

Exploration of Mediation Mechanism

Esteemed members of the Legal fraternity and all those present here.

I would like to thank the Bangladesh Law Commission for inviting me to speak here today. I have been made to understand that the substantive focus of this Seminar is on Enforcing Court-Sponsored Alternative Dispute Resolution (ADR) in Bangladesh.

Negotiation systems created a structure to encourage and facilitate direct negotiation between parties to a dispute, without the intervention of a third party. Mediation and conciliation systems are very similar in that they interject a third party between the disputants, either to mediate a specific dispute or to reconcile their relationship. Mediators and conciliators may simply facilitate communication, or may help direct and structure a settlement, but they do not have the authority to decide or rule on a settlement. Arbitration systems authorize a third party to decide how a dispute should be resolved.

Our judiciary especially at the lower level has been the target of persistent criticism for mounting arrears as well as inefficiency in disposing of litigation. According to Professor Hazel Genn, “mediation as a voluntary process where a neutral mediator attempts to help the disputing parties to reach an agreement that is acceptable to both sides and that will bring the dispute to an early conclusion without having to go to Court”. Apart from the expansion and modernisation of the judiciary, it is important to promote the use of ADR methods. The Australian Courts encourage the use of ADR to resolve a dispute as early as possible and make detailed provision for mediation and arbitration. As a result, there has been an increase in the number of legal practitioners who are skilled in mediation and arbitration. The Registrar of the Court have been trained as mediators and conduct mediations in the Court. The Courts have for over two decades had provisions in its rules for referring the whole part or part of proceedings to independent referees. This technic has been of great significance in ensuring the timely disposition of commercial cases particularly the case in which technical expertise is required.

The ADR movement in the United States was launched in the 1970s, beginning as a social movement to resolve community-wide civil rights disputes

through mediation, and as a legal movement to address increased delay and expense in litigation arising from an over-crowded court system. Ever since, the legal ADR movement in the United States has grown rapidly, and has evolved from experimentation to institutionalization with the support of the American Bar Association, academics, courts, the U.S. Congress and state governments. For example, in response to the 1990 Civil Justice Reform Act requiring all U.S. federal district courts to develop a plan to reduce cost and delay in civil litigation, most district courts have authorized or established some form of ADR. Innovations in ADR models, expansion of government- mandated, Court-based ADR in state and federal systems, and increased interest in ADR by disputants has made the United States the richest source of experience in Court connected ADR.

In recent years, some legislative changes have already pointed in this direction. Three new sections 89A, 89B and 89C by amendment were added in the Code of Civil Procedure to introduce ADR mechanism in our civil judicial system. In view of this amendment the Judges are presently trying to mediate or refer the dispute to mediator by adjourning the hearing after filing written statement by the defendant. All proceedings of such mediation shall be kept confidential and no appeal or revision against any order or decree to be passed by a court in mediation shall lie.

In India a legislative intervention in this regard by amending the Code of Civil Procedure in 2009, which recognised Court-annexed ADR method. Under this amendment the Judges can direct parties in civil proceedings to resort to methods of arbitration under section 89 under circumstances where it is perceived that the dispute can be resolved in a co-operative and non-adversarial manner. This amendment yielded benefit and significant portion of civil litigation at the trial level in respect of rent disputes, property disputes and matrimonial disputes are resorted through this method. A related development in respect of criminal proceedings is the provision for 'plea-bargaining' which was inserted by way of amendment to the Code of Criminal Procedure in 2005. This provision allows persons accused of certain offences to avoid the stigmatisation associated with lengthy criminal trial proceeding. In respect of minor offences, it gives the parties a chance to avoid adversarial litigation together.

In Family Court Suits under the Family Court Ordinance, 1985 section 10 provides a pre-trial hearing of a suit within thirty days of filing written statement by the defendant has been incorporated. The Family Court shall endeavour to effect a compromise or reconciliation between the parties, and if no compromise is reached then the Court shall proceed with the trial of the suit. It is reported, a good number of suits are being compromised by the parties at this stage and the litigants are now enjoying the fruits of introducing the system.

In Artha Rin Adalat Suits under the Artha Rin Adalat Ain 2003, there are provisions for settlement disputes through settlement conferences at the pretrial stage as well as after the trial of the suit. It is provided in section 24 that if the parties agree to resolve the dispute through mediation, the Adalat shall stay further proceedings of the suit and refer the matter to the lawyers of the parties or in the absence of lawyers to the parties. The Adalat may also authorise the local officers of the Financial Institutions by issuing necessary orders under section 24 for effecting mediation if they want to resolute their disputes under section 21 and 22. If any conciliation is reached between the parties an agreement incorporating the terms of settlement shall have to be signed by the parties. The Artha Rin Adalat shall pass necessary order on the basis of such agreement. No appeal or revision lies against such order. Section 45 enjoins the parties to resolve their disputes at any stage of the proceedings notwithstanding anything contained in sections 21 and 22. We have noticed that the parties are now trying to dispose of their disputes even at the execution stage of the proceedings.

