

Report

“Activating the justice system in Bangladesh”



Village Court in Patgati Union, Ghopalganj district

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3.1 Another example concerns the existing law for addressing criminal offences through mediation. Section 345, CrPC provides that in cases of compoundable offences, parties may enter into a compromise or compound the offence between the parties. Such offences include assault and battery, neighbourhood disputes, offences relating to moveable property, cheating, breach of trust where the value or amount is below Taka 25,000 and contracting a second marriage without consent of a first wife and dowry demands (where there is no element of violence). The Village Court provides for settlement of all these disputes.

3.2 Justice Mainur Reza Chowdhury argues that '*Offences like assault and battery, neighbourhood disputes, offences relating to moveable property, family disputes, dowry demands need to be resolved through mediation and conciliation.*¹ In other words, that the courts should refer these matters back to the community for local settlement as being the most appropriate forum for resolution of these types of dispute rather than the court.

*'Mediation in the rural society of Bangladesh is virtually of immemorial origin based on customary practices having its deep roots in the cultural heritage of this sub-continent. Easy access to social justice, particularly distributive, through equal participation for those who now share stark deprivation and poverty is the need of the hour. Recent trends and development in the field of dispute resolution indicates that people in general tend to prefer mediation to litigation. In this backdrop, mediation (ADR) should be allowed to play a role free from any statutory regulations and control.'*²

3.3 An analysis of the 'supply' side of justice delivery in Bangladesh reveals a confusion of procedural laws based on an outdated British model that have been successively 'amended' over the years and are overdue for wholesale reform. In the confusion, the interests of the few are protected by 'coping' mechanisms (such as 'anticipatory' bail) while the poor are exploited with impunity. The need we submit is less to codify these laws than to weed them out and simplify many of them. We also understand that the problem is easier to state than it is to solve.

3.4 We find a compelling need for a 'demand' side analysis. One which focuses on how the poor perceive justice delivery and reforms tailored to their needs first and foremost.

3.5 An example of the analysis that has been applied to-date is illustrated by GoB's approach to legal aid. The approach is top-down, lawyer-centred, ie how to bring lawyers to the people. The 'demand' side looks instead at what sort of legal services the ordinary person who finds himself in conflict with the law needs? Firstly, s/he needs assistance at the police station on arrest, ie a physical presence at the police station particularly at interview where most abuses take place as the investigation system is overwhelmingly confession-based. Yet there is no provision in the Legal Aid Services Act (2000) nor initiative by the National Legal Aid Office (NLAO) for such a service.

3.6 Secondly, assistance is needed at court on first appearance – to apply for bail for instance or argue that the complaint is vexatious.³ Yet a person can wait for four or five appearances before s/he is granted legal aid and the services of a lawyer.⁴

3.7 Thirdly, the prisoner on remand in jail is in urgent need of legal advice and assistance on first remand.⁵ Yet there are no materials for him/her to refer to nor access to legal aid

¹ Second regional conference on access to justice and penal reform, Dhaka, 2002

² Fazlul Huq, Secretary, Madaripur Legal Aid Association (MLAA), 'Alternative Dispute Resolution in Bangladesh' (undated)

³ First Information Reports (FIRs) are commonly based on false or vexatious allegations according to reports and 'most are' according to one senior magistrate.

⁴ Interview with the Legal Aid Co-ordinator under the CIDA pilot scheme in Jessore, 10 September 2005

in prison. S/he must apply to the prison officers who forward the list to the Legal Aid Committee (which may turn an application into a privilege to withhold at will).

- 3.8 It is perhaps not surprising therefore that the budget allocated to the NLAO is consistently under-spent. People who need legal aid cannot access it when they need it most.⁶ It is here that practices developed elsewhere may inform reforms in Bangladesh.⁷
- 3.9 The NGO-organised method of settling disputes – applying a rights-based approach to traditional shalish⁸ - rightly attracts considerable attention both within Bangladesh and outside. The former Chief Justice, Mustafa Kamal, is championing the application of ADR in the courts. Both offer an obvious remedy in appropriate cases.
- 3.10 The team were advised by reform-minded government officers to look at the Village Courts where matters can be settled locally, expeditiously and at low cost; and ‘filter’ out those cases needlessly clogging the formal justice system.
- 3.11 This approach is, we would respectfully submit, the right one. However, GoB needs to commit resources and delegate authority so that these courts have trained staff and adequate jurisdiction to equip them to deal with the matters that come before them for resolution.

