

LAW OPINION

Mandatory Pre-litigation Mediation in Civil Disputes



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As an emerging and prevalent trend, mandatory pre-litigation mediation has been introduced in many parts of the world including the USA, Italy, Australia, Germany, France and Norway. Following the trend and as a solution to case backlog, Bangladesh has recently adopted mandatory pre-suit mediation for some selected civil suits. This article will examine the justification for adopting this mechanism for selected civil suits in Bangladesh, addressing the yet unresolved question whether it should be extended to all other categories of civil litigation, either initially or in the future.

Mandatory pre-litigation mediation (MPM) is a legal requirement that the parties to a dispute must undertake to settle their issue in a setting with a neutral third-party mediator before initiating court proceedings. This concept is quite similar to that of 'Pre-action Protocol' in Australia and 'Pre-action Obligation' in England and Wales, where the parties should consider whether ADR could facilitate the resolution of their dispute prior to formal legal proceedings. In Bangladesh, the parties are required to first apply to the concerned Government Legal Aid Office for the settlement of their dispute before proceeding to the court. A judicial officer designated as a 'Legal Aid Officer' or a 'Special Mediator', typically a retired judge, serves as a third-party mediator in this process. If the mediation succeeds, the settlement attains the status of a court decree. If mediation fails, only then the parties are allowed to file a suit in court demonstrating that mediation was attempted but unsuccessful. Bangladesh has made

this model of mediation applicable to some selected categories of civil suits including 'Suit for Partition', 'Pre-emption under State Acquisition and Tenancy Act' and 'Pre-emption under Non-agricultural Tenancy Act'.

Indeed, mandatory pre-litigation mediation resolves the disputes permanently, even before going to the court. In doing so, it acts as a filtering flask, preventing unusual influx of litigation and reducing case backlog. It is a quick and cost-effective means of dispute resolution. Furthermore, mediation prior to litigation preserves the relationship between disputants, increasing the likelihood of an amicable resolution.

Countries such as Italy have notably benefited from this mechanism. Italy has developed its own model, but it does not include all types of civil litigations within its scope. This is because mandatory pre-litigation mediation is not a 'one-size-fits-all' solution and certain categories of civil disputes are better suited for pre-litigation mediation due to their specific features.

Similarly, in Australia, only the Federal Court under Civil Dispute Resolution Act 2011, requires the parties to take some 'genuine steps' to resolve their issues before initiating court proceedings. In France too, mediation is mandatory before litigation only in cases involving small claims and neighborhood disputes. Given the unique characteristics of different types of civil litigation and following the examples of Italy, Australia and France, Bangladesh has wisely limited its application to some selected categories of civil suits, as an initial test case, rather than extending it to all sorts of civil litigations.

Categories of civil suits involving

complicated questions of title and legal rights, are less amenable to mediation. Therefore, bringing all civil disputes, irrespective of their characteristics, under the ambit of mandatory pre-litigation mediation at the initial stage would not have been an appropriate approach.

The partition and the pre-emption suits have been rightly selected due to its mediation-friendly feature, as disputants are most often family members or close relatives. If the partition disputes can be resolved before litigation, relationship will be potentially preserved, paving the way for an amicable resolution. In an adversarial legal system like Bangladesh, litigation frequently damages relationships, which in turn hinders the possibility of amicable settlement.

Mandatory pre-litigation mediation seeks to compel an effort to resolve disputes through mediation. While the attempt is obligatory, settlement remains completely voluntary. It may at best temporarily suspend access to the courts (not justice), as

disputants are not compelled to reach an agreement. Therefore, mandatory mediation, mandated before initiating court proceedings in Bangladesh, is fully aligned with the constitution and international instruments, as it does not obstruct right to access to justice, provided that specific time constraints are adhered to.

The Italian model of mandatory pre-litigation mediation has also proven effective in combating case-overloads. Italy introduced a form of mandatory mediation in 2010 and re-visited it in 2013 incorporating inputs from other stakeholders to make it more compatible with its legal, cultural and constitutional context. After a decade of trial and error, Italy has included some other categories of civil litigation in the mandatory pre-litigation mediation ambit under the *Cartabia Reform* of 2023. Similarly, Bangladesh should now proceed through the phases of experimentation and trials. After

a reasonable period of testing, Bangladesh should engage all relevant stakeholders to assess the effectiveness or shortcomings of the MPM and then decide whether it should extend the mechanism to other categories of civil disputes to make it more effective, compatible with its own people and jurisdiction.

In conclusion, Bangladesh has correctly adopted mandatory pre-litigation mediation for selected civil suits. After an extensive experimentation and revision of the model, it may be extended to other categories of civil litigation subject to its demonstrated effectiveness and success in reducing case backlog.

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RIGHTS WATCH

The peril of domestic workers in Bangladesh

MEHELIKA ANAN RAMISHA

A shocking news story took Bangladesh by storm in October 2024 when thirteen-year-old Kolpana was rescued from her employer's house. Her rescue years later ignited a media frenzy with the general public expressing shock and horror at the extent of her injuries. The young girl's harrowing account of abuse and isolation sheds light on a particularly vulnerable demographic of the workforce of domestic workers. In that light, a question arises as to why a culture of vulnerability exists around them, and perhaps an analysis of our legal system can shed light on the answer.