Section 345 of the Code of Criminal Procedure provides for compounding of offences. By Ordinance Nos.XLIX of 1978 and LX of 1982 some more offences of the Penal Code have been added in the list of compounding offences but the procedure provided therein being obsolete is required to be modified otherwise it will not give the parties a chance to avoid adversarial litigation altogether.

In India the mediation through Lok Adalat System was introduced in some states. The ADR System by nature of its process is totally different from Lok Adalat. In Lok Adalat, parties are encouraged to come to compromise and settlement on their own, whereas in the mediation system, the parties have before them may alternatives to solve their difference. This Lok Adalat is no

more an experiment and has become an effective and efficient alternative mode of dispute settlement which is widely recognised as a viable economic, efficient and expeditious form of resolution disputes. The award of Lok Adalat is deemed to be decree of a civil Court which is final and binding on the parties. Instead of obtaining a judgment, the parties through ADR might agree for a totally new arrangement, not initially agreed or documented. We have also a provision under the village Courts Ordinance, 1976 for conciliation of petty disputes, but this system fails to achieve its goal in the manner the Lok Adalat has been able to encourage to people that it is an effective mode of dispute settlement.

The Indian Arbitration and Conciliation Act, 1996 contains the detailed scheme of conciliation under sections 61 to 81. Section 67 of the Act contemplates that the role of the conciliator is the same as the role of the mediator in the American legal system. Similar provision should also be introduced in our Arbitration Act, 2001. In section 22 of Act 2001 the arbitral Tribunal has been invested with the power to exercise its discretion for mediation, conciliation or other procedure to encourage settlement, and if the parties to the proceedings can arrive at a settlement, the Tribunal shall record the settlement in the form of an award. In fact, conciliation and mediation are generally interchangeable.

Civil litigation has an inherently adversarial character and is widely perceived in society as a tool of confrontation. Under such conditions, the Judges and lawyers can use their good offices to direct the use of ADR methods under their supervision. If this approach is internationalised in our system, it can greatly reduce the case load. In our country whenever a person has a civil dispute with some one, he would go to a lawyer and the lawyer would advise him to file a case/suit in court for redressal of his grievance. Lawyers by and large still believe that litigation is the way of resolving disputes. In USA a person going to a lawyer is advised to go for negotiation with the other party. Both the parties, generally represented by lawyers, would discuss and try to resolve the dispute by negotiations and the success rate is very high.

Litigation as a method of dispute resolution leads to a win-lose situation. Associated with this situation is growth of animosity between the parties, which is not congenial for a peaceful society. One party wins and other party is a loser, whereas in ADR, the Court and the lawyers try to achieve a win-win situation

for both the parties. There is nobody who is loser and both parties feel satisfied at the end of the dispute. If this method is successful, it brings about a satisfactory solution to the dispute and the parties will not only be satisfied, the ill-will that would have existed between them would also end. This method not only address the dispute, they also address the emotions underlying the dispute. It is therefore necessary to be looked into that for ADR to be successful, first emotions and egoisms existing between the parties will have to be addressed. Once emotions are effectively addressed, resolving dispute becomes very easy.

The main problem that being faced in this regard is that there are not many trained mediators and conciliators. There are very few trained personnel to impart training to prospective mediators and conciliators including Judicial officers and the members of the Bar, about ADR methods. Judicial officers and the lawyers should be trained in mediation method and made in charge of mediation and conciliation centers. They can also be asked to provide training to prospective mediators who can then undertake task of settlement disputes by mediation. This responsibility has to be taken on the shoulders of the lawyers ultimately in order to achieve the goal. The challenge that we are facing today is bringing about awareness among the people regarding the utility of ADR and simultaneously developing personnel who will be able to use ADR methods effectively with integrity.

As a member of the legal profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of the deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, can not afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. Thus, a lawyer should aid the legal professions in pursuing these objectives and should help the bar regulate itself in the public interest. Litigation is time consuming and relatively expensive.

In a country with a vast population of poor people, justice has to be necessarily chief and expeditions. In order to achieve this goal, alternatives to litigation must be produced by the justice system. Therefore, the judicial officers are instructed to promote ADR as a movement especially at the lower level of Courts where bulk of poor litigants seeks justice and the lawyers have a

vital role to achieve this goal. ADR cannot be accelerated without preparation and without demand from litigants themselves and the lawyers have a vital role in this regard to promote awareness to the litigants. It is hoped that in the next few years, like other jurisdiction outside Bangladesh, litigants here would also prefer settlements outside litigation thorough negotiated arrangements. This would proportionately reduce the problem of delay and pendency in litigation as well.

ADR method is being adopted in different countries of the globe with a view to reduce the backlog and to ensure the litigants to get justice within a reasonable time.

Backlog Reduction

In Australia two to three decades ago backlogs in both the District Court and the Supreme Court were substantial. Delays of more than five years, often substantially more, were common. The backlog has been reduced dramatically in the District Court and more gradually in the Supreme Court.

