme Court website.



After the Supreme Court of Bangladesh was established in 1972, it initially published a law report, containing the judgments, orders and decision of the Court. To note, there is no such institutions that publish decisions held by the subordinate courts in Bangladesh. Few law reports, however, publish the decisions of special courts/tribunals such as the decisions of Administrative Tribunal, International Crimes Tribunal, Bangladesh Bar Council Tribunal, etc. either in regular or special issue.

Generally, law report is a record of a judicial decision on a point of law which sets a precedent. The binding effect of Supreme Court judgments as 'precedents' has been well clarified in article 111 of the Constitution of Bangladesh which says that the law declared by the Appellate Division is binding on the High Court Division and the law declared by either division of the Supreme Court is binding on all courts subordinate to it. A plain reading of this constitutional provision gives rises to a misconception among the common people that judge's decision delivered in the court of law always creates a binding precedent. Yes, it does; but a decision which does not lay down any legal principle ought not to be considered as a binding precedent [see, *M. P.* v. *Bablu Natt* (2009) 2 SCC 272 and *Sufia Khatun* v. *Mahbuba Rahman* (2010) 30 BLD (AD) 41]. In other words, not all decisions taken in a court of law or published in a law report qualifies to be a precedent.

Of any law report available in print form, at the very beginning the reader will find the updated list of judges of the Supreme Court of Bangladesh, and that of law officers who represent the government in the Supreme Court. Law reports also include a complete list of statutes that get passed in concerned year by the National Parliament. For the readers easily to find decisions, each law report has separate section containing the decisions of both the Divisions of the Supreme Court.

In the table of contents, anyone can find the list of decisions held in civil disputes, criminal cases, special original litigations (PIL, constitutional issues, etc.), and statutory original matters (income tax/VAT and company matters, etc.). Titles of the cases suggest names of the parties involved in the litigation.

Index of cases contains the highlighted portions of the decisions (a brief summary of the case, the holding, and any significant case law considered) selected by the editors of each law reports which are known as head-notes. It is important to mention that these highlighted notes are not to be taken as the ratio decidendi or obiter dicta of the decisions. One needs to read the full judgment and get the ration decidendi as well as obiter dicta after applying proper knowledge of law and jurisprudence [see for details, Mahmudul Islam, *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers), 2012, pp. 910-18].

Referring to relevant laws or rules, these head-notes generally guide the readers to find detailed discussion in full judgment. Index is presented with a specific reference to Constitution, Statutory Act, Rule, Regulation or Order. Hence, it is easy to find cases related to any specific law or constitutional provision by seeing only the alphabetical order of laws in the index.

It is to be remembered that law reports are edited publications and do not contain all the decisions of each year. Therefore, law reports vary from one to another in publishing judicial decisions.

The importance of law reports lies in section 3 of the Law Reports Act, 1875 which says that courts in Bangladesh are not 'bound to hear cited, or […] receive or treat as an authority binding on it, the report of any case decided by the Supreme Court, other than a report published under the authority of Government.' This implies that reported case laws have considerable amount of impact on the functioning of judiciary. Application of law reports is also essential to understand the judge's depth of knowledge in writing judgments. In present scenario, we often see that lower courts – and even different benches of the High Court Division – deliver inconsistent and/or contradictory pronouncements on a particular legal issue. The consequence of which is evident in SCOB editorial note of Justice Moyeenul Islam Chowdhury and Justice Sheikh Hassan Arif that 'these inconsistencies, though rare, draw criticisms and harsh strictures from the Appellate Division'. For determining the real position of law, therefore, it is imperative to know the day-to-day legal developments with the help of law reports so that individuals concerned with law's application in practical life can knowledgably contribute to the society.

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COURT CORRIDOR

Election buzz at the Court

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THE Bangladesh Supreme Court Bar Association election is here again. It is scheduled to take place on the 23rd and 24th of March 2016. The corridors of the High Court Division and Appellate Division are buzzing with the humdrum of campaigning. The jubilant buzz is all about the predictions and speculations regarding the upcoming executive committee. Held annually this election marks the formation of the executive committee of one of the most prestigious legal professional bodies in Bangladesh.

The Association has a rich history and throughout time has been spearheaded by many legal luminaries. The structure of the executive committee comprises mainly of a President, two Vice Presidents, Secretary, Treasurer, two Assistant Secretaries and seven Executive Committee Members. An advocate who has practised in the High Court Division for one year becomes eligible to apply for membership. After scrutiny of the application and an interview, the Association determines whether to allow membership. Thereafter, an ID is issued and a yearly membership fee is payable.

The Association seeks to promote and protect the privileges, interest and prestige of the Association and to promote union and cooperation among

the advocates practicing in the Supreme Court and other association. It also promotes and maintain high standards of profession among members of the Supreme Court Bar. Under the leadership of many great legal minds the Association has steadily and gradually developed and enhanced the facilities enjoyed by its members. One of the favourite and highly celebrated event arranged by the Association is the annual lunch or break-up party that is held where all the members come together to celebrate the union. In recent times, changes in the High Court Rules require that every person swearing an affidavit i.e. the deponent of an application has to be identified by an advocate having membership of the Supreme Court Bar Association and it is necessary to incorporate the membership number. This has greatly elevated the stature of the Association and reflects the significance of its membership.