The Village Courts

- 3.12 The Village Court,⁹ is an institution where the local government and village representatives resolve petty civil and criminal cases. It was designed ‘not to determine right or wrong and punish the wrongdoers, but to find an amicable settlement of the disputes.’¹⁰ Although it was designed to be a responsive and easy system of conflict resolution for the rural population of Bangladesh, ‘the Village Court has remained ineffective, if not non-existent, for the last three decades’.¹¹
- 3.13 The Village Court consists of five members - the Chairman of the Union Parishad, two Union Parishad members and two villagers (each party selects one member and one representative leader). The cost of filing a complaint is Tk5 (although there are reports of higher charges).¹² At a designated time and place, the Court sits with both parties and resolves the case. The sanctions of the Village Court are limited to Tk5,000. Examples of cases that come to the Village Court are thefts, conflicts over land, small acts of violence etc.¹³
- 3.14 The Arbitration Council (AC) comprises three members – the Chairman and two persons elected by the parties – to deal with divorce and maintenance, land disputes etc. It has no basis in law. However, it sits in the Village Court to settle family and local disputes. It is a slightly formalized version of the Salish.

⁵ 80% of applications for legal aid come from prisoners on remand. ‘Improving mechanism for delivering legal aid’ 2004

⁶ An interesting scheme funded by Manusher Jonno involving setting up a legal aid telephone helpline shows potential promise.

⁷ See Index of Good Practices in Reducing Pre-Trial Detention, PRI, 2004. www.penalreform.org

⁸ See the Madaripur Mediation Model developed by the MLAA

⁹ vested by the Village Courts Ordinance 1976

¹⁰ ‘Local Governance in Bangladesh – Leading issues and major challenges’, Kamal Siddiqui, University Press, 2000, at p145

¹¹ Towards Institutional Reform of Village Court in Bangladesh—the MLAA Experiment, MLAA undated

¹² This amount, according to the MLAA study is too low to cover the filing of documents and miscellaneous meeting costs. Many Village Courts allegedly charge Tk 50 to Tk 150 for filing complaints.

¹³ per s345 CrPC

- 3.15 MLAA has been working to revive the Village Court in three districts.¹⁴ MLAA found that the Village Court are not functioning in any of these districts in practice. The option for ordinary people was either to go to the formal courts or to seek a remedy through traditional Shalish. The first were inaccessible (distance, high costs, slow process, manipulated proceedings, general fear and distrust) and the second while easier and cheaper, was often found to resolve conflicts in favour of the more influential parties. Furthermore, the weak, especially women, 'do not receive fair resolutions from this male dominated institution'.¹⁵
- 3.16 Accordingly, especially for the poor, an alternative avenue for local justice such as offered by the Village Court 'has become urgent and essential'.¹⁶ From a zero base, MLAA have recorded almost 6,000 settlements by the Village Court (VC) and Arbitration Council (AC) in 91 courts they have reactivated in less than 12 months. Monitoring of activities is continuous (through training of members of Community Based Organisations (CBOs): 40% are marked good, 30% marked fair and the remainder are not functioning very well owing to lack of interest by the local Chairman and his staff. From the moment the petition is submitted to the UP Chairman to resolution of the matter takes on average 3 months.
- 3.17 MLAA sees its role as a 'catalyst'¹⁷ and by building partnerships with UP officers, they will be able to hand ownership over within a short period of time. MLAA workers are attached to each court to assist with the administration of justice (ie: documentation, service and filing).
- 3.18 We observed a VC/AC session in Patgati Union, Ghopalganj district. The Patgati UP covers 14 villages. The furthest distant is 4 kms. This was described as 'one of the best courts' owing to the dynamism of the Chairman (aged 37) and his effective secretary.
- 3.19 The room was part of the UP complex. On the day we visited the place was alive with hundreds of people as food cards were being distributed to the most vulnerable people in the community under a World Bank programme. The room set aside for the court measured some 5m x 5m. There were approximately 50-60 people in the room with more gathered outside. The chairman sat behind a table with the secretary on his left and the MLAA worker standing near him. The court alternated as AC or VC depending on the nature of the case and the other members of the panel sat (2:2 in VC on each wing of the table and 1:1 in AC).