The first measure to clear the backlog was an increase in the jurisdiction of the lower courts and the transfer of significant numbers of matters from the Supreme Court into the District Court. The jurisdiction of the District Court was increased and, in motor vehicle cases, was made unlimited. A Supreme Court Judge sat for many days reviewing all of the files, identifying a large number of matters in which no issue of complexity or legal difficulty arose so that they could be handled, appropriately, at a District Court rather than a Supreme Court level. Hundreds of cases were transferred and were disposed of by the more expeditious procedures employed in the District Court. Getting the distribution of the caseload in the hierarchy of courts right is an important way of achieving the most effective use of limited resources.

The second measure to tackle the accumulated backlog, was the appointment of additional Judges, both full time judges and acting judges. The latter included the secondment of senior barristers as acting judges for limited periods of time, such as a few months. Questions of judicial independence arise in the case of active practitioners serving as judges. Once the initial breakthrough was made, the practice changed. Only retired judges are not

appointed as acting judges. They continue to play a significant role in assisting the court to further reduce delays.

Furthermore, a considerable number of personal injury cases were disposed of by referring out cases which did not raise complex issues to arbitrators, generally from the private bar, to determine the disputes. The arbitral determination by experienced practitioners may not have provided the quality of justice of a hearing by a judge, but the complaints were few. This mechanism helped clear the backlog but is now only employed to a limited extent.

Acting judges played an important role in a particular technique of backlog reduction, which we called a “blitz”, in which a large number of cases of a particular character, especially personal injury cases, were listed together.

The combined effect of all these measures was such that, within a decade or so, the substantial delays of five years and more were reduced to a substantial degree. In the case of practitioners who genuinely want to get their cases on, there is no reason today why the case cannot be disposed of to final hearing within 12 months in the District Court and within two years in the Supreme Court. However, many cases are still taking longer than they should and the task of disposing of older cases requires continuing attention.

Unfortunately we do not have National Judicial Policy or any committee like the one in India and Pakistan to oversee the Courts’ docket and other related matters. I have reason to believe that unless the learned Chief Justice come forward and constitute a National Judicial (Policy making) committee, and efforts are not taken to thin Court dockets, we would achieve no goal by arranging this type of seminars. In Pakistan the National Judicial Making Committee approved a uniform National Judicial Policy after a thread bare deliberations and discussion lasting over four days in April and May, 2009 in an attempt to streamline the judicial system in the country and making it responsive to the requirements of society to clear the backlog. The glimpses of the recommendations are as follows:

Short Term measures

I. CRIMINAL CASES

- 1) In bailable cases, grant of bail is a statutory right of the accused; therefore, the Court before which the accused appears or is brought may immediately release him on bail, subject to furnishing of sureties as provided under section 496 Cr.P.C.
- 2) Bail application under section 497 Cr.P.C. with photocopy of the FIR, duly authenticated by the Counsel, should be accepted and the court shall call for record of the case on its own through Naib Court.
- 3) In bail matters, notice to State for production of record shall not exceed beyond 3 days and all the provincial Police Officers/Inspectors General of Police shall issue standing instructions to the concerned officers to ensure production of record without delay.
- 4) Bail applications under section 497 of Cr.P.C. shall be decided not beyond a period of 3 days by the Magistrates, 5 days by Court of Sessions and 7 days by the High Court.

To overcome the problem of congestion in jails, the court should exercise powers under section 497 Cr.P.C. keeping in view the principles of grant of bail including the principle that if the offence does not fall under the purview of prohibitory clause, grant of bail is a rule and refusal is an exception.

In case bail is rejected, the court should take all possible measures for disposal of the case to reduce the chances of filing of bail petitions before the higher courts. However, where the accused desires to remove the higher court, the trial court should provide attested copies of all the relevant documents to avoid the chance of requisitioning of original record from the trial court which hinders the disposal of case.

- 5) Applications for cancellation of bail under sub-section (5) of section 497 Cr.P.C. should be decided within 15 days by the courts including High Court.
Grant of bail or otherwise is the discretion of a court and should be exercised diligently and once a bail is granted it should not be withdrawn unless an opportunity is given to the accused.
- 6) In Criminal Cases it is the duty of the police/investigating agency to submit Challan (Police Report) within a period of 14 days as contemplated in section 173 Cr.P.C.. In case of non-completion of investigation, an interim report shall be submitted and in such cases, the court shall not grant remand beyond 15 days period.

- 7) Non-completion of investigation and non-submission of Challans is statutory period is a major cause of delays in disposal of cases. Since, Police plays crucial role in administration of justice, therefore, the District Police Officers may be asked to ensure that the police should conclude investigation and submit Challans within the prescribed period of 14 days. They may be asked that the SHOs who fail to comply with this statutory provision should be treated as inefficient officer under the Police Order and the court may also lodge complaint under section 166 PPC against him. The DPOs should also submit list of cases in which Challans are still pending for want of investigation for inspection and passing appropriate orders by the District and Sessions Judge.
- 8) No Judge should grant remand in the absence of accused and while granting remand should strictly adhere to the relevant provisions of the Code of Criminal Procedure and principles laid down in the Hakeem Mumtaz case (PLD 2002 SC 590)
- 9) All criminal cases punishable with imprisonment for upto 7 years registered after 1st January 2009 be kept on fast track for disposal within 6 months.
For disposal of freshly instituted cases within the stipulated period and to avoid piling of cases, there may be practical difficulties but the same can be overcome by extending court timings depending upon the workload. The extended time could be utilized for writing judgments, framing of charge and other miscellaneous work.
- 10) All criminal cases punishable with imprisonment from 7 years and above including death cases shall be decided within a period of 1 year.