Despite the substantial workforce, our law remains surprisingly silent regarding the rights of these workers. The Domestic Workers Protection and Welfare Policy (2015) was an attempt to rectify this situation. However, the Policy failed to clearly define necessary terms or create a feasible system, and as a result, a High Court Division bench even went as far as to deem it 'vague' and 'incomplete'.

The Bangladesh Labour Act, 2006 only last year included 'domestic workers' within the definition of workers. In cases of serious abuse, e.g., torture or death, the Penal Code, 1860 and other special criminal laws may be applied. However, these laws do not address certain situations such as discrimination or occupational safety and health violations. It is not enough that domestic workers simply be included in existing Acts, but rather, I would argue that separate legislation is needed. This is primarily due to the social nature of domestic work and the vulnerable backgrounds of the workers.

Furthermore, the large imbalance in power between the worker and the employer is unlike most others. A report by Bangladeshi Ovibashi Mohila Sramik Association (BOMSA) states that about 80 percent of the permanent domestic helpers are minor girl children. Fueled by hopes of a better future, these children are sent to homes within urban regions, but the cruel reality is that these children are denied education, access to adequate healthcare and other basic rights. Adult domestic workers are in similar precarious situations in that they often lack education, and employers often capitalise on their vulnerabilities. In fact, full-time



PHOTO: THE NEW YORK TIMES

housemaids are said to work anywhere from 8 hours up to 15 hours a day. From age to economical background, these workers are at a disadvantage and require a specific sort of legal protection.

When it comes to such specific legislation, Bangladesh may look to other countries for inspiration or guidance. For example, the Philippines, similar to Bangladesh, relies heavily on domestic work, but in contrast, the Philippines has advanced miles ahead in terms of rights for domestic workers. The Domestic Workers Act is a landmark piece of labour and social legislation that extends labour rights, benefits, and protection to an estimated 1.9 million domestic workers in the Philippines. It covers a range of jobs including persons performing general household work, it sets the minimum age of employment to fifteen, and mandates that the employer shall safeguard the health and safety of the domestic worker in accordance with law in addition to the rights and privileges accorded to workers including the right to education and training, access to outside communication and the guarantee

of privacy among others. Brazil is another interesting case as a 2013 Constitutional Amendment allowed domestic workers all fundamental labour rights guaranteed to a typical employee, such as extra pay for night-shift work, family bonuses, severance pay, indemnity fund system (FGTS), and occupational accident insurance, a large stride forward in terms of social protection legislation.

The fabric of society is built upon its citizens, and as such, the law cannot remain blind to the needs and rights of a particularly vulnerable and vast swathe. Simply roping in such a large, unseen group of people into a law not intended for them is not an adequate solution to uphold Bangladesh's constitutional and international obligations. Instead, new specific legislation is necessary, and the lawmakers must focus on social protection and creating an equitable legal framework.

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FOR YOUR INFORMATION

Int'l day for the prevention of violent extremism

Violent extremism undermines peace and security, human rights and sustainable development. It is a diverse phenomenon, without clear definition. It is neither new nor exclusive to any region, nationality or system of belief. Nevertheless, in recent years, terrorist groups such as the Islamic State in Iraq and the Levant (ISIL), Al-Qaida and others have shaped our image of violent extremism and the debate on how to address this threat. These groups' message of religious, cultural, and social intolerance has had drastic consequences for many regions of the world. Holding territory and using social media for real-time communication of their atrocious crimes, they seek to challenge our shared values of peace, justice and human dignity.

The spread of violent extremism has further aggravated an already unprecedented humanitarian crisis which surpasses the boundaries of any one region. Millions of people have fled the territory controlled by terrorist and violent extremist groups. Migratory flows have increased both away, from, and towards the conflict zones, involving those seeking safety and those lured into the conflict as foreign terrorist fighters, further destabilizing the regions concerned.

Nothing can justify violent extremism; however, we must also acknowledge that it does not arise in a vacuum. Narratives

of grievance, actual or perceived injustice, promised empowerment and sweeping change become attractive where human rights are being violated, good governance is being ignored and aspirations are being crushed.

In its resolution 77/243, the General Assembly decided to declare 12 February the International Day for the Prevention of Violent Extremism as and when Conducive to Terrorism, in order to raise awareness of the threats linked to violent extremism, as and when conducive to terrorism, and to enhance international cooperation in this regard.

The General Assembly emphasised in this context the primary responsibility of Member States and their respective national institutions in countering terrorism, and underlined the important role of intergovernmental organisations, civil society, academia, religious leaders and the media in countering terrorism and preventing violent extremism as and when conducive to terrorism. The resolution reaffirmed that terrorism and violent extremism as and when conducive to terrorism cannot and should not be associated with any one religion, nationality, civilization or ethnic group.

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