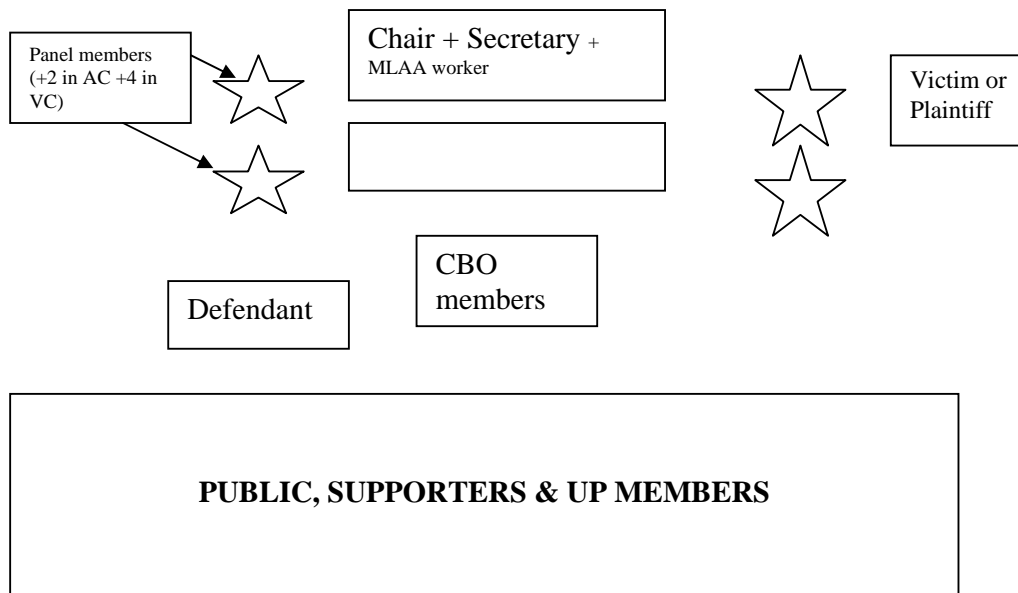
Lay-out of the VC/AC

¹⁴ Madaripur, Shariatpur and Ghopalganj

¹⁵ MLAA report supra

¹⁶ id

¹⁷ Fazlul Huq, director MLAA interview 22 September



- 3.20 The complainant stood by the table behind the secretary and the defendant remained in the crowd surrounded by his people in front and to the right of the Chair.
- 3.21 The atmosphere was informal. In front of the table, there were chairs mainly taken up by members of the CBO formed by MLAA to monitor the court, mostly elderly men who listened intently to the proceedings and added their comments every now and then (which were listened to). Behind them stood the public in four rows. Others peered in through the windows. A village policeman kept guard at the door. Everyone could hear what was going on and people could chip in when they wanted to.
- 3.22 We observed several cases in the two hours we were there.

Case 1: AC – maintenance

In the first case, the court sat as an AC on a maintenance matter. When we arrived we were introduced and the proceedings carried on. Many people seemed to be talking: the Chair was having a quiet word with the member of the panel on his right. The secretary was talking to the other panel member on his left. One of the CBO members, an elderly man voiced his opinion. The complainant (woman with child in her arms) made some comments/observations and the husband was asked to respond. He did and someone from his family or support group spoke as well. The discussion then proceeded quite rapidly as the chair started trading with the parties. The suggestions went back and forth quite quickly. The husband was thoughtful and received a tap on his back from an elderly man and he then nodded his acceptance of the deal which was promptly drawn up by the secretary, signed by the parties and the panel (as witnesses) and filed by the MLAA worker.

Settlement: agreed to live separately and the husband to pay Tk400 pcm by way of maintenance.

The matter had lasted 45 minutes from beginning to end.

Case 2: VC – neighbour dispute

The panel took their seats from among the people observing the proceedings in the room. The first witness was sworn (all witnesses are sworn) on a secular oath ('I shall tell the truth, the whole truth and shall not suppress or conceal anything.') The four persons joining the chairman on the panel comprised 3 men and 1 woman. Two are elected by the parties and two must be UP members.

Issue: a metre wide strip of land separates the two parties. The defendant had planted trees on this strip and was dumping rubbish in between the trees.

