

## **Local Level Justice System in Bangladesh: Challenges and Search for Way-out**

Dr. Abdullah Al Faruque\*  
Md. Mohiuddin Khaled\*\*

### **Introduction**

Local justice remains a neglected issue in Bangladesh at the peril of whole justice system. Since vast majority of the people of Bangladesh is outside the formal justice system, a socially inclusive, participatory and well functioning local justice system is seen as an important strategy to facilitate access to justice and maintain social order and stability. There is no well-accepted definition of the expression 'local justice'. The term 'local justice' can be conveniently defined as mechanisms of access to justice of marginalized groups of people through administering justice system at the local level. Geographical proximity and physical accessibility is, thus, the key element of the notion of local justice.

A predominant feature of the local justice system is the application of social values and customary rules rather than legal norms in dispensation of justice. The concept of local justice includes a number of measures ranging from informal means of dispute settlement to legal awareness programme. The informal means of dispute settlement that is quicker and cheaper has far-reaching consequences for the livelihood and empowerment of the poor. In many countries, the local justice system enjoys legitimacy and authority that is not accorded to the formal justice system.

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\* Professor, Department of Law, University of Chittagong

\*\* Associate Professor, Department of Law, University of Chittagong

The need for ensuring local justice should be posited within the broader framework of local self-governance that also emphasizes decentralization of justice system and context of poverty reduction strategy. It is increasingly realized that a well crafted local justice system can empower the disadvantaged group of society. For minor and petty offences, the local justice system is considered as appropriate and largely effective. The local justice system is popular in many societies for its accessibility, use of local language, affordability, immediacy, effectiveness, legitimacy at the grassroots level. In fact, majority of people in rural areas rely on local justice system.

However, local justice may also suffer from some weaknesses, which may include lack of safeguard against human rights violations, inconsistency and lack of certainty in decision-making, vulnerability to bias and corruption of local decision-makers, absence of basic fair trial standards and limited enforceability of decisions, lack of fairness and accessibility concerning certain group of people such as women, ethnic and religious minorities and poor.<sup>1</sup> Bangladesh is well known for widespread practice of informal dispute resolution at the local level.

The present paper aims at establishing linkage between local justice system and legal empowerment, highlights problems of access to formal justice system in Bangladesh and focuses on necessity of a well crafted local justice system in Bangladesh. This article also seeks to assess successes of local justice system, to identify challenges in ensuring local justice in Bangladesh and to search for best practices on local justice system.

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<sup>1</sup> Carolyn Graydon, 'Local Justice Systems in Timore-Leste: Washed up or Watch this space?' Development Bulletin (2005), No. 68, pp. 66-70, available at: [http://devnet.anu.edu.au/GenderPacific/pdfs/09\\_gen\\_legal\\_graydon.pdf](http://devnet.anu.edu.au/GenderPacific/pdfs/09_gen_legal_graydon.pdf)

### **Linkage between Local Justice and Legal Empowerment**

Local justice is central to achieving legal empowerment. Legal empowerment is inextricably linked to bottom-up approach as ultimate objective of such empowerment is to benefit poor and marginalised group of people.<sup>2</sup> Legal empowerment is defined in terms of the use of legal services and related development activities to increase disadvantaged population's control over their lives.<sup>3</sup> Resolution of local disputes peacefully and amicably has crucial social and economic consequences for the poor as it saves significant amount of costs associated with formal legal proceedings.

According to the UN High Commission on Legal Empowerment, the legal empowerment is the process through which the poor become protected and are enabled to use the law to advance their rights and their interests, *vis-a-vis* the state and in the market.<sup>4</sup> The Commission has identified four fundamental barriers to legal empowerment: (i) lack of legal identity which may exclude people from the opportunities and protections of the legal system. (ii) ignorance of legal rights and obligations which may result from inadequate dissemination of information or deliberate obfuscation.

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<sup>2</sup> Benjamin van Rooij, *Bring Justice to the Poor: Bottom Legal Development Cooperation*, available at <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/VanRooijBringingJusticetothePoor.pdf> (last visited on 16th January 2009); see also, Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies, Achievements and Challenges*, Colorline, Dhaka (2008); Fazle Hasan Abed, 'Development as a Right: The Role of Legal Empowerment in the Making of Just Society', *Journal of the Asiatic Society of Bangladesh (Humanities)*, Vol. 54, No. 1, June 2009, pp. 57-68.