Chapter XX and XXII-A of the Code of Criminal Procedure 1898 prescribed detailed procedure for trial of cases by Magistrate and the Court of Sessions to ensure fair trial for the accused. since the procedure takes longer time, therefore to finalize the proceedings, the following measures should be adopted to cut short the delays:

- a) On receipt of Challan, the court shall immediately fix the case and issue production warrants/notice.
- b) When the accused is brought or appears before the court he should be provided with copies of statements and relevant documents as provided under sections 241C and 265C Cr.P.C.

and be directed to ensure presence of his Counsel on the next date of hearing enabling the court to commence the trial.

- c) Under section 173 Cr.P.C., it is duty of the concerned SHO/Investigating Officer to produce witnesses and case property before the court during trial. Therefore, the court shall take all necessary measures to bind the SHO/IOs to procure evidence on the fixed date.
 - d) All efforts should be made to produce witnesses and the case property on the first date of hearing.
 - e) If no case is made out or there is no probability of accused being convicted, the accused should be acquitted of the charge under section 249-A or 265-K Cr.P.C., as the case may be.
 - f) The court shall not grant unnecessary adjournments and if possible should proceed with the case on day-to-day basis.
 - g) The court shall take care that only relevant and admissible evidence is recorded.
 - h) The District and Sessions Judges should hold meetings with the jail authorities to ensure the production of UTPs on the date of hearing to avoid delays on account of non-production of prisoners.
 - i) The court should take strict action against the parties or witnesses causing deliberate delays in proceedings.
 - j) The judgments should be based on well founded reasons and acumen so that it not only resolve the disputes but also lessen the prospects of future litigation.
 - k) Delay in disposal of criminal cases is mostly due to the non-cooperation of relevant stakeholders of justice sector namely, lawyers, police and prison authorities; therefore, the court should ensure that they may fulfill their legal obligation to minimize delays and expedite trials.
- 11) Production before court for remand/trial is a statutory right of every prisoner; therefore, the District and Sessions Judges should ask the jail authorities to ensure that the prisoners must be produced before the court. The District and Sessions Judges should also monitor that while granting remand all requisite procedural formalities are complied with.

Sub Section (3) of section 167 Cr.P.C. requires that while granting police remand reasons should be recorded for doing so after scrutiny of record and under no circumstances accused should be remanded to police custody unless it is made clear that his presence is actually needed for some specific purpose connected with the completion of investigation. Moreover, sub section (4) of section 167 Cr.P.C. requires the Magistrate to forward a copy of remand order with reasons for making it to the Sessions Judge. Strict compliance of this provision would help the Sessions Judges to supervise the action of Magistrates working under them.

Section 344 Cr.P.C. empowers the court to postpone/adjourn the proceedings and remand the accused person to judicial custody upto 15 days; however, grant of judicial remand in routine on "Robkars" in absence of accused person amounts to violation of law. Therefore, it is recommended that adjournments should not be granted unless necessitated in the interest of justice and for the reasons beyond control.

- 12) In criminal case, non-representation of accused by Counsel is also a source of delay in trial, therefore, the Chief Justices of High Courts, in consultation with the Chairman of the legal Aid Committee of the provincial Bar Councils or Pakistan Bar Council, may appoint lawyer in such cases to avoid delay.
- 13) To check the tendency of filing false and frivolous cases, the court should take penal action against the party by imposing fines under section 250 Cr.P.C. or filing complaints under section 182 and 211 of the PPC.

In cases triable by a Magistrate, if the court discharges or acquits all or any of the accused and is of the opinion that the accusation against them or any of them was false or frivolous, the court may acquit or discharge the accused and may call upon the complainant/informant to show cause as to why he should not pay compensation to the accused. After considering the facts and circumstances of the case the Magistrate may direct the complainant/informant to pay to the accused a compensation not exceeding rupees twenty five thousand. The compensation payable under section 250 is recoverable as arrears of land revenue.

If this provision of the law is enforced in its true sense, it would certainly help to reduce the number of groundless and frivolous complaints/cases. However, in fixing the amount of compensations, the court should carefully consider the status of accused as well as that of the complainant and the nature of accusation.

Besides, if it appears to a court that forgery or perjury has been committed in relation to any proceeding before it then the court can proceed against the defaulter under section 476 Cr.P.C. to vanish the impression that anyone can abuse the process of law by falsehood or fabrication and that too without any risk of prosecution. Before prosecuting the accused it is essential for the court to consider whether there is a reasonable probability for the conviction and is it expedient in the interest of justice or not?

Under section 476 of the Cr.P.C. the court may itself take cognizance of the offence and try it in accordance with the procedure prescribed for summary trials in Chapter XXII of the Code. However, if the court considers that the accused should not be tried summarily under section 476, it may after recording the facts constituting the offence and statement of the accused forward the case to a court competent for trial.