The Association is also active in raising its voice and taking a stand to uphold rule of law. Whenever required the members and the executive committee have come together to express their concern regarding violation of fundamental rights and any attack on the legal profession and the judiciary.

While the Association continues to thrive, there also seems to be a sense of indifference from some of the younger members. Active participation is lacking and there appears to be a reluctance to vote, which is unfortunate.

Among all professions, it is the lawyers who are expected to be more aware of their rights and duties. It is only through selecting their preferred candidate can the members ensure that their views are represented. Merging of innovative ideas of the young with the wisdom of the seniors would give us a strong, modern and vibrant Bar Association.

With the rise in number of legal practitioners there is now a wide diversity of thoughts and demands at the Supreme Court Bar. The Association is the best platform to combine both in order to meet international standards. While we may obtain membership at other international bar associations, end of the day if we seek to practice at the Bangladesh Supreme Court Bar, our pride and honour lies with the Association.

Finally, the election of the Association is always seen as a celebration. Unlike any other election, the election at the Supreme Court Bar Association has so far, proved to be well organised and peaceful. let us all get together and endeavour to further strengthen the Association by exercising our voting rights.

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LAW IN-DEPTH

Bowling out the ban

ADIB SHAMSUDDIN

CRICKET lovers from all over Bangladesh have been left in shock and utter disbelief by the suspension of the Bangladeshi bowlers Taskin Ahmed and Arafat Sunny. Amidst the furor and confusion, skepticism has been expressed over such assessment process of the International Cricket Council (ICC); if their bowling action is indeed illegal, why among all things, would it come to light amidst an International tournament is a question yielding much speculation and criticism among cricket crazed fans.

Before withdrawing its services to ICC in 2014, the University of Western Australia had expressed concerns about the new testing protocol of using of two-dimensional match footage to determine whether bowlers are bowling with the same action while undergoing testing. One of the key areas of mistrust also concerned the methodology used to place markers on the bowlers' bodies to determine whether a delivery is illegal.

Veteran lawyer and Bangladesh Cricket Board consultant Barrister Mustafizur Rahman Khan has provided the following explanation to Law & Our Rights:

According to Regulation 2.2.6, a bowler would only need to replicate the bowling of the match in which he was reported and Taskin Ahmed, as per the footage, had not even bowled one bouncer in the Bangladesh- Netherlands match he was cited. In his assessment, he bowled a successive of bouncers, out of which three were deemed illegal.

Although a minimum of 6 bouncers can be asked for Taskin to bowl according to ICC Standard Analysis Protocols of Annexure I of the Regulations, on a proper construction, such bouncers cannot be evaluative, as he was not reported for a bouncer. In the case of a conflict between the Regulation and the Protocols, the Regulation will prevail as protocols are only supplementary to its readings.

Since Tashin Ahmed's regular deliveries were found legal in both the assessment and the match, it is certain that his bowling action during the match was not questionable. The regulations were meant to ascertain whether the player bowled any illegal delivery during the match, and did not contemplate suspending a bowler for delivering an illegal delivery in test conditions, which he did not bowl during the match. Therefore, he cannot be suspended and his reporting by the Match Officials was wrong.

It is to be borne in mind that the bowler was already fatigued by travelling and participation in 3 international matches. In T20 International matches, bowlers can bowl only one bouncer in an over, his fatigue combined with the stress of bowling such deliveries in quick succession can be said to have contributed to the 'three' illegal deliveries.

There is also an issue of ambiguity over the Match Official's Report. According to Regulation 2.1.1, it should state concerns, inter alia, that relate to the cited bowler's bowling action in general or any specific type of delivery. However for Taskin, the report merely stated that the Match officials were 'concerned about the legality of the bowling action". The form of the Report requires the Match Officials to state the reason for such concern, which in this case, was not given. Hence, to begin with, there is also an issue of whether the Match Officials' Report was a competent/compliant one, on the basis of which there could have been an Assessment in the first place.

Contention also lies from the fact that Regulation 2.2.13 allows a bowler to continue bowling at International cricket sparing the delivery he was reported for: if he bowls the illegal delivery he will run the

risk of being cited a second time. Since Taskin's stock delivery has been found legal and only 3 of his 9 bouncers illegal, he could have been warned but not suspended.

Barrister Khaled Hamid Choudhury, also an expert on cricket rules and counsel for Mohammad Ashraful in his case, expressed likewise views: "Taskin deserves the fullest compliance with the regulations by the ICC before a serious decision like the suspension is taken against him as such a decision may harm his career and he may not be the same bowler again. It seems from the reading of the report that though umpires have the authority to report him for his bowling actions generally (Regulation 2.1) they should give reasons whereas it seems no reason for concerns were given in Taskin's case. Then in the Independent Assessment, he was asked to bowl 9 bouncers in just 3 minutes!"

Barrister Khaled went on to insist that Taskin only bowled his last 3 slower bouncers in an illegal fashion. Like his colleague, he too averred over the actual purposefulness of making Taskin bowl bouncers which are not his stock deliveries. He views the suspension as ultra vires or beyond the jurisdiction of the Committee hence illegal in itself. The due course of action according to him would be to seek a Review by Judicial Commissioner under Regulation 2.1.15 read with Regulation 2.3.1 within 7 days of the receipt of the report. He opined that although the prospects of achieving a quick yet desirous outcome is slim, if good sense prevails, such quick justice may save ICC from further embarrassment

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