<sup>3</sup> Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Imperative*, Working Paper No. 41, Carnegie Endowment, Washington D.C., 2003.

<sup>4</sup> Dr. Lloyd Axworthy, *Progress Report on Access to Justice and Rule of Law*, The UN Commission on the Legal Empowerment of the Poor.

(iii) unavailability of legal services to the poor due to the cost associated with it and (iv) lack of accountability of legal system that can effectively prohibit access to remedies.<sup>5</sup>

Therefore, the initiatives of legal empowerment should include three inter-related process: rights enhancement, rights awareness and right enablement. Rights enhancement process simply refers to legal reform and the process of reforming law-making. The core part of the legal empowerment agenda is to reform the existing formal institutions to make them open, accessible and legitimate.<sup>6</sup> The legal empowerment also requires repealing or modifying laws and regulations that are biased against the rights, interests, and livelihoods of poor people.<sup>7</sup> According to one author, “Legal reform can create legal rights that confer new legal power on the poor. Legal reforms can create more accessible and user-friendly dispute settlement and opportunities”.<sup>8</sup> Rights awareness highlights on accessible laws and legal procedures and legal literacy campaigns. Awareness of rights is central to the legal empowerment as the poor must know their rights and understand contexts in which those rights exist and function. Mere knowledge that a right exists is insufficient to ignite the legal empowerment process.

Rights enablement process includes those measures and mechanisms that can assist the poor in using the law and legal tools to expand their opportunities. The processes of enablement are the means through which the poor can access the legal, economic, and social opportunities attendant to their rights. Such enabling efforts encompass a number of activities including procedural assistance

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<sup>5</sup> *Ibid*, p. 25.

<sup>6</sup> *Ibid*, p. 26.

<sup>7</sup> *Ibid*, p. 5.

<sup>8</sup> John W. Bruce *et al*, *Legal Empowerment of the Poor: From Concepts to Assessment*, USAID, New York, 2007.

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for the poor; and affirmative action measures and institutional and individual capacity building.<sup>9</sup>

Capacity building of local justice system creates and expands the ability of individuals, communities, and institutions to support the poor's exercise of legal rights and use of legal tools.<sup>10</sup> Capacity building helps ground legal knowledge and experience in a community and within institutions, creating environments in which the poor can actively participate in the development, exercise, and enforcement of their rights.<sup>11</sup> Within the government, capacity building focuses on institutions responsible for creating, implementing, and enforcing the legal rights of the poor.

The UN General Assembly Resolution on the Legal Empowerment of the Poor and Eradication of Poverty adopted in 2008 rightly recognises that legal empowerment is one of the essential conditions of realising Millennium Development Goals.<sup>12</sup> The linkage between legal empowerment and achieving broader goal of development has been recognised in the recent report of the UN Secretary General on Legal empowerment of the poor and eradication of poverty in the following way:

Legal empowerment of the poor can be understood as the process of systemic change through which the poor are protected and enabled to use the law to advance their rights and their interests as citizens and economic actors. It is a means to an end but also an end in itself. Strengthening the rule of law is an important contributor to the legal empowerment of the poor. While it is not a substitute for other important development interventions, legal empowerment of the poor can be a necessary condition to

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> UN GA Res. A/63/L.25/Rev.I, Sixty-third session, Agenda item 107.

create an enabling environment for providing sustainable livelihoods and eradicating poverty.<sup>13</sup>

The concept of legal empowerment is rooted in a human rights-based approach to development, which recognizes that poverty results from disempowerment, exclusion and discrimination.<sup>14</sup> Legal empowerment promotes a participatory approach to development and recognizes the importance of engaging civil society and community-based organizations to ensure that the poor and the marginalized have identity and voice.<sup>15</sup>