- 14) Under the Police Order 2002, the Police Complaints Authorities and District Public Safety Commissions are setup at various levels for enquiring into complaints against police regarding misuse of authority, dishonest investigation, negligence and inefficiency. Therefore, it is needed that in appropriate cases the presiding officers should make references to concerned authorities for initiation of proceedings against the delinquent police officers-officials.
- 15) Transfer applications under section 526 and 528 Cr.P.C., miscellaneous applications like Supardari of vehicle and disposal of property under chapter XLIII of the Code and other applications arising out of interim orders should be decided within 7 days.

- 16) In murder references under section 374 Cr.P.C., the practice of printing paper books be discontinued and photocopied books may be accepted so as to avoid unnecessary delay in disposal of appeals for want of printing of paper book.
- 17) The Courts/Government should make use of the probation of Offender ordinance 1960 as well as the good Conduct Prisoners Probation Release Act, 1926 to extend benefits of the said laws by releasing the deserving convicts on parole/probation in accordance with law.

For effective use of these legislations the Committee recommended that:

- a) The Probation and Parole Officers should be activated and be asked to visit jails frequently for conducting inquiry and submission of reports to facilitate the courts and provincial governments to consider the cases of deserving convicts
 - b) The Provincial Home Departments should ensure the presence of Probation and Parole Officers in jails during the visits of the Sessions Judges and Judges of the High Court.
 - c) The Registrar, Supreme Court/Secretary, NJPMC may convene regular meetings of the Registrars of the High Courts and Home Secretaries to evolve strategies for effective enforcement of the aforesaid laws.
 - d) In proper cases the Sessions judges should exercise powers under Probation of Offender Ordinance, 1960 or make recommendations to concerned government to extend favour to the convicts/UTP under Good Conduct Prisoners Probation Release Act 1926, as the case may be.
- 18) The Registrars of High Courts should approach the Law and Justice Division to know about the pending mercy petitions and copy of the list shall be submitted to the registrar, Supreme Court, who shall take-up the matter with the competent authority in consultation with the Chief Justice Pakistan on priority basis. In case of rejection of mercy petition, the Provincial Home Secretaries should ensure

completion of the process without unnecessary delay to maintain the deterrent effect of the sentence.

- 19) Emphasis should be given on quick disposal of Narcotics and Anti Terrorism cases, cases of women and Juvenile offenders etc.
For early disposal of ATA cases, the Committee recommended that the judges of the High Courts and Supreme Court be designated to monitor and ensure compliance of guidelines laid down in case of Liaquat Hussain Vs. Federation of Pakistan (PLD 1999 SC 504).
- 20) To clear the backlog under different categories, special benches should be constituted at Principal seat and branch Registries of Supreme Court and High Court to decide current/old cases by placing the prioritized ones on fast track.

II. Civil Cases

- 1) Writ petitions under Article 199 of the Constitution should be fixed for "Katchi Peshi" on the next day of institution and be disposed of as quickly as possible.
- 2) Writ petitions of the following categories if competent under the law, should be decided within 60 days:
 - I. Pertaining to service disputes including promotion, transfer and such other matters.
 - II. Relating to admission of student in professional colleges and allied matters.
- 3) Stay matter under Order 39 rule 1 & 2 should be decided within 15 days of grant of interim injunction and in case of delay, the judicial officer should report reasons to the concerned Chief Justice of the High Court through Registrar.
 - a) All Courts shall examine such applications critically and ensure that the interlocutory injunctions should be granted ex-parte only in very exceptional circumstances, unless the plaintiff can convince the Court that by no reasonable diligence could he have avoided the necessity of applying for unilateral order.
 - b) Such injunctions should be limited to a minimum time within which a defendant can come effectively before the Court.

- c) It should be noted that under rule 2-A of Order 39, Code of Civil Procedure, an interim injunction passed in the absence of the defendant shall not ordinarily exceed 15 days, provided that such injunction may be extended for failure of its service on the defendant when such failure is not attributable to the plaintiff or when the defendant seeks time for defence.
 - d) The Court should take greatest care to state exactly what acts are restrained instead of copying the application, and if only one or some of the acts are sought to be restrained, the injunction should be confined to that and should not hold on other acts to which the defendant can possibly object.
 - e) When the defendant appears or files his reply/affidavit then the court should immediately dispose of the matter without any adjournment and if it is not possible the court should take an undertaking from the defendant to be restrained from doing any act complained about.
 - f) The Court should not allow the abuse of injunction by common tactics such as non-service of process or lingering on the period by seeking adjournments etc.
 - g) An order of injunction made under Rule 1 or 2 of Order 39 after hearing the parties or after notice to the defendant shall cease to have effect on the expiration of six months unless extended by the Court after hearing the parties again and for reasons to be recorded for such extension and a report of such extension should be submitted to the High Court.
- 4) The rent cases should be decided speedily within a period of 4 months.
- a) Affidavits of not more than two witnesses in support of the ejectment application shall be filed in the Court in addition to the affidavit of the petitioner himself in support of the contents of ejectment petition.
 - b) While replying to the ejectment application the respondent shall be similarly required to submit his own affidavit and affidavits of two other witnesses in support of his affidavit on the date fixed in the notice served upon him.