This was the second hearing. It appears that settlement reached in the first hearing was that the defendant should cut down the branches over hanging the plaintiff's property and stop dumping the rubbish. Apparently the agreement had not been honoured.

The court agreed on a 'local inspection' of the site and the Chairman agreed to go and visit. The case was adjourned.

The matter lasted 20 minutes.

Case 3: VC – loan not paid of Tk1000

Neither party had brought representatives to sit on the panel, so the same one remained for this case.

The plaintiff took the oath and explained the issue, namely that the defendant had borrowed Tk1000 from the plaintiff and failed to repay the debt. The defendant did not refute the facts. He said at once that he would sell some land to pay back the loan by 20 October.

The matter was agreed, the agreement drawn up and signed.

The matter took 10 minutes.

Note: the defendant should return to the VC on 20 October and hand over the sum due in the presence of the court.

- 3.23 There was then a short break for tea and biscuits (in our honour). One elderly man spoke up to commend MLAA. He said the VC had done a lot of good for the local community. Before they had to go to the District Court which cost a lot of money and they had to eat in a hotel. The presence of this local court had done a lot to defuse local tensions.
- 3.24 The Chairman praised the work of the MLAA worker. The secretary asked why it was only happening in the three target districts and why there was not a VC and AC in his home district. He asked why these courts were not available throughout Bangladesh.
- 3.25 The Chair recounted a case that had been settled recently and had spent 11 years pending resolution before the District Court. Both parties had had enough of spending so much money and had come to the Chair for settlement which was done.

Case 4: VC – criminal matter: assault

This case had been referred to the VC from the Magistrates Court as it was within the jurisdiction of the VC (being compoundable under s345 CrPC and having less than 10 accused (5 in this case).

The parties immediately announced that they had settled the dispute between themselves and the victim sought to withdraw the case. Accordingly the case was dismissed by the Chair.

There were some wry comments about why they had gone to the police in the first place. It appears some money had been spent on bail and other 'business' only to find it transferred to the VC with no costs to anyone. When asked why they had not gone to the VC in the first place as it would have saved time and expense, the response was philosophical: 'it happens.'

On enquiry whether the victim may have been pressured to withdraw the case, the response was that the court could see from the demeanour of the victim that this was not the case and that there was a relationship already between the parties.

3.26 From records kept by the MLAA supervisor the following general points were noted:

- the VC/AC sits one day a week
- the chair sits on these days from 0800-1600
- on average he settles 15-16 cases each month
- other UPs average half this.

Box 3

Patgati Union

AC	Pending	Received	Resolved	VC	Pending	Received	Resolved
Jul	9	9	7		11	13	8
Aug	11	10	7		16	12	9
Sep	11	7	7 (to 22/9)		19	15	10 (to 22/9)

Av no of cases heard in a day 5-8

3.27 In interview with MLAA and the UP Chairman afterwards, the following observations were made:

- the police are not happy as they have lost business through the work of the VC
- the 'touts' have gone to ground with the presence of the MLAA workers and CBOs
- corruption is reduced as proceedings are highly participatory and open for all to see and comment on.

3.28 The revival of the Village Court with MLAA support appears to be well received. All the Village Courts in the UP project area report a marked increase in the number of cases every week and resolution is fast, fair and inexpensive. The strengths of the Village Court are given as follows:¹⁸

- It is held within the community, and the villagers do not have to spend money on transport
- It is cheap. There is no scope for bribes to members
- It is fast. Parties have to respond to the Chairman's notice within 72 hours, and cases are resolved usually within 30 days.
- It is fair. Since the participants all belong to the community, there is little scope of lying or using false witnesses. The judicial panel of five consists of equal representation from both parties.
- It is participatory. With the proceedings typically observed by dozens of villagers, it has educational value and commands a degree of community sanction.
- Women participation is encouraged. Women are invited to participate in the Village Court, to ensure a safe and fair space for them to speak.
- It is potentially sustainable, with best practice innovations incrementally replicable across an entire system of local governance in Bangladesh.