#### **Formal and Informal Mechanisms of Access to Justice**

The prevailing justice system in Bangladesh can be broadly divided into two categories: formal justice system and informal justice system.<sup>16</sup> While the formal justice system refers to the application of formal rules and institutions in dispute resolution to deliver justice, informal justice system mainly refers to informal rules and unwritten customs and social values which are used as mechanisms in dispute resolution. Local justice system is broadly associated with informal justice system. Given the growing dissatisfaction of people with both the process and outcome of litigation, alternative dispute resolution is increasingly recognised as one of the instrumentalities to facilitate access to justice. The “all or nothing” approach of litigation is now considered inappropriate for resolving all kinds of disputes. While litigation is a predominant instrument of formal justice system, mediation remains the principal mechanism of informal justice system. The informal dispute resolution process is relatively more accessible to

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<sup>13</sup> UN Secretary General Report on Legal empowerment of the poor and eradication of poverty, UNGA (A/64/133), 13 July 2009.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Abdullah Al Faruque and Nirmal Kumar Saha, *supra* note 17.

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the poorest members of the community and is also relatively less expensive.

In particular, poor people who are often deprived of access to justice due to their poverty, need alternative means of dispute resolution more desperately than others. ADR “enables the poor to meet the better-off opponent on a level of equality to negotiate a settlement.”<sup>17</sup> In Bangladesh, many people who lack the information or the means to overcome the substantive and procedural frameworks resort to the ADR or informal mechanisms to redress their grievances. Against this backdrop, ADR is increasingly becoming important tool as an informal dispute resolution process.

### **Problems of Access to Formal Justice and Necessity of Local Justice System**

Access to formal justice system should be seen within wider context of access to the whole justice system. Access to formal justice remains a hollow promise to the vast majority of people of Bangladesh for many reasons. Prohibitive cost of litigation, inordinate delay in the courts, corruption in the justice delivery spheres, backlogging of cases, and complex procedural rules are few, if not exhaustive, obstacles to access to justice.<sup>18</sup> Legal

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<sup>17</sup> D.K. Sampath, *Mediation*, National Law School of India University, Bangalore, (1991), pp. 3-4.

<sup>18</sup> Procedural causes of backlog and delay include: (i) free access for civil claimants to the courts with incentives for frivolous, party-controlled litigation processes (including initiation of without cause, extension without excuse, motions without merit); (ii) discontinuity, repetition, and fragmentation of the legal processes, without early or accountable judicial interventions such as court administration and case management mechanisms; (iii) limited opportunity or incentives (especially early in the process) for consensual settlements, including limited venues for alternative dispute resolution processes such as mediation. See, Hiram E. Chodosh, Stephen A. Mayo, A.M. Ahmadi, and Abhishek M. Singvi, “Indian Civil Justice System Reform: Limitation and Preservation of the

system continues to be inaccessible to economically and socially disadvantaged segments of society as they can not afford to pay lawyers to vindicate their rights, which constitutes a violation of human rights. Many poor people also live far away from centres providing legal services and have very few legal resources and facilities in their communities.<sup>19</sup> Lack of monitoring and coordination by the government, lack of human and physical resources, inadequate training of judges also renders formal justice mechanisms ineffective and non-functional.

The problems of access to justice have several aspects: social, economic, geographical, legal and psychological.<sup>20</sup> Social aspect refers to making individual and group of individuals aware of their legal rights and thus enabling them to assert their legal rights and obtain legal services. Economic aspect of access to justice refers to capability approach which means that affordability of the justice system by common people.<sup>21</sup> Geographical aspect denotes that judicial institutions should be distributed in such a way that they are not beyond the reach of common people. Thus, a fair degree of decentralisation of the court system is essential for accessible judicial system. Legal aspect of access to justice refers to the fact that the nature of the legal system itself. If legal norms are anti-

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Adversarial Process,” *New York University Journal of International Law and Politics*, Vol. 30, Numbers 1-2, (1998), pp. 25-26.

<sup>19</sup> Shahdeen Malik, ‘Access to Justice: A Truncated View from Bangladesh’, in: Rudolf V. Van Puymbroeck (ed.) *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21<sup>st</sup> Century*, Washington D.C., World Bank, 2001.

<sup>20</sup> Abdullah Al Faruque and Nirmal Kumar Saha, ‘Access to Justice for Legal Empowerment: A Conceptual Framework’ *The Chittagong University Journal of Law*, Vol. XI, 2010, pp. 33-57.