- c) The parties shall be bound to produce their witnesses for purpose of their respective cross-examination on the day fixed by the Court.
 - d) A party obtaining the affidavits of the witnesses in support of his petition/reply would be bound to produce them in the Court for cross-examination and in case of its failure to do so their evidence shall be excluded from consideration.
 - e) Appeals against the interim orders of the Rent Controller and resort to Constitutional jurisdiction, against orders at intermediate stages arising out of the ejectment proceedings, should be discouraged.
 - f) The Court should take serious view of the situation when witnesses for cross-examination in support of their affidavits deliberately avoid/evade appearance in Court.
 - g) Adjournment of ejectment petition should not be allowed except under unavoidable circumstances on an application moved by a party supported by affidavit. In such cases also adjournment should be made for a period exceeding three days. Following the above procedure in ejectment matters appears to be necessary to achieve the goal of expeditious disposal of a case within a period of three months particularly in respect of residential tenements.
- 5) Appeals, Writ Petitions and other miscellaneous petitions pertaining to rent matters should be decided in 60 days.
 - 6) Revision petitions under CPC arising out of interlocutory orders i.e. interim stay orders, mis-joinder and non-joinder of necessary parties, appointment of local commissioners and non-payment of court fee should be decided within 3 months subject to the maintainability of such petition.
 - 7) Family cases should be decided within 3-6 months.
 - 8) Civil appeals arising out of family cases, custody of minors, guardianship cases, succession and insolvency cases, if competent, shall be decided within 30 days and for any delay, reasons should be furnished to the High Court.
 - 9) Banking, tax, duty, levy and cess cases should be decided within 6 months.

- 10) Civil Judges should decide review applications within 30 days and the trial of new cases (instituted after 1st January 2009)
- 11) Priority should be given to women and juvenile cases for quick disposal.
- 12) The Small Claims and Minor offences Courts Ordinance 2002 should be applied in earnest. The High Courts should designate civil Judges cum magistrates to try exclusively cases under said law. Such judicial officers be imparted training in ADR. For this purpose a Committee of Judges of the High Courts headed by a judge of the Supreme Court would arrange training in ADR for master trainers who would later on train the remaining judges in provinces.
- 13) In the Supreme Court and High Courts, priority should be given to dispose off old cases, except cases in which special orders were passed by court of fixation of the cases on specified dates.
- 14) Priority should be given to the disposal of trade, commercial and investment cases. Such cases should be managed on fast track through establishment of designated courts and by constituting special benches by High Courts and Supreme Court.
- 15) To check filing of false and frivolous cases the courts should impose compensatory costs under section 35-A of the C.P.C. Similarly on the patron of High Court of Sindh, the other High Courts may also amend the relevant rules for incorporation of a provision to impose a cost upto rupees one lac for false, frivolous and vesatious litigation.
- 16) Civil and criminal functions of the court should be bifurcated so that the judicial officers can try criminal and civil cases exclusively. For fuller comprehension of civil/criminal law and experience, such judicial officers be rotated annually.

Long Term Measures

- 1) The vacant posts in the subordinate courts should be immediately filed and funds for creation of new additional posts of Civil Judges cum Judicial Magistrates may be acquired from respective governments.
- 2) Presently, judicial officers are appointed through respective Provincial public Service Commissions which takes time.

Keeping in view the emergent need of judges to clear backlog, the High Courts should consider making appointments on adhoc basis.

- 3) The respective Provincial Governments may be approached for grant of supplementary funds for the construction of courtrooms, bar rooms, waiting rooms for litigant parties and witnesses and residential accommodation of judicial officers/court staff.
- 4) Upgrading and activation of judicial academies to arrange pre and in-service training of the judicial officers and staff.
- 5) Seminars and workshop should be organized for Judges to have regular interaction and experience sharing with other judges at provincial and national level.
- 6) Presently, some Judges of the High Courts are performing additional functions like Chairman, Environmental protection Tribunals, Labour Appellate Tribunals etc. which affects the working of the High Courts as a whole, therefore, it is decided that the concerned Government may be asked to appoint suitable persons against these positions instead of giving additional charge to the High Court Judges.
- 7) Non-production of prisoners before the Courts for trial due to shortage of resources and cramped judicial lockups is a major cause of delay in quick disposal of cases, therefore, the Provincial Governments should equip the prison department with necessary resources and increase the capacity of judicial lockups by constructing additional rooms with necessary facilities and security so that prisoners who are brought from other Districts should be kept there to face their trial.
- 8) Computerization and networking should be introduced at all levels of judicial hierarchy. By introducing specifically designed software, the effectiveness of computers could be enhanced to check and monitor the case flow and measuring the qualitative and quantitative output of judicial officers. Therefore, all the computers of a province should be connected through web based networking so that data transferring to MIT branch, High Court becomes easy.
- 9) Installation of Video Conferencing facility between the courts and jails will also help the courts in early disposal of cases.

Therefore, High Court Division should take initiatives for introducing modern techniques and automation in the courts.

