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Access to Justice for Legal Empowerment: A Conceptual Framework

Dr. Abdullah Al Faruque*
Nirmal Kumar Saha**

1. Introduction

Empowerment of the poor is a much talked issue in political and economic realm. In political realm, it is seen as the effective strategy to overcome oppression, exploitation, injustice and other maladies with which a society can be beset.[1] It also seeks to attain social transformation through dismantling of all forms of inequality and embedded hierachy in society. In economic field, empowerment is about fulfilling basic needs, ensuring economic security and enhancing economic and social capabilities of the ordinary people. In essence, economic notion of the empowerment draws on Sen's notion of expanding human capabilities and freedoms to enhance the substantive choices they have.[2] The legal empowerment is a relatively less familiar and neglected issue in Bangladesh. Any notion of legal empowerment denotes that every person is equally entitled to the protection of law and access to legal institutions. The central tenet of legal empowerment is that laws and and the legal system should be available to the poor, disadvantaged and marginalised segments of society in order to

* Associate Professor and Chairman, Department of Law, University of Chittagong.
** Assistant Professor, Department of Law, University of Chittagong.

[1] Andre Beteille, Empowerment, Economic and Political Weekly, March 6-13, 1999, p. 589.
[2] Amartya K. Sen, *Development as Freedom,* Knopf, 1999 New York:.

enable them to realise their full potential.[3] According to Golub and McQuay, legal empowerment is "the use of any of a diverse array of legal services for the poor."[4] In her seminal book, Khair succintly defines legal empowerment as a

> critical consciousness amongst poor and marginalised populations that they are entitled to an unhindered and meaningful exercise of their rights and support services for the realisation of the same, irrespective of gender, age, religion, ethnicity, social class or any other criterion that may be utilised to restrict their participation as citizens of the state.[5]

According to her, legal empowerment is a complex process of raising individual and collective consciousness of rights for desired social transformation.[6] In many societies, law acts as an obstacle for the poor and law enforcement as instruments of repression of the poor. But law can also be transformed into a source of opportunities- for expanding access to economic benefits, for ensuring government accountability and effecting broader social change.[7]

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. The Commission has identified four fundamental barriers to legal empowerment: (i) lack of legal identity; (ii) ignorance of legal

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[3] The UN Commission on the Legal Empowerment of the Poor, *Progress Report on Access to Justice and Rule of Law*, by Dr. Lloyd Axworthy.
[4] Stephen Golub and Kim McQuay, 'Legal Empowerment: Advancing Good Governance and Poverty Reduction' in *Law and Policy Reform at the Asian Development Bank*, 2001 Edition. Manila: Asian Development Bank, p. 76.
[5] Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies, Achievements and Challenges,* Dhaka, 2008, p. 25.
[6] Ibid, p. 26.
[7] Ibid, p.1.

rights and obligations; (iii) unavailability of legal services and (iv) lack of accountability of legal system. First, lack of legal identiy may exclude people from the opportunities and protections of the legal system. In other words, a person who lacks formal legal recognition can only experience the law as an obstacle. Second, ignorance of legal rights and obligations may result from inadequate dissemination of information or deliberate obfuscation. Third, legal services may not be affordable to the poor due to costs associated with it. Finally, unaccountable legal system can effectively prohibit access to remedies. In order to address these barriers, the Commission has envisaged a comprehensive framework with four pillars for legal empowerment: access to justice, property rights, labour rights and business rights.[8] Accordingly the Commission has set out two conditions for legal empowerment of the poor- 'identity' and 'voice'. While the 'identity' is essential for civic and economic agency of the poor as citizens, their voice should be heard for the process of legal empowerment. Their 'voice' should be heard in institutional and legal reforms and social policies, which will eventually improve the realisation of their rights as citizens. The Commission has rightly emphasised that for ensuring legal empowerment, not only best practices of informality should be incorporated in formal economy or institutions but also a legitimate and inclusive legal order is essential. The formal judicial system, land administrations and relevant public institutions should be more accessible by recognising and integrating customary and informal procedures with which the poor are already familiar.[9] The core part of the legal empowerment agenda is to reform the existing formal institutions to make them open, accessible and legitimate.[10] The