<sup>21</sup> Ross Cranston, Ross Cranston, “Access to Justice in South and South East Asia”, in: Julio Faundez (ed.), *Good Government and Law*, Macmillan Press, London, 1997 pp. 233-34.

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poor, suffer from gender bias, and are not intelligible, people can hardly get remedy from legal institutions. For facilitating accessible legal system, legal texts and procedure should be intelligible to and understandable by the common people.<sup>22</sup> In this sense, access to the justice system depends on the nature of the legal system itself. Psychological aspect refers to poor people's fear and distrust of the courts due to perception of biasness, lack of legitimacy of the legal system, excessive formalism in legal rules.<sup>23</sup>

#### Institutions of Local Justice

##### *Shalish*

The institutions or mechanisms of local justice can be categorized into mainly two types: the informal dispute resolution e.g., *shalish* and Village court. There are two types of *shalish* system: traditional *shalish* system, which is deeply rooted in social and cultural traditions of Bangladesh and human rights and legal aid NGOs sponsored mediation which is re-modelled and modernised version of traditional *shalish* system. Traditional *shalish* system has been practiced from time immemorial. It is often based on tradition but led by subjective assessment of community elders and local elites without explicit reference to law or legal system. But traditional *shalish* often perpetuates social inequality due to its male bias, and elitist character. Traditional *shalish* often applies repressive norms and involve humiliating punishments. It is social norm and power that dominates the traditional *shalish* system.

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<sup>22</sup> Report of the Commission on Legal Empowerment of the Poor, 'Making the Law Work for Everyone', New York, 2008.

<sup>23</sup> Siri Gloppen, 'Courts and Social Transformation: An Analytical Framework', in: Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.), *Courts and Social Transformations in New Democracies: An Institutional Voice for the Poor?* Ashgate, Aldershot, 2006, p. 46.

The prominent NGOs involved in reformed ADR are *Madaripur Legal Aid Association* (MLAA), Bangladesh Legal Aid and Services Trust (BLAST), *Ain o Shalish Kendra*, *Nagorik Uddyog* and *BRAC*. Amongst them, only MLAA is exclusively concerned with mediation at grassroots level.

Over the years, NGOs have formalised the mediation system substantially to address the biasness and gender discrimination in the traditional *shalish* system. This re-modelled *shalish* is conducted by trained mediators and within the framework of legal system. In Bangladesh, many legal and human rights NGO are conducting ADR at the rural area either as a part of human rights and legal aid programmes or as part of broader development agenda. Key features of these mediations include a systematic, informed, participatory and gender-sensitive process in dispute resolutions. In particular, NGOs put a special effort to engage female mediators in their mediation projects, especially for cases involving women's rights, family disputes and other gender equity issues. They encourage women in the process of dispute resolution, either as a member of *shalish* panel or as disputant telling her story. NGOs-sponsored *shalish* or mediation offers several advantages: modification of the traditional process which is often arbitrary, biased and harsh, cost effective delivery of justice, enhanced community knowledge of the law, women's participation in the decision-making; greater gender equity and justice, greater negotiating strength of the disadvantaged, and gradual sustainability of the changes over time.<sup>24</sup> NGOs sponsored mediation also helps the parties to understand their differences and facilitates to reach an agreement which is acceptable to both parties.

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<sup>24</sup> Sumaiya Khair, *Alternative Approaches to Justice: A Review of ADR Initiatives under the Democracy Partnership*, Report Prepared for the Asia Foundation, Dhaka, May, 2001.

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NGOs have developed specific procedural guidelines to mediations including development of user-friendly strategies and tools on accessibility of clients to services offered, application processes, guidelines for mediators, and privacy and confidentiality issues. NGOs have also developed documentation and monitoring mechanism for following up mediations conducted. Mediation conducted by NGOs is documented and generally a memorandum is prepared and signed by the parties detailing the resolution adopted on the basis of mutual acceptance of the disputants. A crucial question arises how to ensure consistency with regard to conducting, monitoring and following up mediation of disputes should be maintained by all relevant NGOs.<sup>25</sup>

It is important to be noted that most NGOs providing mediation services also undertake legal aid activities, so that aggrieved parties have the option to pursue claims in the formal system. Thus, NGOs tend to take an integrated approach to legal services at the community level, of which *shalish* is an integral part.