¹⁸ MLAA report on Village Courts, undated

3.29 This summary was confirmed by the team's findings on one observation as noted above. However, there are still some weaknesses. For instance, a party can withdraw the case before the Village Court before it is resolved and take it to the district court.¹⁹ People are still discouraged by local power elites from attending. One of the most important weaknesses identified was the limited power of the Village Court to enforce its sanctions. Some plaintiffs do not get compensated even after the case is resolved in their favour. However Village Court members can and do create social pressure to ensure compensation.

3.30 Although the participation of women has improved, social barriers still exist that restrict their contributions.²⁰

3.31 The MLAA study recommended the following:

- increase the sanction limit of Tk5,000. As many cases that are submitted to the Village Court do not fall under its jurisdiction because of this restriction. Respondents claim that cases that involve livestock thefts or dowry conflicts either go unresolved or go to the formal court because of this rule. *'An average cow today costs more than Taka 5,000, so we cannot take simple cases of cow thefts,'* complains one member of the Village Court. The suggestion is that the limit should be raised appears to have been agreed and that it will shortly be increased to Tk25,000. This would not only increase the scope of the Village Court, but also make people take it more seriously.
- establishing an appropriately equipped office for the Village Court to provide a work space for the members, a safe filing space for case documents, books, forms and materials, and a meeting space for case proceedings.
- establish adequate manpower to service the court. At present there is one full paid (irregularly) secretary. While MLAA provide a 'worker' to assist him/her, this cannot substitute for the creation of a full-time bench clerk.
- introduce training for all UP members in the law (to be adjudicators). In addition, awareness building among the public from local NGOs are essential if the Village Court is to be an effective legal institution.
- documentation of Village Court proceedings is valuable in solving the operational problems faced by the Court. It was further noted that the Chairman does not have time with his other duties and is in need of support.
- monitoring mechanisms need to be set up particularly in the early stages

Informal justice sector: Salish and NGO-organised mediation

3.32 Outside the formal system lies the traditional salish – 'the practice of gathering village elders for the resolution of local disputes'.²¹ In the past, this system has commanded the respect of villagers however, decisions are sometimes arbitrary and maintain the status quo and interests of local elites; and because the traditional shalish is composed almost exclusively of men, women are particularly vulnerable to biased decisions.

¹⁹ 'Those who can afford it and feel that the Village Court judgement might go against them often resort to this strategy. This not only creates inconvenience for the opposing party, but also undermines the strength and reputation of the Village Court.' (MLAA supra).

²⁰ Responses reported by MLAA include: *'When a woman goes to take part in a Village Court, villagers say a lot of bad things about her behind her back,'*; women are discouraged by their families because they have to leave their housework to attend these meetings; or women are not aware of the functions of the Village Court; or *'Many women think that only bad women have to go to the Village Court.'*

²¹ The Asia Foundation, *In search of justice supra* at p6

- 3.33 Field studies further show that in many villages, traditional salish had ‘completely broken down’²² or had ‘become largely inoperative.’²³ However where it was operating well, ‘[i]t had the advantage of being prompt to assemble, allowed the parties to freely express their opinions and provided equitable justice.’²⁴
- 3.34 To improve access to justice through salish, NGOs have conducted training and offered advice and assistance to salish members including training in law, providing local advisers and providing legal aid where recourse to the formal system was required. NGOs have also provided parallel systems of mediation that refine the basic salish model, through specialized training, the appointment of women mediators, or the convening of mediation panels with a specialty knowledge of women’s rights or other areas.
- 3.35 The primary distinction between the traditional salish (TDR) and NGO-co-ordinated salish (ADR) is that the former relies on arbitration while the latter aims to be a mediated process. In the one, parties are bound by the decision of the officiating individuals, while in the second, the NGO training enables the decision-makers to actively engage both parties in settling the dispute, with the goal of reaching a mutually agreed solution. The process is highly participatory and results are usually complied with because a) they have been accepted by both sides; and b) the maximum participation of villagers and the role played by the local mediators further vests ownership and community sanction in them to ensure compliance between the parties (ie societal pressure).²⁵
- 3.36 The ‘leading’²⁶ NGO who has specialized in this field is the MLAA who have developed over years the Madaripur Mediation Model (MMM). NGOs from all over the country and outside Bangladesh send staff to the Training and Resource Centre in Madaripur for training on the model where it has earned wide acclaim both in Bangladesh and abroad.²⁷
- 3.37 The team made a field visit to Madaripur to visit the training centre and observe the MMM in practice.
- 3.38 In essence the MMM works in the following way: MLAA identify local contact persons to disseminate information on mediation as a viable alternative to the court system in the project area.²⁸ MLAA then establishes CBOs (formerly called ‘mediation committees’) and train the members in human rights and the law. All members of these CBOs are volunteers and receive no remuneration at all. ‘Given the reality that women were subject to greater social and economic injustice in rural areas than men....the preferred selection of women [took] on heightened importance.’²⁹
- 3.39 The mediation CBOs exist at the two lowest local levels of local government: the village (comprising 7-10 members) and the UP (with nine CBOs for each UP and 8-15 members each).