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[8] Report of the Commission on Legal Empowerment of the Poor, 'Making the Law Work for Everyone', New York, 2008, p. 27.
[9] Ibid, p. 5.
[10] Ibid, p. 26.

legal empowerment also requires repealing or modifying laws and regulations that are biased against the rights, interests, and livelihoods of poor people.[11]

The concept of legal empowerment has emerged as powerful and counterveiling notion to the dominant paradigm of "rule of law orthodoxy" which takes a top-down or state-centered approach to legal reform and access to justice. Legal empowerment is inextricably linked to bottom-up approach as ultimate objective of such empowerment is to benefit poor and marginalised group of people.[12] 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.[13] But perhaps, the shift from 'rule of law orthodoxy' can be better understood in terms of potetnial role of legal empowerment in achieving development goals. Thus, legal empowerment of the poor envisions a holistic approach to development that combines the underpinnings of law and human rights and the economic theories of incentives and markets.[14] 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.[15] The linkage between legal empowerment and acheiving broader goal of development has been recognised in the recent

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[11] Ibid, p. 5.

[12] 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).

[13] Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Imperative*, Working Paper No. 41, Carnegie Endowment, Washington D.C., 2003.

[14] See, UNDP Report, Envisioning Empowerment, New York, 2009, p. viii.

[15] UN GA Res. A/63/L.25/Rev.I, Sixthy-third session, Agenda item 107.

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 create an enabling environment for providing sustainable livelihoods and eradicating poverty."[16]

However, the legal empowerment is rooted in a human rights-based approach to development, which recognizes that poverty results from disempowerment, exclusion and discrimination.[17] 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.[18]

According to the Commission, formalisation of land and business of the poor which they often hold informally, is a vital step toward their legal empowerment since informality deprive them many economic opportunities.[19] Because poor 'may be unable to use

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[16] UN Secretary General Report on Legal empowerment of the poor and eradication of poverty, UNGA (A/64/133), 13 July 2009.
[17] Ibid.
[18] Ibid.
[19] John W. Bruce, Omar Garcia-Bolivar, Michael Roth, Anna Knox, and Jon Schmidt, Land and Business Formalisation for Legal Empowerment of the Poor: A Strategic Overview Paper, USAID, January 2007, available at: http://www.ardinc.com/upload/photos/677Land_and_Business_Formalization_

their untitled land to secure a loan, or their unregistered small business may be ineligible for a government credit programme.' Thus, the poor who operate outside legal frameworks lose important economic opportunities that could have a significant impact on economic growth. Formalisation of land and business can legally empower the poor to grow their businesses, enjoy the appreciation of their assets in formal property markets, and access credit more easily.[20] Legal reform is critically important for such land and business formalization, which is a complex process.

Access to justice is an important element of operational framework of legal empowerment. The concept of access to justice encompasses the whole range of laws, procedures, institutional arrangements through which justice can be delivered to the people in efficient and effective manner. It denotes the instrumentalities by which citizens can approach courts, tribunals, lawyers, legislatures, judges, administrative agencies for addressing both substantive and procedural justice. Access to justice is inextricably linked with the justice system of a country. There are three basic features of the justice system in a democracy. First, the orderly resolution of disputes is essential to the functioning of any democratic society. Secondly, the institutions should be governed by defined set of rules; thirdly, the courts as a judicial branch of the government have a particular role in the protection of human rights.

Linkages between Access to Justice and Legal Empowerment

Access to justice is recognised as one of the fundamental tenets of rule of law, democracy and human rights.[21] Article 8 of the

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Strategic_Overview_Paper_FINAL_with_Annexes.pdf, (last visited on 15th January 2010)

[20] Ibid.

[21] See, article 8 and 10 of the UDHR .