Major disputes addressed by NGO sponsored mediations include land disputes, declaration of rights, money suits, family related disputes, cases of dowry, bigamy/polygamy, early marriage, dower, divorce, maintenance, guardianship, cases of domestic violence, etc. It is widely believed that early resolution of the disputes helps prevent domestic violence, violent conflict and escalation of legal action in formal court system.

#### ***Village Court***

The Village Courts Act, 2006, which replaces and updates the Village Courts Act 1976, provides for the establishment of a village court in every Union Parishad (UP). The origin of the Village Court can be traced back to *Panchyat* system of ancient

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<sup>25</sup> Dr. Rana P Sattar, "Existing ADR Framework and Practices in Bangladesh: A Rapid Assessment", A study report prepared for Bangladesh Legal Reform Project, CIDA, 28 February, 2007.

time, which as the body of elders was responsible for running village affairs including the settlement of disputes. The Village Court is envisaged to settle the local disputes of, both civil and criminal nature. The Village Court is not a part of the regular judiciary.

The Village court is comprised of a panel of five: the UP chairperson; two other UP council members, one of whom is chosen by each party; and then two additional citizens, one of whom is chosen by each party. The court have jurisdiction over civil disputes valuing up to 25,000 Taka and some criminal offences. The Village Court integrates mediation in the formal legal order. The UP chairman acts as the chairman of Village Court. Where he is, for any reason, unable to act, or if any party to the dispute challenges the chairman on his impartiality, in that case the Chairman of Village Court may be any other UP member, whom no party has already nominated as representative.

The Village Courts currently faces many problems and challenges. For example, striking a right balance by UP representatives between administrative job and dispute resolution is often difficult task and they are not clear about their role of delivery of justice. Many UP chairman consider the administrative and development activities as priority. Dishonour of the UP notice by the accused and witnesses and lack of punctuality in attending courts hampers the effective functioning of the village court.<sup>26</sup> Administrative support for the village court should be extended for the effective functioning of the court. Additional staff member is essential for the court to function properly. Provision should be made for appointment of court clerk or assistant for technical administration of the court, record-keeping and communication with parties. Lack of regular supply for format and registrar as mentioned the Rules

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<sup>26</sup> 'Local Justice System: Limitations and Potentials', A Paper prepared by Madaripur Legal Aid Association (in Bangla)

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and lack of budgetary provision for printing these documents creates obstacles for the Village Court.

As there is no government supervisory body to oversee the dispute resolution function of UP, it can be suggested that Upzilla chairman and Upzilla Nirbahi Officer should have supervisory role for ensuring smooth functioning of the court and should cooperate to execute the judgement given by the Village court. A coordinated effort between lower judiciary like judicial magistrate and assistant judge and UP Chairman and members is needed for effective functioning of the village court. Judges should periodically review the records and practices of village courts. A process of accountability and transparency through establishment of appropriate documentation and monitoring system is essential for increased popularity, confidence and credibility of both statutory as well as other community level informal mediations/*shalish* conducted by such bodies.<sup>27</sup>

Promoting legal literacy can serve as a deterrent to the occurrence of disputes as well as facilitator for resolving them through the Village court. Common training guideline should be developed for UP chairman and members, NGO workers, local elites including traditional village leaders, school/*madrasha* teachers, religious leaders and so forth.

In Bangladesh, local government bodies have been historically resource poor. There is no separate fund or government allocation for the Village Courts. Additional expenses of UP holding trials cannot be met from the small amount of money, which are collected as fees. Dispensation of justice, thus, depends on discretion of the individual UP chairman, and based on the availability of local revenue. State/NGO partnership in providing legal aid and justice delivery at local level should be explored

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<sup>27</sup> Dr. Rana P Sattar, *supra* note 24.

given the tremendous success of NGO-led *shalish* and legal aid programme activities in rural areas.

There is a dearth of literature, research and information on functioning and impact of the Village Court. Poor record keeping of village courts, lack of enforcement power of the UP chairmen to give effect the judgement are other limitations of the Village Court that make local level justice a far cry.