²² Siddiqui supra at p148

²³ id citing Shapan Adnan (1997) at p148

²⁴ id at p149

²⁵ Interview with Fazlul Huq, Director, MLAA – 21 September 2005

²⁶ Siddiqui supra at p149

²⁷ The MMM has been referred to in numerous academic papers and is being actively recommended by PRI in its work in Africa where similar conditions apply.

²⁸ Madaripur, Shariatpur and Gopalganj districts

²⁹ Cited from ‘Alternate Dispute Resolution - community-based mediation as an auxiliary to formal justice in Bangladesh: the Madaripur Mediation Model (MMM)’ brochure produced by MLAA.

3.40 A MLAA mediation worker provides dedicated support to each UP CBO. Their tasks are to:

- receive applications for mediation
- send letters to the parties concerned
- arrange mediation sessions
- supervise mediation sessions
- follow-up and monitor the solution agreed at and report to head office

3.41 At the thana level (representing between 5-15 UPs), a thana mediation supervisor is responsible for supporting and supervising all UP mediation workers. These supervisors are co-ordinated at district level who works with the central office co-ordinator to ensure consistency in the application of mediation support. A MLAA monitoring, evaluation and research cell maintains updated information on mediation procedures and data on sessions and outcomes.

3.42 The team observed one such mediation in Taker Hat³⁰ which had been in progress for two hours. The setting was a gloomy tin shack (7x3m) with an overhead fan. There were approximately 30 people in the room.

3.43 The issue concerned a dowry dispute. The husband had sought money from the parents of the wife for dowry. On being turned down, the husband had then taken the child from the mother and gone to live further off. The wife then walked 15kms to rescue the child. She subsequently approached the MLAA mediation worker³¹ who immediately organized a mediation because of the urgency of the situation. The matter was resolved within four days.

3.44 The settlement reached was that the child would stay with the mother. She would be taken back with the husband who would relinquish his claim to any dowry and give an undertaking no longer to mistreat her. Two elderly men (near neighbours and related to the husband) agreed to check on the wellbeing of the wife and act as guarantors in the event of subsequent mistreatment.

3.45 The team witnessed an act of submission made by both husband and wife to the two men (which involved touching their feet) and the parties signed the agreement drawn up by the MLAA mediation worker (on a standard MLAA form) and the members of the mediation committee (some 10 people) also signed in witness thereof.

3.46 NGO administered mediation is generally regarded in the literature available and observations made to us by both users and practitioners as more equitable, especially where women are concerned as they are encouraged to speak and put their side. Another characteristic of NGO mediation is that NGO staff, as well as local members of CBOs (villagers) follow up the settlements reached to determine if they are being carried out by all parties concerned and either bring the parties back for further mediation or apply societal pressure to encourage compliance. Where the differences are irreconcilable or one party is not complying with the terms of the settlement, the community is made aware of the failure and/or the matter is taken up for adjudication in the formal system.³²

³⁰ 22 September 2005

³¹ 18 September 2005

3.47 Some observers expressed concern that mediated settlements could not be the answer in every case; that certain matters could not be subject to a compromise between parties but require adjudication and enforcement of judgment. The example of rape was raised.

3.48 While MLAA do not disagree with the principle of a 'cut-off' point, they temper principle with the practice they find on the ground – namely, that in approximately 50% of rape cases filed the case has been filed by the parents after the daughter fell pregnant by the lover, or the daughter was caught in compromising circumstances, ie contact was consensual. The point is that cultural practices proscribe pre-marital sexual contact and the criminal law is invoked to save face and family honour (with devastating consequences for the lover). MLAA argues that mediation should not be ruled out in such cases *simpliciter*.