Universal Declaration of Human Rights, 1948 states that everyone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights guranteed by the constitution or by law while Art. 10 provides that everyone is entitled the full equality to a fair and public hearing by an independent and impartial tribunal. Access to justice is the pre-condition for legal empowerment of the poor. Access to justice is considered the enabling framework of legal empowerment. The concept of access to justice is premised on the fundamental principle of *ubi jus ibi remedium* which means that every right when it is violated must be provided with a right to a remedy.[22] Access to justice has been defined as:

> Access by people, in particular for poor and disadvantaged groups to fair, effective and accountable mechansims for the protection of rights, control of abuse of power and resolution of conflicts. This includes the ability of people to seek and obtain a remedy through formal and informal justice systems, and the ability to seek and exercise influence on law-making and law-implementing processes and institutions.[23]

Access to justice also requires a just procedure, timeliness and affordability in the judicial system.[24] Thus, the concept of access to justice is concerned with the ease of entry to legal institutions than the nature of the remedy they provide. The concept of access to justice has developed in three distinct phases: the first wave is

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[22] See, on philosophical account of access to justice, Peter Fitzpatrick, 'Access as Justice', *Windsor Yearbook on Access to Justice*, Vol. 23, (2005), pp. 3-27.
[23] World Bank, A Framework for Strengthening Access to Justice Indonesia, Washington D.C., World Bank, 2007, at 1-2, quoted in: Ferdous Jahan and Asif Mohammad Shahan, 'Access to Jstice for the Poor in Bangladesh: Conflict Between Western Model and Eastern Culture', *Journal of Law and Development*, Vol. 1, No. 1, 2009, p. 3.
[24] See, generally for discussion on access to justice in comparative perspective, Mauro Cappelletti, (ed.), *Access to Justice: A World Survey*, Sijthoff and Noordhoff, Amsterdam, (1978).

extension of legal aid to the poor litigants; second one is the representation of diffuse or collective interests such as that of consumer or environmental groups through liberalisation of standing rules, and multy party actions, otherwise called public interest litigation; the third phase is the improvement of adjudicative procedures to accommodate different types of litigants and issues.[25] However, the term 'access to justice' is not only associated with the right to access to trial courts but also with the ability to access appellate courts.

Constitutional Basis of Legal Empowerment

The concept of empowerment in its various menifestations-economic, political and legal- is one of the fundamental premises on which the Constitution of Bangladesh is based. Article 7 procliams that all powers of the State belong to people while Article 11 states that effective participation of people in all levels of administration should be ensured. In particular, Article 13 states that it is the fundamental responsibility of the State to emanciapte the peasants, workers and backward sections of the people from all forms of exploitation. Legal empowerment is an important derivative of the right to equality before the law guaranteed under the Constitution of Bangladesh, Article 27 of which provides that all citizens are equal before law and are entitled to equal protection of law. Similarly, Article 31 provides that to enjoy the protection of the law, and to be treated in accordance with law is the inalienable right of every citizen. The notion of legal empowerment is essentially based on the universal concept of equality which requires necessary legal framework and institutional arrangement through which every person have access to legal system on equal footing. In understanding legal

[25] Ross Cranston, "Access to Justice in South and South East Asia", in: Julio Faundez (ed.), *Good Government and Law*, Macmillan Press, London, 1997, p. 233.

empowerment, one should address the particular social and economic context in which justice system and legal structure operate.

But legal empowerment of the poor remains a far cry in Bangladesh where ill-defined property rights, widespread poverty, absence of legal protection of workers in informal sectors, lack of regulatory framework for the informal sector remains a persisitent problem.[26] Centralised law-making process, top-down institutional legal framework, excessive procedural formalism and administrative complexities also act as significant barriers to the legal empowerment of the poor.

Barriers to Access to Justice

Access to justice in adversarial system is restricted by many factors. Participants in adversarial system, which is resoure based, can never be equal in terms of capability. Access to justice remains a hollow promise to the vast majority of peple of Bangladesh for many reasons. Menon emphasised access to justice becomes meaningful "only when the law is equal to all and offers equal protection irrespective of status of individuals in society."[27] 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 causes,

[26] Fazle Hasan Abed, 'National Consultation in Bangladesh on Legal Empowerment of the Poor', available at: http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/4_Bangladesh/4_6_Overview_National_Consultation.pdf (last visited 16th January 2010).

[27] N.R. Madhava Menon, "Access to Justice and the Role of Legal Education", in: *Access to Justice: A Shift from Letter of Law to Spirit of Law,* Proceedings of the Commonwealth Legal Education Conference, New Delhi, July 28-30, 2006, p. 3.

which remain as obstacles to access to justice.[28] Legal 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 itself 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.[29] The lack of human and physical resources, inadequate training, the malfunctioning of systems can also restrict the access to justice to a significant extent.