### **Arbitration Council**

This is another local level justice forum. It consists of the Chairman and a representative of each of the parties to the dispute. *The Union Parishad, Paurashava* can act as Arbitration Council (AC) under the Muslim Family Law Ordinance of 1961 to resolve family disputes including dower, divorce, polygamy, dowry and maintenance. AC panels are comprised of three members: the UP chairperson and two others, one of whom is chosen by each party.

It is important to note that both the Village Court and Arbitration Council work under the aegis of local government representatives in the *Union Parishad* and within the territorial jurisdiction of a *Union Parishad*. Both the forums of *Union Parishad* derive their validity from statutes and are not legally required to follow the procedures of Code of Civil Procedure, Code of Criminal Procedure and Evidence Act. The underlying argument is that the disputant parties will be able to discuss all their problems without any reservation or hesitation and can take an amicable and justifiable decision.<sup>28</sup> However, decisions of these courts are as binding as those of any other formal courts of the country. In this

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<sup>28</sup> Zahidul Islam Biswas, 'Access to Justice through State-led Rural Justice System in Bangladesh:

A Case Study in a Union Parishad', available at C:\Documents and Settings\Admin\Desktop\The Projects « Bangladesh Rural Justice Movement.htm

way, both these forums accommodate elements of formal court system and traditional *shalish* system.

### **The Conciliation (Municipal Areas) Board**

The Conciliation Board as envisaged under the Conciliation of Disputes (Municipal Areas) Board Act, 2004<sup>29</sup> empowers the Board to settle minor disputes within respective municipal areas through conciliation. The Act does not define disputes to be resolved by the Board. As a result, the Board has jurisdiction to resolve disputes of both civil and criminal nature. Both the disputing parties can participate in resolution of disputes. The Board is composed of five members headed by the municipal Chairman; the other members of the Board shall be nominated by the respective parties each of which shall name two individuals of their own choice.<sup>30</sup> In choosing nominees, each party shall ensure that at least one of them is a municipal Commissioner. Decisions are reached either by consensus or by a majority vote of the members following which the decision shall be announced.<sup>31</sup> The Board has power to award compensation or order delivery of possession of property. But it can not impose jail or fine. Where a decision is reached unanimously, it shall be deemed final, but when the decision is reached by consensus of a majority of three members and without consent of two members, an appeal may be filed against it in Additional District Magistrate Court in case of criminal case and Joint District Judge Court in case of civil suits within 30 days of delivery of judgment.<sup>32</sup> The decision of the appellate courts will be final. However, parties to the disputes are barred from hiring lawyer to conduct the case before the Board. The Board have jurisdiction over some criminal offences

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<sup>29</sup> Act No. XII of 2004

<sup>30</sup> Section 7 of the Act.

<sup>31</sup> Section 10 (1) of the Act.

<sup>32</sup> Section 11 (2) of the Act.

mentioned in first part of Schedule of the Act and particular category of civil disputes valuing up to 25,000 Taka mentioned in second part of the Schedule. The Board applies conciliation as a means of settlement of disputes lodged before it.

### **Integration of Local Justice in Formal Justice System**

A clear relationship between informal and formal justice system should be delineated in relevant law to establish accountability of the former and to prevent manipulation of disputes. It is generally recognised that resolution of disputes conducted by traditional *shalish* has no legal validity in formal justice system. However, mediation when conducted by NGOs is generally documented and mediated agreement reached through free consensus of the parties, has some presumptive value in the eye of law and can be used as evidence before courts of law.<sup>33</sup>

As mentioned earlier, the proceedings of local justice system such as the Village Courts and Municipal Boards is informal in nature. However, the decisions of both the Village Court and Municipal Board are legally recognised by the formal justice system. If the decision of a Village Court is unanimous or by a majority of four to one or in presence of four members by a majority of three to one, the decision shall be binding on the parties. But if the decision of a Village Court is by a majority of three to two, any party aggrieved may, within thirty days of the decision, prefer an appeal to the Courts of Magistrate of First Class and Assistant Judge having jurisdiction, as the case may be. If satisfied that there has been a failure of justice, the concerned authorities may set aside or modify the decision or redirect it to the Village Court for reconsideration. Almost similar provisions also exist regarding the decisions of the Municipal Board.

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<sup>33</sup> Rana P. Sattar, *supra note* 24, p. 52.

