

## SHALISH an Effective Means of Justice for Disadvantaged in Bangladesh: A Case Study

Md. Shamsuddin Masum<sup>1</sup> and Most Yasmin Ara<sup>2</sup>

### ABSTRACT

*This research is intended to improve the quality of Shalish system in Bangladesh by analyzing its functions and adopting recommendations and findings in the most benefitting manner. In this research report, descriptive methodology is used to bring out the rational and justification of the work. Further a literature review and analytical analysis of literature have been adopted for the completion of this report. For justifying the same primary data has been collected by the persons involved in the Shalish process and same was critically analyzed. Author's personal experiences, being judges of formal Court, have also been used for the achievement of this research.*

**Keywords:** Investment on IT, Organizational productivity, Technological advancement, Human resources

### 1. INTRODUCTION

Justice invokes rule of law, resolution of disputes and the mechanisms for the administration of laws. It presupposes the notion of access to justice for all through the effective legal process. The purposes of access to justice are to ensure that every person is able to invoke the legal process for redressal, irrespective of their socio-economic status and to ensure that every person perceives just and fair treatment within the legal system.

The justice system in Bangladesh may be broadly classified as State led justice system and Non-state justice system. State led justice system comprises the Supreme Court, the traditional civil and criminal courts, the tribunals and some other rural courts such as Village Courts and Arbitration Councils. On the other hand non-state justice systems are traditionally called as Shalish in Bangladesh.

The traditional courts, in its present form and procedure, removed the poor and disadvantaged people to get fruits of justice. Within the context of rule of law, the notion of justice presumes an egalitarian society in which access to justice signifies to have equal opportunity to claim recognition of certain entitlements.

---

<sup>1</sup>Md. ShamsuddinMasum: Senior Assistant Secretary, Law Commission, Bangladesh.Email: msmasum81@gmail.com

<sup>2</sup>Most YasminAra : Translation Officer (Senior Assistant Judge), Law Commission, Bangladesh.

In fact, the availability of effective procedure can only ensure rule of law and access to justice for all. Most of the people, particularly the economically poor people are denied to get justice from the formal courts which is very expensive, complex and time consuming. People have to go through the ordeal of procedural nuance when they come within the four corners of formal statutory courts. The right to speedy trial is not a fact or fiction but a “Constitutional reality” and it has to be given its due respect. The right of speedy justice not only adversely affects citizen's fundamental rights but also impedes development when the poor are unable to protect their assets and livelihoods.

This research is intended to improve the quality of Shalish system in Bangladesh by analysing its functions and adopting recommendations and findings in the most benefitting manner. In this research report descriptive methodology is used to bring out the rational and justification of the work. Further a literature review and analytical analysis of literature have been adopted for the completion of this report. For justifying the same primary data has been collected by the persons involved in the Shalish process and same was critically analysed. Author's personal experiences, being judges of formal Court, have also been used for the achievement of this research.

## **2. CONCEPTUALIZING SHALISH**

Before British invasion and establishment of colonial judicial system in South Asian Region, traditionally the people of South Asia were resolving their disputes by way of Panchayath in India and Shalish in Bangladesh. Panchayath or Shalish as dispute resolving process are rooted in the history since time immemorial and are still in existence. India has had long history of Panchayth dating back to several centuries before Christ. Similarly Shalish is also an age-old practice in Bangladesh.

The word Shalish in Arabic means Arbitration and in Persian means mediation. Shalish is basically a practice of gathering village elders and concerned parties, exclusively male, for the resolution of local disputes. It has no fixed dimension and its size and structure depend entirely on the nature and gravity of the problem at hand. It is an informal resolution process, wherein the conflict between individuals, family, lineage, and land related disputes, unlawful activities, ill-feelings, non-cooperation, or other things etc., which regulated the actions and behavior of the villagers in the society.

On the other hand, Shalish can be identified as an outgrowth of rural power structure. It can be understood as a process of mediation with much emphasis on the people who act as mediators or ideally “Shalishkers”, who are rich, powerful and socially accepted persons.

Hence, Shalish may be defined as a method of resolving disputes based on community where village elders and elite gather with a motive to make a compromise at one sitting in an informal way. Sometimes it may impose its decisions upon the parties. Here social pressure, though not binding, acts as a force to execute the decisions. Sometimes, Shalish is facilitated by some NGOs like Madaripur Legal Aid Association (MLAA).

### **3. SHALISH AS AN EFFECTIVE MEANS OF JUSTICE FOR DISADVANTAGED**

The present legal system in Bangladesh has failed to render access to the disadvantaged people of the country. Since the system is adversarial and expensive, the poor rarely make use of it voluntarily. Shalish, as an informal judicial system is committed to render speedy, cost effective and affordable justice to the rural disadvantaged people as it is always engaged to grow pro-poor attitude.