Realisation of rule of law and ensuring access to justice to all depends not only just upon laws and procedures, but also enabling institutional arrangements through which justice can be delivered to the people in an efficient and effective manner. Access to justice has several aspects: social, economic, geographical, legal and psychological. 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

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

[29] 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 21st Century*, Washington D.C., World Bank, 2001.

affordability of the justice system by common people.[30] 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 nature of the legal system itself. If legal norms are anti-poor, suffers from gender bias, and are not intelligble, 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.[31] 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.[32]

Formal and Informal Mechansims of Acess to Justice

The traditional notion of access to justice is limited to representation of one's legal claim before the courts and tribunals. In view of changing needs of society, the notion of access to justice should be interpreted more broadly than as mere formal representation before the courts and obtaining legal remedies. It should also include access to non-judicial remedies. Thus, a broader notion of access to justice should also include the ability of the people to obtain legal assistance, to reach law makers and law enforcement agencies and to participate effectively in the legal

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[30] Ross Cranston, supra note 26, pp. 233-34.

[31] Report of the Commission on Legal Empowerment of the Poor, 'Making the Law Work for Everyone', New York, 2008.

[32] 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.

system through formal means of litigation and informal means of alternative dispute resolution.

Prevailing justice system in Bangladesh can be broadly divided into two categories: formal justice system and informal justice system. 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. 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 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 the poorest members of the community and is also relatively less expensive. In particular, poor people who are often denied access to justice due to their poverty, need alternative dispute resolution more desperately than others as "it enables the poor to meet the better-off opponent on a level of equality to negotiate a settlement."[33] In Bangladesh, many people who lack the information or the means to overcome the substantive and procedural frameworks resort to the ADR (Alternative Dispute Resolution) or informal mechansims to redress their grievances.

Informal dispute resolution or mediation system can be categorised into two types: traditional *shalish* system, which is deeply rooted in social and cultural traditions of Bangladesh and NGO-sponsored mediation which is a re-modelled and modernised version of

[33] D.K. Sampath, *Mediation*, National Law School of India University, Bangalore, (1991), pp.3-4.

traditional *shalish* system. 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.

The prevailing practices of access to justice, according to Khair, can be divided into two set of activities[34]: state-centric activities which attempt to improve the effectiveness of justice delivery mechansims of the state, namely the courts, the legislature, the police and other relevant agencies of the government; and people-centric activities, which concentrates on vulnerable segments of society by way of providing legal services that include legal literacy, legal aid, public interest litigation and alternative dispute resolution. An integrated approach is needed for acheiving the holisitic purpose of access to justice.[35]

Components of Legal Empowerment

Legal empowerment requires legal and institutional reform. Laws should be designed in a way so that they can respond to people's needs. Rights enhancement, legal reform, reforming the process of law making, rights awareness, accessible laws and procedures, institutional and individual capacity building are core components of legal empowerment of the poor. Legal empowerment requires a bottom-up approach where the poor can actively participate in the law-making process.[36] The initiatives of legal empowerment can 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. According to one author, "Legal reform can create legal

[34] Sumaiya Khair, supra note 5, p. 58.
[35] Sumaiya Khair, supra note 5, p. 58.
[36] Stephen Golub, supra note 14.

rights that confer new legal power on the poor. Legal reforms can create more accessible and user-friendly dispute settlement and opportunities".[37] Rights awareness highlights on accessible laws and legal procedures and legal literacy campaigns. Rights enablement process include 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 ther rights. Such enabling efforts encompass a number of activities including procedural assistance for the poor; and affirmative action measures and institutional and individual capacity building.[38] 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. Rather, rights awareness requires both comprehension of the right and concrete understanding of how to assert, protect, and ultimately effect it. Capacity building creates and expands the ability of individuals, communities, and institutions to support the poor's exercise of legal rights and use of legal tools.[39] 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.[40] Within the government, capacity building focuses on institutions responsible for creating, implementing, and enforcing the legal rights of the poor.

Instrumentalities for Access to Justice

[37] John W. Bruce et al, *Legal Empowerment of the Poor: From Concepts to Assessment*, USAID, New York, 2007.
[38] Ibid.
[39] Ibid.
[40] Ibid.