### Successes of Local Justice Delivery in Bangladesh

There is no in-depth and systematic study on how far the local justice mechanisms contributed to local people's access to justice. From various information and practices, in Bangladesh, it is generally recognized that at local level, informal justice systems are resorted to much more often than are formal systems.<sup>34</sup> In fact, *shalish* is well-accepted in rural areas as a final dispute resolution forum. Despite its general acceptability, low cost and quick disposal, *shalish* has been often criticized for its elitist character and the hazard that it perpetuates existing power structure. Often *shalish* have been criticized for their harsh and publicly humiliating punishments which violate human rights norms. It may be noted that a significant number of the dispute resolutions by traditional *shalish* to a large extent remains unregulated, undocumented and without any follow-up or monitoring process. Most of the disputes settled by the UP relate to family matters under the Muslim Family Laws Ordinance 1961. The Village Courts have remained unutilized as dispute resolution forum as the most of the UP chairman are pre-occupied with their development functions in local area. The lack of awareness of the existence of the Village Court amongst both the rural people and the UP Chairmen and members, the ambiguity and inadequacy in the rules and procedure of the village court are also responsible for ineffectiveness of the village courts. Lack of engagement of the *UP Chairman* in justice delivery system is explicated by the fact that they are elected to fulfill some development agendas during their tenure. Obviously, the justice delivery system is a secondary issue to them. Even when they administer cases brought before them, due to lack of training and knowledge of UP Chairmen and members about relevant laws and procedures and proper

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<sup>34</sup> See, Maitreyi Bordia Das and Vivek Maru, 'Framing Local Justice in Bangladesh', Background Paper for the National Workshop on Local Justice Systems in Bangladesh, Dhaka, May 2008, The World Bank

orientation, mediation conducted by them does not differ substantially from that presented by the traditional process of *shalish*.<sup>35</sup> According to Khair,

UP, Chairmen who are often overwhelmed with many disparate responsibilities and little governmental support, tend to view family disputes and other violations of law as low priorities. Many UP Chairmen and members are also ill informed in law and some are reportedly corrupt, and politically motivated, causing them to act with prejudice.<sup>36</sup>

It is widely believed that activating village courts would provide access to affordable justice to the vast majority of people at the local level. Since the Village Courts are not active, rural people prefer to the traditional *shalish* system for getting justice and a very few rich people go to the higher court. It is also expected that activating village courts will reduce the caseloads of upper courts and facilitate easy access to justice at the grassroots level.

### **Practice of Local Justice in Other Jurisdictions**

Non-formal justice system is deeply rooted in Asian values and tradition. Many Asian countries have rich tradition of non-state justice system that is based on local wisdom and culture. Bangladesh has a success story of local justice system in many respects. In particular, human rights and legal aid NGOs have developed modified *shalish* system, which is unique in the region. Furthermore, the Village Court system is an institutional mechanism that blends both formal and informal notion of local justice.

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<sup>35</sup> See Stephen Gulab, 'Non-state justice Systems in Bangladesh and the Philippine', A paper prepared for the DFID, UK, 2003, p. 8.

<sup>36</sup> Sumaiya Khair, 'Alternative Approaches to Justice: A Review of ADR Initiatives under the Democracy Partnership', Report Prepared for the Asia Foundation, Dhaka, May, 2001.

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In India, panchayat system has been reformed as *Nyaya Panchayat* for dispute resolution at village level. *Nyaya panchayats* can be endowed with functions based on broad principles of natural justice and tend to remain procedurally as simple as possible. The system of *Lok Adalat* in India is an improvement and is based on the principles of panchayat. *Lok Adalat* is a non-adversarial system, whereby mock courts are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee. These are usually presided over by retired judges, social activists, or other members of the legal profession. No appeal lies against the order of the *Lok Adalat*. Philippine is another example of having long tradition of non-formal justice system. The Philippines' *Barangay* justice system is a formal justice system that is based on traditional mechanisms of mediating local disputes. It operates at local level and is rooted in society. The basic feature of this system is that no dispute will be filed in court until an attempt has been made to mediate at *Barangay* level. However, unlike shalish, it is run by the government officials and persons they appoint, rather than local elites or NGOs.<sup>37</sup> An agreement reached by the parties is a legally binding and can be enforced by the courts.