#### **3.1 Case Study of a Shalish held in Madaripur**

**Brief facts:** A girl aged about 15 years with 1½ months old child is the complainant. Her husband is the opposite party. The girl has come before the Salishkers seeking resolution of her family dispute. She made complain regarding demand of dowry against her husband. He also beats her often. According to the wife, she sold her wedding jewels worth 10,000 Tk. for the child's welfare. The wife also stated that the husband was beating her mother when she refused to give some money to him. The wife was residing in her parental home and is willing to go back to her husband's house provided she is treated properly and no dowry is demanded by him and also he should also take care of the child and provide for its maintenance. The husband admitted that he asked for money; but not as a dowry, instead he wanted to start a business with that money and out of the profit he was planning to return back the money to his mother-in-law. After his marriage he had separated himself from his own family and this was the reason why he had to ask the mother-in-law for money. The husband accused the wife of having illicit relationship with another person in her earlier days and doubted the legitimacy of the child.

**Process Involved in Salish:** After the questioning / interrogation by the Salishkers the husband admits that the child was his own and has no further disputes in this regard. Further the mother of the husband was examined and the fact that came in to light that husband was addicted to the narcotic and further the girl's mother was also examined after ascertaining the fact the Salishkers proposed to the husband to not to inflict any torture on his wife or her mother and to restore the conjugal life with the wife. At one point of time, the lady member

of the Shalish advised the husband of the importance of family and the responsibilities he had towards his family.

**Decision of Salish:** As the final settlement process, the husband was asked by the Salishkers to sign a bond to the effect that he will take full care and responsibility of his family, will not claim dowry and will not inflict any mental or physical torture to his wife or his mother-in-law. Further cautioned him he does not abide by the decision then he may have to face the wrath of the society. After the perusal the Husband agreed to the decision and was happy to receive his child and promised to restore the conjugal life with his wife in the peaceful manner.

**Analysis:** The husband was a day labor. In district town there is a specific formal Court which deals with those kinds of cases. Despite, the parties did not opt for but urged for a local settlement. Because, Shalish in locality saves time, money and is exempted from complexities of procedural laws. Both the parties seemed to be economically disadvantaged. So, coming to local Shalish is economically beneficial to them.

Open and close to parties: All the proceeding held in public and the Shalishkers are known to the parties. Most of the people of the audience were also known to them. So, there was no chance of ambiguity or complexity to be in touch with the whole Shalish process by the parties. In traditional courts, most of the procedure remained unknown to the parties especially to the disadvantaged in terms of education or economic condition.

**Natural Justice:** One of the principle of natural justice is nobody should be condemned unheard which means that every person must have a right to defend himself. While the proceeding was going on, the researcher found that the Shalishkers were keen to hear both the parties. Firstly, the wife narrated the story. The Shalishkers inquired some facts from her and then heard the husband. They discussed with each other.

**Cost effectiveness:** It is indeed very essential for a rural economically poor person to dispose a case speedily for the reason he will be engaged for earning his daily bread by doing some of the daily labour work. If the petitioner would go to District Court she had to hire a lawyer for preparing her case who might took from her minimum of taka 1000/. Besides, she had to pay the Court fee and other ancillary costs. The case would consume normally more than two years for the disposal. So, after finishing the entire proceeding, the parties might lose the effectiveness of the fruit of the decision of the Court. In a Shalish, the parties need not bear a single penny. Shalish held in their own village.

**No complexities:** The traditional courts are full of so many complexities. There are hard and fast rules prescribed by the procedural and evidence laws. It is generally tough for the disadvantaged to overcome those complexities hence,

they are not eager to go to District Courts. Shalish is absolutely informal in nature. At the said Shalish the Shalishkers heard the parties first and then some witnesses. The discussions held before the parties. At one sitting, the Shalishkers gave the decision.

**Representation of party:** The parties had their representatives in the jury board of the Shalish. They expressed their views to the members before the hearing of the case. By this way, the parties contributed even in the decision making process.

**Pro-poor attitude:** Shalish, as it stands with all its informal procedure and decision making seems to have a pro poor attitude. On a question to 'x', a shalishker of the present case answered that, about 90% cases come from the poor people. The rich, generally, refer their dispute to traditional courts.

**Social sanction:** Like the traditional court, the decision of Shalish is not enforceable by law or obligatory for the parties. Despite, the decision had a social sanctity which arose out of the desire for settlement and purely due to social accountability. For that reason, in about 80% cases the parties oblige with the decision of Shalish.

#### 4. CRITICAL ANALYSIS OF THE SHALISH

The power-relation between the disputants and between shalishkers and disputants play a significant role in the Shalish system. The shalishkers forced the disputants to come to a compromising situation. The mothers were made to shake hands, disputants were forced to bow their heads in front of their mothers and was forced to sign on the 'agreement'. The powerful disputants had the 'power' to say no to imposed decisions, but the fear of social wrath and respect for process prevents them from doing so and they end up in a compromising situation.

There are some cases where for lack of confidentiality, parties often do not disclose the key issues of disputes. In matrimonial cases, this is not unlikely that wife feels ashamed to express her views in public. At the instant case, the proceeding started in public. At one point, the shalishkers allowed a private meeting after the demand of the wife. If the lady was not dominant, she would never have had the courage to make such a demand. Therefore it should be the duty of every Shalishker to inform the disputants of matrimonial cases regarding the option for private hearing.