Considering the shortcomings of both informal and formal justice system, over the last two decades judicial reform movement had been initiated in both developing and developed countries to make the legal systems more accessible and credible. Indeed, the demand for wider access to justice has acted as one of the main driving forces behind such legal reform for judicial modernisation process. Mediation is widely seen as one of the alternative means of accessing justice. The innovative strategies like provision of legal aid, public interest litigation (PIL) and modernisation and transplantation of alternative dispute resolutions in formal justice system have remained to be as integral part of such modernisation process of justice system and instrumentalities of access to justice. The role of law schools is also increasingly recognised as vital in promoting access to justice to the poor. Therefore, in understanding the broader notion of access to justice, we must encapsulate the following issues.

First, in mediation, parties can control the process and design solutions that meet their needs, while not neceesarily adhering to technical legal principles, procedure of evidence and witness. In mediation, parties are empowered to apply their sense of own values and reach to results that are outside the typical juridical order. On the other hand, outcomes of litigation are limited to strictly legal remedies. The informality of mediation allows conducting negotiation more quickly and decisions can be made immediately following negotiation. This time element helps to reduce cost to a significant extent. Apart from reduced economic cost, mediation can provide social and psychological benefits to the parties. Legalistic and formalistic approach of litigation emphasises on legal rights of the parties, which are usually determined by a win-lose outcome. This win-lose outcome may be counterproductive to the future relationship of the parties.

The mediation process values personal feelings and relationships. Mediation not only brings about to the resolution of the dispute, but also attains peace and healing, which is important for the preservation of future relationship between the parties. Thus, mediation reduces the alienation and tension that often arises between the parties, and creates mutual understanding and trust. This acheives the valuable goal of social cohesion. In this way, mediated soultion tends to be integrative, accommodative and durable. Mediated settlement, if reached, gives finality to the resolution of a dispute. On the otherhand, a judgement rendered through litigation will most likely to be appealed, which can result in reversal and lead to new trials.

Mediation has also great potential to empower the disputant parties as they have considerably more autonomy in the process of mediation and more control in the outcome of the process than they would be in an adjudication process where a judge or arbitrator would impose a decision.[41] This also explains why mediated settlement agreements enjoy higher degree of compliance than adjudicative outcomes. Moreover, mediation is a form of informal justice and is a consensual system, which can help the parties tell their own story and gives the parties the opportunity to participate fully in the process. Mediation helps the parties to a dispute find a solution that is acceptable to both parties.

Second, legal aid as one of the strategies of affording access to justice has now been widely recognised in many countries and has remained an important instrument of legal empowerment. Legal aid can conjure up a range of activities including public legal aid scehme, pro bono arrangements organised by the legal community and legal advice and litigation by NGOs. In adversarial legal

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[41] Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, West Publishing Company, New York, (1991), p.58.

systems like ours, reaching legal services depends to a great extent upon the economic ability of the litigants to obtain skilled lawyers and to puruse the time consuming, expensive investigation, pre-trial procedures, trial, post trial arguments, and appeals. In such a situation, equalisation of resources becomes absolutely necessary for having equal protection of law. This necessitates that legal aid should be granted to the poor litigants as a matter of right, not a matter of charity.[42] There are two main approaches of legal aid: individualistic and structural. According to individualistic approach, legal aid is generally given to individuals by way of legal advice, assistance, or representation and payment of court fee in litigation. The main focus of this approach of legal aid is to assist indigent individuals by encountering ordinary legal problems through case by case basis. On the other hand, structural legal aid seeks to use legal services to assist groups as well as individuals in the pursuit of legal rights to initiate social change. The underlying agrument advanced for such approach to legal aid is that it addresses the causes of injustice and seeks to remedy them. State sponsored legal aid scheme was initiated in Bangladesh through the enactment of the Legal Aid Act, 2004 which enables the state to provide legal aid to the poor with a view to giving them a greater access to the formal justice system. The state sponsored legal aid programmes are not successful for many reasons. Many human rights NGOs are also providing legal aid mainly through informal means of dispute resolution and financial assistance in obtaining legal representation for the poor under donors led legal aid programmes. However, NGOs' efforts in legal aid are limited by many factors.

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[42] See, Abdullah Al Faruque and Md. Mohiuddin Khaled, 'Legal Aid in Bangladesh: Goals and Strategies', *Chittagong University Journal of Law*, Vol. IV, (1999), pp. 131-150.