In Indonesia, mediation is practised from time immemorial under *adat* law (customary laws). The Indonesian constitution of 1945 has a provision that gives recognition to the traditional customary law.<sup>38</sup> Even judges are required by law to explore, follow and understand the legal values and the sense of justice which exist in society.<sup>39</sup>

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<sup>37</sup> Stephen Gulab, supra note 31.

<sup>38</sup> 'Forging the Middle Ground: Engaging Non-state Justice in Indonesia', A Report of World Bank, May 2008, available at: [www.justiceforthe poor.or.id](http://www.justiceforthe poor.or.id)

<sup>39</sup> Law 4/2004 on Authority of Judges, Article 28(1).

In Taiwan, there are three tier of local justice system- mediation committee of village, town and city under the Ordinance of Mediation of 1955. There is a strong link between mediation committee and the courts. According to art. 12 of the Ordinance, the District courts have the power to refer certain disputes to the local mediation committees if the judges are convinced that mediation is better method of resolving the dispute.

Irrespective of different practices of non-formal justice in many countries, there are several elements of best practices that should be featured in mediation. First, the issue of confidentiality is a key to the success of mediation in family disputes because it is an expectation of the parties to a mediation that their personal information should be kept confidential. Confidentiality refers to the issue of whether statements and communications made by the parties during mediation can be used as evidence in subsequent litigation. In fact, confidentiality is one of advantageous features of mediation. Secondly, the involvement of neutral and impartial third party is the distinctive feature of mediation. While neutrality refers to the behaviour or relationship between the mediator and the disputants, impartiality is attitude of the mediator and is an unbiased opinion or lack of preference. Thirdly, mediation is negotiation intensive and therefore, the process should be designed to facilitate equal and fair participation of the parties. Fourth, mediated settlement is not illegal or contrary to public policy. Finally, the parties' ultimate control over the process is another basic feature of mediation. Mediator must tackle power imbalances among the disputants, must ensure informed consent of the parties, prevent coercion and must not impose decision on the parties.

One of the common problems ascribed to the feature of mediation is that it is unenforceable. This remains the greatest limitation of the mediation. However, a well stated and accepted exception is that a mediated agreement to which parties agree to, is an enforceable

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contract. The enforceability of mediated settlement also depends on the good faith of the parties.

#### **Reforming the Village Courts Act, 2006**

The Village Courts Act, 2006 requires reform to make the court fully functional. The following reform measures can be suggested:

- Pecuniary jurisdiction of the Village Courts should be extended upto seventy five thousand taka instead of currently 25000 TK.
- Administration of justice by village court is not mandatory for the UP chairmen under the Village Court Act, 2006. Therefore, the UP chairmen are under no obligation to settle the disputes. The Village Court Act, 2006 can be reformed to ensure sitting of the court at least once in a week is mandatory.
- The Village Court cannot impose imprisonment. Therefore, the Village Court should have power to impose fine in criminal case.
- The Court ought to be empowered to execute its own decision.
- The Court can be allowed to sit in three, provided each party is represented by a member of its choice.
- Some financial incentives should be given to the chairman and members of the Court in the form of honorarium or remuneration depending on the number of cases disposed.
- The Village Court should be entitled to initiate and act as an ADR forum, prior to the start of the proceedings under the Act.
- There need to be a system of accountability of UP chairmen and members in relation to conducting of the Village Court

### **Conclusion**

Given the backlog of cases in the formal justice system, and inaccessibility to it of rural and poor people, it is imperative that local justice system should be strengthened to empower them to resolve their disputes at the local level in an expeditious, transparent and affordable manner. Realisation of access to justice through local justice mechanisms requires dissemination of information and knowledge, training and skill development, basic legal literacy, community mobilisation at grass root level, monitoring the activities, and resource mobilisation. The Village Courts and Municipal Boards should be focal point of justice delivery system at local level. NGOs practice of reformed shalish can be replicated in the practice of the Village Courts and the Municipal Boards. Involvement of NGOs in transmission of their knowledge and expertise in state-run village court system should be explored and appreciated. Training and monitoring village courts by NGOs can be part of such collaboration. Effective local justice system needs necessary legal and policy change, informed and supportive judiciary, availability of locally based trained mediators, and adequate budgetary allocation.