- 10) The salary/allowances of court staff should also be suitably increased.

ADR Programmes in Developing Countries

Centre for Democracy and Governance Bureau for Global Programmes, Field Support, and Research U.S. Agency for International Development Washington, D.C. made five case studies in developing countries, such as:

- (1) Bangladesh : NGO Supported Community Mediation.
- (2) Bolivia : Private Mediation and Arbitration of Commercial Disputes.
- (3) South Africa : NGO Mediation and Arbitration of Labour Disputes.
- (4) Srilanka : Government Supported Community Mediation.
- (5) UKraine : NGO Mediation of Civil and Commercial Disputes.

The cases are designed to give USAID Staff concrete examples of ADR action.

Bangladesh

It was pointed out that Bangladesh's Court system is unresponsive to the needs of the poor, and its traditional village dispute resolution institutions are biased against the interests of women. Based on a 1995 national customer needs survey, USAID-Bangladesh defined local participation and increased access to justice as a strategic objective, and improved ADR as an intermediate result (1R). The case profiles a community mediation programme developed to meet USAID's ADR 1R. The programme is managed by the Madaripur Legal Aid Association (MLAA). After assessment of the programme it was pointed out that in general, the efforts of NGO's to provide ADR Services to the poor have been quite successful. The MLAA model is a workable one and more and more NGOs are requested training in ADR skills. The MLAA Programme currently

mediates roughly 5000 disputes annually and resolves roughly two-thirds of them. Satisfaction with the programme is high. Due to paucity of resources, it was pointed out, perhaps the most important contributors to success of the ADR programme are the clearly articulated goals set out by USAID and Democracy Partnership-most importantly providing the poor and disadvantaged with access to justice. The low levels of literacy and the lack of understanding of ADR, human rights, and legal issues make it difficult to ensure that high quality will always be available to deliver the programme. At present, only 15% of Bangladesh's population is served by NGOs and only 0.5% are covered by ADR programme. Replicating the MLAA model across Bangladesh will be an uphill battle.

Bolivia

ADR mechanisms address an extraordinarily broad range of social needs, reflecting the limited ability of state judicial institutions to address those needs over time. In Bolivia, ADR services fall into three categories; chamber of commerce conciliation and arbitration centers, Court-annexed pilot Programmes, and extra judicial community conciliation for marginalised Communities. The Court-annexed Pilot programme for civil cases in the city of Cochabamba is not yet operational, but was interviewing candidates for conciliation positions in October, 1997.

After assessment it was found that Commercial ADR responds to a well-defined need in Bolivia, that of creating the conditions which encourage investment. Commercial ADR service providers do believe that they have created a service with the potential to both alleviate Court backlog and satisfy new demand by providing services to those who would otherwise not seek out judicial resolution. This goal of satisfying a new demand is not explicitly supported by USAID as one of its development aims.

Cultural legitimacy is not a serious obstacle for commercial ADR in Bolivia at present. It will become an issue if and when commercial ADR providers reach the microenterprise level of business activity, where the different characteristics of the Quechua and Aymara indigenous peoples are cited as examples of cultural differences that can generate conflict. Commercial ADR providers will need to learn from the other ADR providers in the Court-annexed or community ADR sectors already grappling or about to grapple with these issues.

SOUTH AFRICA

Since the beginning of South Africa's political transition in the early 1990s, the country has become one of the world's most active arenas for experimentation with ADR systems. These efforts have arisen out of a foundation laid in the early 1980s with the establishment of Independent Mediation Services of South Africa (IMSSA), an NGO originally devoted to expanding the use of ADR in the resolution of labour disputes. ADR mechanisms are now seen as an important component of both government and NGO efforts to rapidly expand the provision of services, including broadening access to justice, and to reduce the high levels of conflict and violence in the country, transforming the current culture of confrontation into a culture of tolerance and conciliation.

This case focuses on IMSSA'S ADR work in the labour sector, which began during the apartheid era in the 1980s in an environment in which South Africa's justice system was unable and unwilling to meet the needs of the population as a whole, and in which the mechanisms for meeting dispute resolution needs in the labour sector in particular were woefully inadequate. Meanwhile, USAID/SA and other donors in the country were interested in providing support to talented individuals and organizations that could promote and help to develop democratic attitudes and practices in preparation for an eventual political transition, and so supported IMSSA.

IMSSA began its work in 1984 under the leadership of Charles Nupen and a group of founders who had been trained in ADR in the U.S. and U.K., and who have maintained close links with ADR pioneers in both of those countries and with the "Western" models of ADR that they developed.

Before comparing the time and cost of reaching settlement between the two systems, it was first reiterated that IMSSA had simply been much more successful in helping parties to reach settlements at any cost or length of time a 70 to 80% success rate, compared to 15 to 30% for the state system.