Third, the innovation of Public Interest Litigation (PIL) as a tool to achieve social justice by enabling easy access to courts for those disadvantaged socially and economically has become an important part of judicial landscape. The PIL can promote access to justice by allowing any public-spirited citizen or social action group to approach the court on behalf of the oppressed and marginalised segments of society to realise their rights. It is undisputed that initiation of PIL requires relxation of the rule of standing which is one of the impediments in access to justice in many countries. Justice Bhagwati remarked:

> The Supreme Court of India found that the main obstacles which deprived the poor and the disadvantaged of effective access to justice was the traditional rule of standing, which insists that only a person who has suffered a specific legal injury by reason of actual or threatened violations of his legal rights or legally protected interests can bring an action for judicial redress.[43]

PIL is one of the important strategies of judicial activism, which is now regarded as a necessary and inevitable part of the judicial process in South Asia.[44] In South Asia, much of the human rights jurisprudence has been developed by the courts through public interest litigation, which seeks to enforce basic human rights of the deprived and vulnerable sections of society. PIL is a means of protection of collective rights of poor and under-privileged group of people and is now well accepted avenue of judicial activism.[45] The PIL is an innovative approach in accessing the judcial process through dismantling the procedural barriers of locus standi and is

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[43] P. Bhagwati, 'Judicial Activism and Public Interest Litigation', 23 *Colombia Journal of Transantional Law* (1985), pp. 561-77, at. 570-71.
[44] Justice P N Bhagwati, 'Fundamental Rights in their Economic, Social and Cultural Context', in: *Developing Human Rights Jurisprudence*, Vol. 2, Commonwealth Secretariat, London, (1990), p. 81.
[45] See, Jeremy Cooper, "Public Interest Law Revisited", *Bangladesh Journal of Law*, Vol. 2, No.1, (1998), pp. 1- 25.

playing a critical role in bringing issues of violation of human rights before the courts. PIL address group rather than individual rights and court devise new new and effective remedies, both of a preventive and of a continuting nature, through the series of interim orders.[46] The PIL can promote human rights in several ways: first, human rights issues which can be raised in PIL are often ignored or can be violated by government. Second, the court can create a new regime of human rights by expanding the meaning of fundamental human rights to equality, life and personal liberty. Third, the court can grant new kinds of relief under its constituional jurisdiction. Fourth, the court can monitor the state institutions such as jails, women's protective homes, and safe custody places and can contribute to gradual improvements in their management and administration.[47]

Over the last decade, judiciary of Bangladesh has allowed PIL in a significant number of cases involving wide ranging issues of collective interest to bring justice to and ensure fundamnetal rights of underprivileged sections of society. It can be fairly argued that the PIL has democratised and widened the access of populace to justice system of Bangladesh.

Finally, there is a discernible trend towards integration of elements of informal justice system with the formal one. Norms of informal justice system have been transplanted in the formal justice system through amendment of relevant procedural rules of what is known as court-sponsored mediation or judicial mediation. For instance, section 89 of the Civil Procedure Code, 1908 of Bangladesh has

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[46] Clarence J. Dias, "The Impact of Social Activism and Movements for Legal Reform in South Asia", in: Sara Hossain, Shahdeen Malik and Bushra Musa, (ed.), *Public Interest Litigation in South Asia: Rights in Search of Remedies,* The University Press Limited, Dhaka, (1997), p. 8.

[47] See, Ross Cranston, supra note 26; Naim Ahmed, *Public Interest Litigation: Constitutional Issues and Remedies,* Dhaka, BLAST, 1999.

been amended recently to incorporate mediation system, which is commonly called court-annexed mediation. Court-sponsored mediation differs from traditional mediation in the sense that while the latter is based on purely voluntary third party assisted negotiation, the former is court-assisted, and a formalised process which is mandatory for disputing parties to some extent.[48] In contrast to traditional mediation, judicial mediation occurs within the framework of law of land and existing judicial structure.