Non representation of women as shalishkers create problem in Shalish process. At the instant case, though, there was one lady member as shalishkers, in most of

the cases; the male-dominated Bangladesh society does not give any space for woman to be engaged in a Shalish proceeding.

Sometimes, Shalish cannot control the interference of third party. During the said Shalish, the researcher observed that a male audience made some comments which were very much scandalous for the lady. Being a male-dominated society, women are exposed to vulnerability and often their self-respect is at stake. There was no attempt on the part of the Shalishkers to prevent the third party interference or the disputant husband from showering abuses on his wife in public. The decision of Shalish is not enforceable which turns the process weak. If any agreement is made after the Shalish, it has no evidentiary value before the formal court of law.

## **5. CONCLUSION AND RECOMMENDATIONS**

In Bangladesh, though Shalish is working widely to ensure easy access to justice for rural poor people, social ostracism by no means represents the harshest, most extreme version of Shalish. There are some incidents of women, even rape victims, being lashed or even stoned to death for violation of local norms. Often these abuses stem from fatwahs handed down by some of local mullahs, having lack of knowledge about Sharia, who belong to the Shalish panels or otherwise influence them, and misinterpret sharia to impose such egregious treatment. Sometimes, Shalish is manipulated by corrupt touts and local musclemen who may be hired to guide the Shalish process.

On the other hand, when a dispute is compromised, it is just not between the disputants, it has an impact on the entire family and society at large and often the power disparity is forgotten and forgiven. The main strength of Shalish is its humanizing force, as it believes on the absolute resolution of disputes through compromise. The relationship between the parties revives by this process. The Shalish system in Bangladesh emerges from the root of the society. People feel the system. So, in light of the following recommendations, it is very urgent to develop the system for the poorest of the poor, thus enabling them proper and effective access to justice.

1. The decision of Shalish must be written in a document which must have an evidentiary value before the traditional court of law. In matrimonial cases, such kind of report should play the dominant role in a formal Court. This change in law may ensure some sort of enforceability of the decision of Shalish.
2. Women participation in Shalish as shalishkers, especially in matrimonial cases, must be ensured.
3. Though the procedure of Shalish depends on particular cases and thus remains informal, the decision must have a formal structure in all cases.

4. Third party interference must be restricted and the whole process of Shalish should be regulated by the shalishkers. In matrimonial cases, only the immediate and affected members of the family should be allowed to be part of the Shalish.
5. Awareness among people about the usefulness of Shalish must be extended especially towards the vulnerable sections. Trainings and campaigns should be initiated to enable the individuals to understand and appreciate the Shalish system.
6. There should be sufficient training program for the village elite to give a comprehensive knowledge about the probable process of a Shalish. Training should also be provided to help them to learn the general principles of law. They should also be motivated and trained to adhere to the judicial norms and values.
7. The state should be more proactive to facilitate Shalish system in the rural areas of the country.
8. The shalishkers must show and keep their neutrality while involved in Shalish, a judicial work. The power relation between the parties must be strictly checked by them. Their neutrality will certainly make them highly respectable in the society.
9. Matrimonial issues are very sensitive and utmost care should be given while handling them. The Shalishkers must, in every matrimonial case, make it clear to the disputants that they have a right to be heard in private and that it is purely dependent on the will of the parties to decide the mode of proceedings.
10. The shalishkers must be refrained from taking any decision relating with religious complexities. They should be aware so that the process of shalish cannot be manipulated by the mullas who have no knowledge and authority to pronounce fatwas. Due to gravity of the offences like physical torturing, robbery, murder, offences against state etc should be adjudicated by the formal court. The Shalishkers must ensure that no wrong or tricky complaints are entertained, so that the sanctity of the process remains unscratched.

## REFERENCES

- S. Muralidhar, Law, Poverty and Legal Aid. Access to Criminal Justice, Lexis Nexis Butterworths, (New Delhi, 2004), P. 1.
- Patricia Mc Fadden, 'Democracy: A Gendered Relation of Power. Problems of Creating a Feminist African Culture' available at [www.lolapress.org/artenglish/fadde6.htm](http://www.lolapress.org/artenglish/fadde6.htm), accessed on February 7, 2011.
- Annual Activity Report. (2006-2007). Madaripur Legal Aid Association (MLAA), P. 8.
- Praveen Dalal, 'The Culture of ADR in India', available at <http://www.odr.info/> accessed on April 4, 2011.

Sumaiya Khair, *Legal Empowerment for the poor and disadvantaged: Strategies Achievements and Challenges*, (Dhaka, 2008), 2-3.

Sumaiya Khair, *Alternative Approaches to Justice: A Review of ADR Initiatives Under the Democracy Partnership*. Report prepared for the Asia Foundation, (Dhaka, May, 2001), p. 5.

*Mediation Manual*, MLAA with support of PRI, London, Paris. (2004). p. ix.

Sumaiya Khair, Karen L. Casper, Julia Chen, Debbie Ingram, & Riffat Jahan., *Access to Justice: Best Practices under the Democracy Partnership*, Dhaka, (The Asia Foundation, April, 2002), p8-9.