SRI LANKA

Sri Lanka's mediation program is based on the Mediation Boards Act no. 72 of 1988. The act was written in response to concern that:

- 1) the backlog in the courts was preventing Sri Lankans from accessing justice effectively and efficiently (which was linked to a desire to keep minor crimes from becoming major ones);
- 2) the current justice system needed to be improved, especially to provide access to the economically disadvantaged; and
- 3) that Sri Lanka has a long history of community mediation and the failure of the Conciliation Boards Act of 1988 did not, in the minds of those working at the ministry of justice (MOJ), indicate that mediation was a failure. In fact, the MOJ asked that an analysis of the failed conciliation boards be conducted and the new programme was designed based on that analysis. The MOJ then drove the process of writing the Mediation Boards Act No. 72 of 1988.

Program Activities

- 1) The training of mediation trainers.
- 2) The recruitment and training of mediators (panel members).
- 3) Awareness raising and educational programs for police, local officials, school children, social workers.
- 4) Regular monitoring and evaluation of panel members by the mediation trainers and the mediation boards commission members.
- 5) Training for law school students at the Sri Lanka Law College.
- 6) Posters to advertise the boards in each community were produced in Sinhala, Tamil, and English.

Satisfaction is also reflected in the compliance rates. Anecdotal evidence indicates that a vast majority of bank-debtor settlements are respected. At the Moratuwa Mediation Board, the chairman said that 95% of the loan cases are resolved and the settlements abided by because both sides feel that mediation is more conducive to resolution.

The Sri Lankan mediation boards system seems to be an efficient and effective way to administer justice. Building on a culture of mediation and learning from the mistakes of the past, the MOJ has succeeded in meeting the goals it articulated in the ‘formulation of these boards. Delays in the court system have been reduced, minor offenses are dealt with in an expeditious way – preventing smaller crimes from becoming major problems, and the poor and disadvantaged have greater access to justice. The system is well-administered and enjoys an outstanding reputation. A total of 4,59,364 disputes were taken

for mediation and of them, 2,95,302 disputes were settled amicably. The settlement rate is 64.2%

UKRAINE

Emerging from the oppressive Soviet system, it has been a challenge for Ukrainians to respond to the new policies of a democratic society. Generally speaking, Ukrainian citizens are notably cynical and apathetic about their ability to effect change in government – especially the political and judicial systems. These attitudes manifest themselves in many ways. People are reluctant to share information about themselves or their programs, as they are uncertain as to how that information will be used. This in turn impacts the establishment of new processes like mediation, since suspicion and ignorance prevent clients from using the system. These attitudes also impact the design of mediation systems, as mediators try to accommodate the extremely cautious response of potential clients. As a result, there are few statistics shared with strangers as to numbers and kinds of cases mediated and even less data on client satisfaction and mediator performance.

In this climate, Mr. Nicholai Borisov has started a program to introduce a means of ADR to the citizens of Ukraine. Mr. Borisov began his work in ADR under the Soviet Government. He is trained as a psychologist and he, along with several colleagues, was asked to work with miners in the coal industry in the early 1980s to develop methods for resolving conflicts within the industry. In 1989, when social enterprises were permitted to establish themselves, Mr. Borisov and his colleagues founded an organization called the Donetsk Scientific Applied Association (the “Psychological Center”).

The Ukraine Mediation Group (UMG) is really an umbrella organization for a network of mediation organizations. At present there are four regional offices: Donetsk, Lugansk, Odessa, and Kiev.

The first three have been in operation almost three years and the Kiev office was registered in November 1997. The UMG is involved in training mediators, offering a “clearinghouse” for those seeking mediation (matching mediators with clients), and consulting to enterprise who wish to set up systems within their organizations to deal with conflicts before they erupt. The number of staff varies at each office but in all cases, it is quite small. For example, in Donetsk there are three permanent staff (an accountant, a project assistant, and

the executive director) and approximately 60 volunteers, 15 of whom are very active. Between January 1996 and March 1997, the three regional mediation groups accepted a total of 61 applications for mediation, of them, 26 were mediated and 25 of the resulted in settlement. The mediation programme is relatively new and is operating in a dynamic changing culture.

Proposal

- a) Establish a National Judicial (Policy making) Committee for ensuring efficient utilization existing resources.
- b) Establish effective procedures for selection, training, and oversight of mediators and arbitrators.
- c) Find or create a sustainable source of financial support.
- d) Create an effective outreach and education programme to reach users.
- e) Create support services to overcome under barriers.
- f) Establish effective procedures for case selection and management.
- g) Establish effective procedures for programme evaluation.
- h) Curtail the yearly holidays of the Supreme Court of Bangladesh from 66 days to 30 days as a short term measure to reduce backlog.
- i) Increase civic engagement and create public processes to facilitate economic restructuring and other social change.

Conclusion

ADR programs can serve as useful vehicles for promoting many rule of law and other development objectives. Properly designed ADR programs, undertaken under appropriate conditions, can support court reform, improve access to justice, increase disputant satisfaction with outcomes, reduce delay, and reduce the cost of resolving disputes. In addition, ADR programs can help prepare community leaders, increase civic engagement, facilitate public processes for managing change, reduce the level of community tension, and resolve development conflicts.

I would record my profound gratitude to the organisers of this seminar for the valuable efforts they are making to render justice to all litigants.

Justice S.K. Sinha

Appellate Division

Supreme Court of Bangladesh

Dated 18th September, 2010.