Finally, the law schools have also important role to play in facilitating access to justice to marginalised segments of society through dissemination of legal information and engagement in a variety of community services by law students. In many countries like the USA, South Africa, and India, law schools are promoting access to justice through conducting Clinical Legal Education Programmes which not only aim to impart practical legal skills for law students, but also orienting them towards serving poor people through providing legal aid, legal advices and legal awareness programme. In these countries, legal aid projects and public service goals are highly emphasised in Clinical Legal Education Programmes. The legal education system in Bangladesh should also put emphasis on justice-based approach to the clinical legal education programme which should accommodate both a narrow focus on acquisition of professional/practical or legal skills and a broader function of providing the means to access to justice through promoting legal services and legal literacy programmes.

Judicial or Court-sponsored Mediation and Access to Justice

[48] See for detailed discussion on court-sponsored mediation: Hong-Lin Yu, ‘Is Court-annexed Mediation Desirable?’, *Civil Justice Quarterly*, 2009, Vol. 28, Issue 4, pp. 515-646.

Judicial mediation[49] is relatively a new phenomena. The concept of judicial mediation owes much of its origin to the notion of 'multidoor courthouse' propounded by Frank E.A. Sander an American Professor. In 1976, Professor Sander had proposed the idea of a 'multidoor courthouse' where individual disputes would be matched to appropriate processes such as mediation, arbitration, or fact finding.[50] According to him, court room should be a comprehensive justice centre where disputes would be analysed according to various criteria to determine what mechanism would be best suited for the resolution of the problem.[51] His idea was adapted in the American civil justice system through introduction of court-annexed mediation which is now a huge success story in the USA. Its Civil Justice Reform Act of 1990 calls upon every federal district court to use ADR mandatorily in order to reduce expenses and delay in the civil justice system.[52] Judicial mediation has been introduced in many parts of the world in one form or another given the relative ineffectiveness of their judicial systems.[53] Indeed, the last two decades witnessed profound transformation in judicial reform towards improving access to

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[49] The expressions court-annexed mediation, judicial mediation or pre-trial mediation have been used inter-changeably.

[50] See, Frank E.A. Sander, "Varieties of Dispute Processing", 70 F.R.D. 111 (1976).

[51] See also, Frank E.A. Sander, "Dispute Resolution within and Outside the Courts- An Overview of the US Experience" in: P.C. Rao and William Sheffield (eds.), *Alternative Dispute Resolution: What It is and How It Works,* Universal Law Publishing Co., New Delhi, 1997, pp. 123-136.

[52] See, Dana H. Freyer, "The American Experience in the field of ADR", in: P.C. Rao and William Sheffield (eds.), *Alternative Dispute Resolution: What it is and how it works*, Universal Law Publishing Co., New Delhi, (1997), pp. 108-122.

[53] See, Hiram E. Chodosh, "Judicial Mediation and Legal Culture", Issues of Democracy, December 1999- Mediation and the Courts, http://usinfo.state.gov/journals/itdhr/1299/ijde/chodosh.htm, (last visited on 6 June, 06), p. 2.

justice in many parts of the world. The main instruments of the reforms are legislative initiative which made changes either in substantive or procedural laws.

The lawyers and judges in common law tradition and adversarial systems have always been very suspicious of ADR as a competing system of dispute resolution, considering it a threat to the proper dispensation of justice and seeking to restrict its use. But the last decade witnessed a sea change in the attitude of lawyers and judges of common law traditions towards ADR. The UK has initiated major legal reform of its civil justice system towards introducing the use of arbitration for commercial disputes and court-annxed mediation for civil and family disputes.[54] In India, pre-trial mediation has been introduced in *Lok Adalat*, where mediation is practised now for 20 years. India has also amended its Civil Procedure Code of 1908 to implement the scheme of court-annexed mediation.

While in traditional mediation, there is the possibility of coercion, unfairness and bargaining imbalance between the parties, these problems do not arise in judicial mediation. However, in judicial mediation, the issue of voluntary consent of the parties arises in reaching final agreement after mediation.[55] In contrast to traditional mediation, judicial mediation occurs within the framework of law of land and existing judicial structure. Such mediation often occurs in the shadow of the legal rules and principles. It is correctly observed:

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[54] The UK, by the 30th amendement of the Civil Procedure Rules introduced court-annexed mediation which came into effect on April 26 1999. See, SK. Golam Mahbub, *Alternative Dispute Resolution in Commercial Disputes: The UK and Bangladesh Perspective*, Dhaka (2005), p. 47.
[55] Jacqueline M. Nolan-Haley, supra note 42, pp.78-79.

> The role of law becomes increasingly more significant in court-annexed mediation programmes where parties go to court in the first instance to seek a vindication of their legal rights. In jurisdictions where mediation is a mandatory prerequisite to trial, it is important that the parties have a basic understanding of the legal parameters of their case. While there is no guarantee of how a judge will rule in a particular case, there is usually a predictable range of possible outcomes. Disputing parties should not enter into mediation settlement agreements without some awareness of these outcomes. Otherwise, the danger is too great that legal rights are being relinquished without informed consent, that expediency rather than justice is the goal and that the resulting agreements are, therefore, unfair.[56]

Thus, judicial mediation is a coordinated effort of delivery of justice. But it should be kept in mind that such mediation is complementary to and not competitive with the court system.

Given the existing bleak scenario of justice delivery system and recent movement of legal reforms for increasing access to justice through ADR around the world, Bangladesh has initiated legislative scheme toward pre-trial mediation in order to make formal justice system more accessible and fair. Such much needed legal reform was not only necessary to overcome the problem of accessibility in formal justice system, but was also needed to generate confidence of common people about the fairness and ability of the court to deliver justice, which has eroded in recent times. Such initiative of judicial mediation reveals that how traditional court system with inflexible procedure can be remodelled to adjust with the flexible process of mediation to cope with the changing needs of the society.

However, it is not enough to bring some changes in procedural laws for facilitating access to justice through mediation. Success of this judicial mediation system depends considerably upon efficient

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[56] Jacqueline M. Nolan-Haley, supra note 42, p.84.

administration and time management within the justice delivery system of the lower judiciary. It also involves effective coordination between legal norms and social norms within the setting of mediation process as judicial mediation can involve application of legal principles and rules contained in the statutes, codes and judicial decisions. On the other hand, mediation is also seeen as a social process that reflects prevailing societal norm and values. If implemented effectively, judicial mediation can increase access to justice in several ways: by reducing the number of contentious issues bewteen the parties; by providing solution to disputes more expeditiously but with less expense, and reducing the workload of the courts.

The recent legal reform towards judicial mediation in Bangladesh reflects a clear shift from traditional means of litigation to ADR for improving access to justice. The newly enacted provisions on mediation and other ADR forms have created an window of opportunity for promoting access to justice for all through reducing the cost and expediting the process of civil dispute resolution. Successful implementation of legal scheme on mediation will obviously lead to reduction in civil litigation as well as better court management. But full integration of mediation within formal justice system requires an appraisal of old legal doctrines, legal institutions, legal processes and legal education, which are pre-dominantly concerned with litigation as justice delivery system. It needs considerable reorientation of lower judiciary towards mediation, and requires adequate institutional and policy support, and appropriate legal reform on the part of the government. It also requires training, motivation and skill development of large number of judges and lawyers. In particular, judges should take an activist stand to fully utilise the provisions on judicial mediation.

Conclusion

Bangladesh's prevailing justice system is viewed by many as anti-poor, exclusionary and non- participatory. To make the justice system more accessible, the government, NGOs, and the legal community should undertake concerted efforts to dismantle the existing barriers to access to justice so that it can deliver much needed goods to the common people. Accessibility of the justice system is the most important strategy for legal empowerment.

Ensuring property rights of the poor, reform of the formal and informal adjudication process for more inclusive justice system, respect for labour rights in informal sector are, but few, essential conditions of legal empowerment of the poor in Bangladesh. Legal empowerment involves integration of different elements of access to justice such as mediation, public interest litigation, legal awareness, and para-legal activities. It also involves a complex combination of legal and institutional reform so that justice system can reach the poorest of the poor. Implementation of legal empowerment requires proper combination of informal and formal mechansims of dispute resolution. Legal empowerment is also viewed as a process through which people assume increasing control over the legal process. To make legal empowerment operational, collaboration and coordinated efforts is needed by a host of legal actors such as pro bono lawyers, activist judiciary, human and legal NGOs. It also depends on responsiveness of the judiciary to interpret the legal texts to overcome the procedural barriers and accept the claims to vindicate rights of the poor.